FTR Now

No *Charter*-Protected Right to Strike Says Saskatchewan Court Of Appeal

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In a much-anticipated decision – Government of Saskatchewan v. Saskatchewan Federation of Labour, 2013 SKCA 43 – a five-member panel of the Saskatchewan Court of Appeal has found that the *Canadian Charter of Rights and Freedoms* (the "*Charter*") does not guarantee a right to strike for unions and their members. Rather, the Court found that previous decisions of the Supreme Court of Canada, which had determined that the *Charter* does not guarantee a right to strike, remain the law until the Supreme Court itself decides otherwise. In this *FTR Now*, we review the decision, its background and its implications for employers.

FACTUAL BACKGROUND

In 2007, the newly elected Saskatchewan government enacted two pieces of labour legislation – *The Public Service Essential Services Act* (the "*PSES Act*") and *The Trade Union Amendment Act 2008* (the "*TUA Amendment Act*").

The *PSES Act* provided a mechanism by which the government and other public sector employers could, in consultation with public sector unions, determine which services were essential in the event of a strike or lockout. Where the parties could not negotiate an essential services agreement, employers were given the ability to unilaterally make the following determinations:

- the classifications of employees who had to work during the work stoppage;
- the number of employees in each classification who had to work;
- the names of the specific employees who had to work; and
- for most public employers, which essential services had to be maintained.

There was limited oversight of the employer's decision given to the Labour Relations Board.

The *TUA Amendment Act* made a number of changes to the *Trade Unions Act*, including the following:

- changes to the certification process, including increasing the minimum card support required for a certification application (from 25% to 45%), by requiring membership cards to have been signed within the previous three months (as opposed to six previously), and by requiring a certification vote in all cases, but without specifying a time frame in which a vote must be held;
- changes to the decertification process, including lowering the threshold of employee support to trigger a vote (from 50% to 45%) and also requiring that cards be signed within the previous three months; and
- changes to increase the scope of permitted employer communications.

The new statutes were challenged by a number of public sector unions and the Saskatchewan Federation of Labour as violating various rights and freedoms under the *Charter*.

In a decision released on February 6, 2012, the Saskatchewan Court of Queen's Bench found that the *PSES Act* violated section 2(d) of the *Charter*, and was not saved by section 1. In so finding, the Trial Judge found that the freedom of association guarantee in the *Charter* includes a constitutional right to strike – the first such recognition in Canadian law. The Trial Judge also found that the *TUA Amendment Act* did not violate the *Charter*. While recognizing that the changes would have the effect of reducing the success rate of unions organizing, he found that they did not infringe the freedom of employees to choose a union to collectively bargain on their behalf.

LEGAL BACKGROUND

The question of the scope of the freedom of association guaranteed by section 2(d) of the *Charter* has undergone an evolution over the years. The following, greatly simplified, review will help situate the Saskatchewan Court of Appeal's decision.

Early cases took a narrow approach to the scope of freedom of association. It was found not to provide constitutional protection for collective bargaining nor for a right to strike, and was generally thought of in individualistic terms (i.e. the focus was on groups of individuals performing individual activities in concert). Examples of this narrower approach can be found in the "Labour Trilogy", a series of labour decisions decided by the Supreme Court in 1987: *Reference re Public Service Employee Relations Act (Alta.)*; *PSAC v. Canada*; and *RWDSU v. Saskatchewan.*

While not universally endorsed, the following comments of Sopinka J. in a subsequent 1990 decision illustrate this early approach:

Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.

Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)

The Supreme Court began to move away from this narrower approach in the 2001 decision of *Dunmore v. Ontario (Attorney General)*, the Court's first decision addressing the associational rights of farm workers in Ontario. For the first time, the Court recognized that freedom of association can also extend to the collective activities of associations in their own right.

In 2007, the Supreme Court released its groundbreaking decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia.* In *Health Services*, the Supreme Court revisited the Labour Trilogy, and departed from its prior decisions. In so doing, the Court found that freedom of association is broad enough to protect collective bargaining. The *Charter* protections were found to apply only to the process of collective bargaining, and not to any specific results. Moreover, they only protected against "substantial interference" with associational activity (whether through intent or effect).

The Supreme Court had an opportunity to revisit the scope of freedom of association in the 2011 decision of *Ontario (Attorney General) v. Fraser. Fraser* was the follow-up decision to *Dunmore*, and again concerned the associational rights of farm workers in Ontario. While the majority of the Supreme Court endorsed *Health Services*, it did so in what appeared to be narrower terms.

Moreover, in *Fraser* the Supreme Court overturned the Ontario Court of Appeal decision that had found that, in order to be meaningful, the right to collective bargaining needed to incorporate three additional features: (1) a statutory duty to bargain in good faith; (2) a statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism to resolve disputes, both as to bargaining impasses and the interpretation of any collective agreements.

THE SASKATCHEWAN COURT OF APPEAL DECISION

Against this background, the Saskatchewan Court of Appeal heard appeals from both findings of the Court of Queen's Bench – namely, that the *PSES Act* violated section 2(d) of the *Charter* and was not saved by section 1, and that the *TUA Amendment Act* did not violate the *Charter*.

Despite convening a five-member panel, the Court of Appeal declined to render a substantive finding on whether section 2(d) of the *Charter* protects a right to strike as found by the Trial Judge. Rather, the Court of Appeal noted that, in the Labour Trilogy, the Supreme Court had found that section 2(d) did **not** protect a right to strike. While the Supreme Court has clearly moved away from its reasoning in the Labour Trilogy, it has not yet expressly overruled this specific finding from the Labour Trilogy. Indeed, the Court of Appeal noted that neither *BC Health Services* nor *Fraser* considered the question of a right to strike. Therefore, the Trial Judge and the Court of Appeal were bound to apply the existing Supreme Court decisions.

Moreover, the Court of Appeal also found that, even if the recent developments of the Supreme Court's case law suggested that it might overrule its previous finding on the right to strike, there was sufficient ambiguity in the recent decisions to make it very difficult to determine what course the Supreme Court might ultimately adopt.

For example, if the "right to strike" is considered as an adjunct to constitutionally protected collective bargaining rights, the decision in *Fraser* suggests that section 2(d) does not require a mechanism for resolving bargaining impasses, and would therefore not include a right to strike. Alternatively, if the "right to strike" is considered as a freestanding right, it is also unclear how section 2(d) would apply, as there is considerable difficulty in separating a "right to strike" from the modern statutory labour relations regimes – which the Supreme Court has said are not protected under section 2(d) – in which strikes occur.

Given this level of ambiguity, it was not appropriate for the Trial Judge to decline to follow the Labour Trilogy's findings on the right to strike. In the result, the Court of Appeal found that section 2(d) does not protect a right to strike, and therefore the *PSES Act* was found to be constitutional.

The Court of Appeal also found that the *TUA Amendment Act* was constitutional. Even accepting that it made organizing more difficult than previously in the province, the Court of Appeal found that it did not amount to "substantial interference" with associational rights that are protected by section 2(d).

CONCLUSION

For employers, the judgment of the Saskatchewan Court of Appeal is a welcome recognition that legislators retain some ability to fashion a labour relations regime that is responsive to complex societal and economic pressures without necessarily running afoul of the *Charter*. This is especially so with respect to the changes brought about by the *TUA Amendment Act*, which represent the Legislature's attempt to rebalance labour, business and individual interests in a manner that it felt was more responsive to 21st-century economic realities.

However, the Court of Appeal's judgment is also a clear call to the Supreme Court to once again revisit and clarify the question of the scope of section 2(d) associational rights in the context of labour relations. Given the importance of labour relations policy in the Canadian economy and society, it is imperative to have clear principles in place.

If you would like any further information about this decision and how it might affect your workplace, please contact your regular Hicks Morley lawyer.

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