

BCTF/ HEU/BCPSEA: Definition of Strike

Issue: Does the definition of a strike, in conjunction with s.57 of the *Labour Relations Code*, infringe the appellants' rights to freedom of expression under s.2 (b) of the *Charter of Rights and Freedoms* (the Charter)? Also, does it infringe on their rights of freedom of peaceful assembly and freedom of association?

Facts: On January 28, 2002, the BC Teachers' Federation (BCTF) held a one day work stoppage and political protest in response to the enactment of the *Education Services Collective Agreement Act* (Bill 27) and the *Public Education Flexibility and Choice Act* (Bill 28). Similarly, on January 28, 2003, the Hospital Employees' Union (HEU) staged a one day work stoppage to protest the *Health and Social Services Delivery Improvement Act* (Bill 29). Both one day stoppages contravened interim orders issued by the Labour Relations Board (LRB). The contravention was brought before the LRB.

The matter between the BCTF and BCPSEA before LRB Vice-Chair Saunders was whether the Code's prohibition of what he termed mid-contract political strikes is constitutionally valid. The parties relied on sections 1 and 2 of the Charter. The LRB found in favour of BCPSEA. The definition of strike was found to infringe on individuals' freedom of expression; however, Vice Chair Saunders found that this infringement could be justified under section 1 of the Charter.

On the same day, the LRB issued a decision regarding the health care sector, finding that the definition of strike does violate the Charter. The Health Employers' Association of BC (HEABC) subsequently applied for a stay of the decision.

The BCTF filed an application for reconsideration of the decision with the LRB. For the purposes of reconsideration, the two applications were combined and heard by a three person panel of the LRB. The effect of the LRB award issued on December 17, 2004 was that the definition of strike remained constitutionally valid and applicable, unless and until a court determined otherwise. The reconsideration decision was appealed.

Relevant Legislative Provisions:

Labour Relations Code

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services...

Strikes and lockouts prohibited during term of collective agreement

57 (1) An employee bound by a collective agreement entered into before or after the coming into force of this Code must not strike during the term of the collective agreement, and a person must not declare or authorize a strike of those employees during that term.

(2) An employer bound by a collective agreement entered into before or after the coming into force of this Code must not during the term of the collective agreement lock out an employee bound by the collective agreement.

Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion
 - (b) freedom of thought, belief, opinion and expression, including the freedom of the press and other media communication
 - (c) freedom of peaceful assembly
 - (d) freedom of association

Section 1 of the *Charter* qualifies these rights:

1. The Canadian Charter of Rights and Freedoms Guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Decision: The BC Court of Appeal upheld that “the impugned definition of a strike, through its effects, infringes the guarantee of free expression in s. 2(b) of the *Charter* but the infringement is justified under s.1.”

In dismissing the unions’ appeals, the Honourable Mr. Justice Mackenzie states:

“...the prohibition of mid-contract strikes is an integral part of the labour relations scheme.”

In conclusion, Justice Mackenzie states:

“The pre-1984 definition prohibited mid-contract collective bargaining strikes; the 1984 amendment extends that mid-contract prohibition to strikes for any purpose. The right to strike when no collective agreement is in force is maintained, subject to Code procedural requirements and essential services limits. The object of the prohibition is the prevention of disruption of services or production. That objective is pressing and substantial; the mid-contract prohibition is rationally connected to that objective. The prohibition extends a limit that is non-controversial in a collective bargaining context to a political protest context. Means of free expression other than through work stoppages remain unimpaired. The mid-contract prohibition meets the standard of minimal impairment and is proportionate to the balance between free expression and harmful impact. The indeterminate and politically charged dimensions of a Charter guarantee of limited protest strike action reinforces the validity of the Legislature’s imposition of a clear standard.”

The BCCA also concluded that the Code prohibition against mid-contract political strikes does not violate employees’ right to freedom of association or freedom of assembly under the Charter.

Significance: This decision upholds the constitutionality of the definition of strike under the *Labour Relations Code*, finding that the definition does not violate the unions’ right to freedom of expression.

Note: The BCTF has indicated they will be seeking leave to appeal this decision to the Supreme Court of Canada.

BCPSEA Reference No. CD-01-2009

BCTF/ SD No. 36 (Surrey): Employee Injury/Incident Report Forms

Issue: Can the employer require teachers to complete a locally developed employee injury/accident form when reporting workplace injuries to the district?

Facts: When an employee is injured or an incident/"near miss" occurs while the employee is working, the district requires that the employee complete a form called the "Employee Incident/Injury Report (EIIR)." The district developed the current EIIR in 2003 in consultation with the Canadian Union of Public Employees (CUPE) and the local teachers' union. The district EIIR includes, among other things, information such as the school name where the incident/injury occurred, date and time of the incident/injury, supervisor's name, witnesses to the incident, and a description of how the incident happened.

The *Workers Compensation Act* (s. 53 Part 1) also covers reporting injuries and states, "the worker must, if he or she is fit to do so and on request of the employer, provide to the employer particulars of the injury or occupational disease on a form prescribed by the Board and supplied to the worker by the employer." The Act prescribes "Form 6A" be used for reporting purposes.

While many of the questions on the EIIR district form are similar to those found on Form 6A, there are a few differences. The key difference is that the EIIR includes reporting requirements for both incidents and injuries, whereas Form 6A only contemplates injuries. The union made no objection to the EIIR until it filed a grievance in December of 2006.

Decision: Grievance allowed. In his analysis, the question Arbitrator Taylor examined was:

"is s.53(3) a complete code for purposes of requiring written particulars of injury or occupational disease from employees, or does it leave space for concurrent authority, under the Employer's management rights, to require employees to provide the same written particulars on a form other than 6A."

Arbitrator Taylor concluded that:

"To the extent the EIIR's content and function overlap with Form 6A, the District cannot require teachers to complete it. In purporting to do so, the District is acting contrary to s.53 (3) of the *Workers Compensation Act* and without authority under the *Collective Agreement*.

Subsection 53 (3) does not preclude the District from simply requesting that teachers report injuries on the EIIR. However, teachers are free to refuse without consequence as a matter of workplace discipline — and, of course, without consequences under s.53 as well, provided there is otherwise compliance with the section.

To the extent the District uses the EIIR solely for the purpose of accident reporting and investigation under Part 3 of the *Workers Compensation Act*, without overlap with S.53 (3) — i.e. only in the event of near misses — it does have authority under the *Collective Agreement* to require teachers to complete the form, as a workplace rule. However, if the District wishes to require the written reporting of near misses and injuries for Part 3 purposes, it will have to develop a new form — and surrounding policies and procedure — which clarify that this reporting scheme bears no functional connection to s.53

To put the arbitrator's decision into context, it is important to discuss the relevant provisions of the *Workers Compensation Act*. Part 1 Division 5, Procedure and Miscellaneous, governs the "relevant information to the Board in the event of workplace injury or occupational disease, for purposes of adjudication of the injured or diseased worker's entitlement to compensation." Section 53 (3) specifically discusses the requirements of reporting to the employer. In Part 3 of the Act, "the statute

shifts focus from compensation to the prevention of workplace injuries and occupational diseases. The specific provisions of relevance for present purposes, found in Division 10-Accident Reporting and Investigations, impose obligations on employers to report and investigate workplace accidents — not only injuries, but also, more broadly, in keeping with the preventative orientation of Part 3, serious near misses."

Significance: If the content and function of locally developed injury forms overlap with the WorkSafeBC Form 6A, the district cannot require that teachers complete it. The district can require teachers to complete local forms that pertain only to "incidents" or "near misses" as this does not overlap with s.53 (3).

BCPSEA Reference No. A-08-2009

Questions

If you have any questions concerning these decisions, please contact your BCPSEA labour relations liaison. If you want a copy of the complete award, please contact **Nancy Hill at nancyhi@bcpsea.bc.ca** and identify the reference number found at the end of the summary.