@issue

British Columbia Public School Employers' Association

2009-24 August 20, 2009 By E-mail: Four Pages

Supreme Court of Canada Denies Leave to Appeal: BC Court of Appeal Decision Re Definition of Strike Stands

In a decision released this morning, the Supreme Court of Canada (SCC) has dismissed the BC Teachers' Federation (BCTF) application for leave to appeal the BC Court of Appeal decision regarding the definition of strike in the *Labour Relations Code*.

The SCC also dismissed the leave application by the Health Employees' Union in the companion case.

The effect of the SCC decision is that the BC Court of Appeal decision stands and the definition of strike remains constitutionally valid and applicable.

BC Court of Appeal Decision

In a unanimous decision released on February 4, 2009, the BC Court of Appeal (BCCA) found that the *Labour Relations Code* (the Code) prohibition against mid-contract political strikes does not violate employees' right to freedom of association or freedom of assembly under the *Charter of Rights and Freedoms*.

In response to appeals of earlier Labour Relations Board (LRB) decisions on this matter filed by the BC Teachers' Federation (BCTF) and the Hospital Employees' Union (HEU), the BCCA specifically addressed the issue of whether a day of protest during the term of a collective agreement constitutes a strike under the Code and, if so, does the Code violate the Charter-protected rights of freedom of speech and association.

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

> "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."

and further:

> "…the prohibition of mid-contract strikes is an integral part of the labour relations scheme."

In his 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.
>
> In the result, I conclude that the impugned definition of 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. It follows that the HEU protest strike was properly enjoined, independent of the picketing activity and the severance issue raised by the HEU is immaterial. Accordingly, I would dismiss the appeals.

A copy of the BCCA decision is available on the BCPSEA public website at http://www.bcpsea.bc.ca/access/publications/aissue/2009/ai2009-08-strikedefinition.pdf

Background

On January 28, 2002, the 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 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 LRB.

BCPSEA took the view that the BCTF action constituted a strike under the Code. The BCTF asserted that it is unconstitutional for the Code to define "strike" to include political protests.

The issue 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.

Section 2 of the Charter provides:

> 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.

The BCTF sought a declaration that the definition of strike under the Code infringes on their right to freedom of expression, freedom of assembly and freedom of association guaranteed by Section 2 of the Charter and is not saved by section 1 of the Charter.

In addition, the BCTF sought a declaration that the definition of strike in the Code is *ultra vires*[1] the provincial legislature because its purpose is to regulate political protest activity by unions.

BCPSEA argued that the definition of strike is constitutionally valid and that the freedom of association and expression do not include the right to strike. Further, BCPSEA relied on an Ontario Labour Relations Board decision which held that while strikes do engage the right to freedom of expression, a ban on mid- contract strikes can be justified under section 1. Finally, BCPSEA relied on several court decisions which hold that such a ban is within the provincial jurisdiction.

The LRB found in favour of BCPSEA. Vice Chair Saunders found that the Code's prohibition against mid-contract political strikes is not *ultra vires* and does not violate employees' right to freedom of association or freedom of assembly. The definition of strike was found to infringe on individual's freedom of expression; however, Vice Chair Saunders found that this infringement could be justified under section 1 of the *Charter*. He justified the infringement on the basis of the "effect of the strikes on others, the fact that they are a breach of employees' employment obligations, and the availability of other means of expression that do not have these effects."

Interestingly, on the same day, the LRB issued a decision with reasons emanating from the health care sector, finding that the definition of strike does violate the Charter (*Health Employers Association of BC and the Attorney General of BC* –and– *Hospital Employees' Union*, BCLRB No. B64/04). HEABC subsequently applied for a stay of the decision. The LRB decided to hold the stay application in abeyance, considering that as the parties were engaged in collective bargaining, and the union might have been in a legal strike position in a matter of weeks, a stay decision might not serve any practical purpose. The LRB also based its decision not to grant the stay application on the unsettled nature of the law given the two conflicting decisions.

The BCTF filed an application for reconsideration of the decision with the LRB. For the purposes of reconsideration the two applications — HEABC-HEU and BCTF-BCPSEA — were combined and heard by a three person panel of the LRB. While differing analyses were provided by each of the three reconsideration panel members, 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 (B395/2004).

The BCTF and HEU proceeded to appeal the reconsideration award, leading to the decision of the BCCA.

The SCC does not give reasons when they deny or allow leave to appeal, so no written reasons will be issued.

[1] Beyond the scope or in excess of legal power and authority

For Your Reference

The *Labour Relations Code* references are as follows:

- **"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.