

Roper Greyell Case Law Update – September 2009

Challenge to Definition of “Strike” in the *Canada Labour Code*

The Federal Court of Appeal recently issued an important decision upholding an earlier decision of the Canada Industrial Relations Board (CIRB) that the definition of “strike” in the *Canada Labour Code* does not offend the *Canadian Charter of Rights and Freedoms: Grain Workers’ Union, Local 333 v. B.C. Terminal Elevator Operations’ Assn.*, [2009] F.C.J. No. 722 (C.A.).

Background

This *Charter* challenge arose in the context of a lawful strike by the Public Service Alliance of Canada (PSAC) against the federal government in 2004. PSAC members employed by the Canada Grain Commission set up lawful picket lines at various marine and grain terminal sites where members of the Grain Workers’ Union (GWU) and International Longshore and Warehouse Union (ILWU) also worked. GWU and ILWU members refused to cross PSAC’s picket line, relying on terms in their respective collective agreements that permitted their members to refuse to cross a lawful picket line.

Both of the affected employer organizations applied to the CIRB for declarations that the GWU and ILWU members were engaged in illegal strikes and for orders requiring them to return to work. The CIRB issued interim orders to that effect and scheduled a separate hearing to consider the *Charter* issues raised by the unions. The unions, supported by PSAC and the Canadian Labour Congress, argued that treating a refusal on the part of GWU and ILWU members to cross PSAC’s lawful picket line as an unlawful “strike” infringed on those members’ freedom of expression and freedom of association guaranteed under sections 2(b) and 2(d) of the *Charter*.

Canada Industrial Relations Board

The CIRB dismissed the unions’ *Charter* arguments in original and reconsideration decisions. The CIRB concluded as follows:

- (a) Treating a work stoppage caused by a refusal to cross another union’s lawful

picket line as a “strike” does not infringe on union members’ rights to free expression or association because:

- i. the purpose of the strike definition is to promote industrial peace and stability;
- ii. the strike definition regulates only the timing and manner, and not the content, of the union members’ expression; and
- iii. the strike definition was not a substantial interference with union members’ rights to collective bargaining.

(b) Alternatively, if a *Charter* infringement had occurred, such infringement was reasonable and justified in accordance with section 1 of the *Charter* because:

- i. union members’ collective agreement rights to respect picket lines did not “trump” the provisions and operation of the *Canada Labour Code*; and
- ii. the benefit of the *Code*’s preservation of industrial peace and stability outweighed any negative impact on union members’ rights.

Federal Court of Appeal

The Federal Court of Appeal was unanimous in dismissing the unions’ judicial review applications. The majority upheld the earlier CIRB decisions in their entirety. Mr. Justice Evans concurred in the result, but would have held that the strike definition infringed on union members’ freedom of expression, but the infringement of that right and any right to freedom of association was justified under section 1 of the *Charter*.

The majority specifically agreed with the CIRB’s finding that the strike definition does not offend *Charter* expression rights in either purpose or effect. Mr. Justice Blais found that the strike activity at issue “had neither a social nor political purpose” and was “an intrusion into a private contractual dispute between PSAC employees and their employer”. He further held that the CIRB’s orders only affected the employees’ work stoppage and not any message that the employees sought to convey.

Mr. Justice Ryer held to the extent that refusing to cross PSAC’s picket line constituted commentary on the dispute between PSAC and the federal government, that was not within the ambit of “participation in social and political decision making” protected by the *Charter*.

Conclusion

This decision is important because it:

- (a) preserves the ability of federally regulated employers to require their employees to continue to work despite the presence of a lawful picket by other employees at their worksite; and
- (b) confirms the CIRB's jurisdiction to treat a work stoppage caused by a refusal to cross another union's lawful picket line as an illegal strike for the purpose of preserving industrial peace and stability, regardless of privately negotiated collective agreement provisions regarding picket lines.

It has come to our attention that the GWU is seeking leave to appeal this decision to the Supreme Court of Canada. We will keep you apprised of any further significant development in this case.

If you have questions regarding the issues raised in this case law update and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

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Delayne M. Sartison, a partner at Roper Greyell, and Barbara A. Korenkiewicz, an associate lawyer with the firm, were legal counsel for the British Columbia Maritime Employers Association, one of the employer organizations that made the application to the CIRB and was a respondent before the Federal Court of Appeal.



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Delayne's practice covers all aspects of management-side employment, labour and human rights law, including strategic planning, dispute resolution and advocacy. She has particular expertise in the unique field of health sector labour relations, and has been recognized by "Lexpert" as a leading labour relations lawyer.

Barb advises both unionized and non-unionized employers facing challenges in all areas of workplace law. Barb's primary practice involves the analysis of complex

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* Every effort has been made to ensure accuracy in respect of this case law update. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this case law update. *