



NEWSLETTER – JANUARY 2009

---

## ENFORCEABILITY OF FINES LEVIED AGAINST UNION MEMBERS FOR CROSSING A PICKET LINE

This newsletter summarizes the recent decision of the Ontario Court of Appeal in *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809. The Court of Appeal addressed the issue of enforceability of fines levied by a trade union against its members for crossing a picket line.

Although the decision emanates from another province, it was made by an appellate court. It is accordingly persuasive authority in British Columbia, and could well have application in cases based on a similar fact pattern.

### Facts

The facts in *Birch v. Union of Taxation Employees, Local 70030* can be simply stated.

Jeffrey Birch and April Luberti were employees of the Canada Revenue Agency and members of the Union of Taxation Employees (the “UTE”).<sup>1</sup> They crossed a picket line to attend work on three days in

the fall of 2004 during a lawful strike by the Public Service Alliance of Canada (“PSAC”).

The UTE, a constituent member of PSAC, brought disciplinary proceedings against Mr. Birch and Ms. Luberti for violating the PSAC constitution by working during a lawful strike.

Mr. Birch and Ms. Luberti were each suspended from union membership for a period of three years (one year for each day he or she crossed the picket line). In addition, each of Mr. Birch and Ms. Luberti was fined \$476.75 (the total of each employee’s gross salary for the three days he or she crossed the picket line).

Mr. Birch and Ms. Luberti – and, interestingly, a number of other employees who had been fined by the union for crossing the picket line – refused to pay their fines.

### Procedural History

The UTE sought to enforce payment of the fines against Mr. Birch and Ms. Luberti in the Small Claims Division of the Ontario Superior Court of Justice.

---

<sup>1</sup> The employment of Mr. Birch and Ms. Luberti was accordingly regulated at the federal, rather than the provincial, level.

In the course of the court proceedings, Mr. Birch and Ms. Luberti brought an application in which they sought the following relief:

- (a) a declaration that the Court “[did] not have the jurisdiction to enforce provisions set out in the constitution of a trade union that provide for fines/financial penalties against the trade union’s members”;
- (b) in the alternative, a declaration that the Court “[did] not have the jurisdiction to enforce the fine/financial penalty provisions as set out in the Constitution of ... [PSAC] and/or the By-Laws of ... [the UTE ]”; and
- (c) an order dismissing “claims brought by the Union against the Applicants in the Small Claims Branch of the Superior Court of Justice”.

An application judge of the Superior Court of Justice, using different language to that used by Mr. Birch and Ms. Luberti, granted the relief sought by them. In effect, the application judge decided that the provision in the PSAC constitution authorizing the fines was a legally unenforceable penalty clause.

The union appealed that decision to the Ontario Court of Appeal. The union advanced arguments including the following:

- (a) “The application judge erred in concluding that the penalty clause in the constitution was *per se* unenforceable.”
- (b) “The penalty clause in the union constitution is not unconscionable.”
- (c) “The statutory context under which the union operates established a

recourse system which presupposes that the union has the right to levy fines on their members.”

- (d) “Mr. Birch and Ms. Luberti were required to proceed in alternative forums to challenge the validity of the penalty clause in the constitution.”

### Decision of Ontario Court of Appeal

The union’s appeal was heard by a three-judge panel of the Ontario Court of Appeal.

The appeal was dismissed, with Mr. Justice Russell Juriansz dissenting from the majority judgment.

### ***Did the application judge err in concluding that the penalty clause in the PSAC constitution was per se unenforceable?***

#### Majority

The issue to which the majority first turned its attention was whether or not the common law rule against penalty clauses (i.e. the rule that a court will not enforce a penalty clause in a contract if the clause is not a genuine pre-estimate of damages) applied to render the penalty clause in the PSAC constitution unenforceable.

From a reading of the majority judgment in *Birch v. Union of Taxation Employees, Local 70030*, it appears that the majority was reluctant to say the penalty clause in the union constitution was unenforceable *purely* on the basis of the common law rule against penalty clauses.

The majority expressed the view that “a union constitution represents a different kind of contract between a union and its

members”, and stated that the penalty clause in the union constitution was “not necessarily unenforceable in accordance with the common law” [emphasis added].

The majority cited an earlier decision of the Ontario Court of Appeal in *Peachtree II Associates – Dallas LP v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.), where Mr. Justice Robert Sharpe, delivering the unanimous judgment of the Court of Appeal, held:

All of this suggests to me that courts should, whenever possible, favour analysis on the basis of equitable principles and unconscionability over the strict common law rule pertaining to penalty clauses.

The majority did precisely what was advocated by Mr. Justice Sharpe in *Peachtree II Associates – Dallas LP v. 857486 Ontario Ltd.* The majority “favour[ed] analysis on the basis of equitable principles and unconscionability” and “move[d] to a consideration of whether the clause [in the PSAC constitution] was or was not unconscionable”.

### Dissent

The dissenting judge in *Birch v. Union of Taxation Employees, Local 70030* took the matter further than the majority. He expressed the view that “the common law rule that penalties are *per se* unenforceable does not apply to the disciplinary provisions of a union constitution”.

### ***Was the penalty clause unconscionable?***

#### Majority

Turning to the question of whether or not the penalty clause in the union constitution

was unconscionable, the majority began by articulating the test for unconscionability.

The majority stated:

However one articulates the test for unconscionability, I am satisfied that it involves more than a finding of inequality of bargaining power between the parties to a contract ... [A] determination of unconscionability involves a two-part analysis – a *finding of inequality of bargaining power* and a *finding that the terms of an agreement have a high degree of unfairness*.

[Emphasis added.]

Using that two-part analysis, the majority declined to interfere with the application judge’s finding that the penalty clause in the union constitution was unconscionable. In the words of the majority, there was “no basis upon which th[e] court could or should interfere with [the application judge’s] conclusion that the penalty clause in the constitution [was] unconscionable and therefore unenforceable”.

Focusing on the first part of the test for unconscionability (i.e. the question of whether or not there was inequality of bargaining power), the majority held that “the application judge committed no error in concluding that there was inequality of bargaining power between [Mr. Birch and Ms. Luberti] on one hand and the union on the other hand”.

The majority noted the application judge’s reliance on the Supreme Court of Canada’s decision in *Berry v. Pulley*, [2002] 2 S.C.R. 493, where Mr. Justice Frank Iacobucci, delivering the unanimous judgment of the Court, explained that:

- (a) the contract existing between a trade union and its members is a contract of adhesion (i.e. a “take it or leave it” sort of contract where, practically speaking, the weaker party yields no bargaining power relative to the stronger party); and
- (b) “it is when the contract is formed [rather than some later point in time] that determines whether there [is] inequality of bargaining power”.

The majority proceeded to rule:

When Mr. Birch and Ms. Luberti joined the union, *they took the union constitution as they found it with no ability to negotiate or change its terms until they became members.* The fact that they could recommend and lobby for change after becoming members does not alter the analysis.

[Emphasis added.]

Turning to the second part of the test for unconscionability (i.e. the question of whether or not the contractual terms at issue give rise to a high degree of unfairness), the majority held that “the application judge considered all of the facts relevant to th[e] issue”.

The majority recounted the findings made by the application judge and chose not to interfere with them.

Dealing with the union’s argument that the fines imposed pursuant to the PSAC constitution were “proportional to the damage suffered by the union as a result of Mr. Birch and Ms. Luberti crossing the picket line”, the majority held:

- (a) “[T]here is not a scintilla of evidence of any damage to the union.”
- (b) “[I]f there was any evidence of damage, such damage would be to the other members of the bargaining unit. Again, there is no such evidence ... [T]he discussion about the intangible nature of damage to the union is simply irrelevant because there is no evidence of damage – intangible, actual or otherwise.”

The majority expressly disagreed with the union’s suggestion that the \$476.75 fine levied against each of Mr. Birch and Ms. Luberti was “a trivial sum”. The majority made the following noteworthy statement: “It is *the circumstances of the employee* that determines whether the fine meets the test of substantial unfairness” [emphasis added].

The majority did not take issue with the application judge’s finding that a fine in excess of an employee’s take-home pay “at a time when members may already be suffering financially as a result of strike action” is “very unfair”. As the majority put it, the application judge’s “general statement that members may be suffering financially appears ... to be a logical inference to draw from the circumstances of a cessation of work due to a strike”.

The majority agreed with the:

- (a) out-of-hand rejection by the application judge of the argument that “a fine representing the gross pay of an employee [who crossed the picket line] was justified because it represented the value of the work to the employer”; and

(b) finding of the application judge that “basing a fine on the value of the work to the employer does not make an excessive fine justifiable”.

The majority did not object to the application judge’s suggestion that there were “more appropriate means” to “deter members from taking the benefits of union membership without accepting the burden of a work stoppage due to a legal strike”.

The majority did not question the examples of other “more appropriate means” provided by the application judge – i.e. “the waging of information campaigns” and “the setting of strike pay on a basis that would encourage support for the strike”.

The majority bolstered the suggestion that there were other deterrents to “free-loading by individual members of the union during the collective bargaining process” by adding the following:

[Mr. Birch and Ms. Luberti] were suspended from union membership for three years ... [A] suspension of such duration is a significant penalty in itself. [Mr. Birch and Ms. Luberti] not only lost the benefits of union membership but risk ostracism and ridicule from their fellow employees who are members of the union.

The majority did not accept the contention that “the simple answer to the question concerning unconscionability is that [Mr. Birch and Ms. Luberti] could have resigned from the union before crossing the picket line and avoided the imposition of the fines”. The majority reasoned:

*The penalty clause in the union constitution is either unconscionable or it is not. Resigning from the union does not change the conclusion that*

*the penalty provision is unconscionable. If this were so, no penalty clause could be unconscionable.* Let us suppose that the penalty clause provided for a \$10,000 fine per day for each day that a union member crossed the picket line or a fine of \$500 for some other breach such as failure to wear a union hat during a strike. In my view, no court would say that such a clause is not unconscionable because a union member could resign from the union before he or she crossed the picket line or declined to wear a union hat. The failure to resign from the union before crossing the picket line or declining to wear a union hat does not turn an unconscionable penalty into an enforceable obligation.

When [Mr. Birch and Ms. Luberti] joined the union, they entered into a contract, the terms of which were fixed at that point in time. Only those terms which were not unconscionable could be enforced against them and the unilateral act of resignation at some later date does not make an unconscionable provision enforceable by the courts.

[Emphasis added.]

### Dissent

Mr. Justice Juriensz concurred with the majority’s articulation of the test for unconscionability.

He, however, arrived at a different result after applying the test. He would have found that the fines levied against Mr. Birch and Ms. Luberti were not unconscionable and, accordingly, were legally enforceable.

***Does the Public Service Labour Relations Act<sup>2</sup> recourse system presuppose that the union has the right to levy fines on its members?***

Majority

The majority said it could find nothing in the applicable statutory regime that “would permit the enforcement of a fine that the court found to be unconscionable”.

Before the Court of Appeal, the union made reference to sections 188(c) to (e) and 192(1)(f) of the *Public Service Labour Relations Act*. The union argued that those sections preclude trade unions from imposing penalties (including fines) on union members *only* in certain delineated circumstances. The union argued that because sections 188(c) to (e) and 192(1)(f) do not deal with imposition of fines for crossing a picket line during a lawful strike, unions are not precluded from imposing fines for such conduct.

The majority rejected the union’s argument. In the majority’s view, “[T]he absence of a prohibition against the imposition of fines for crossing a picket line during a legal strike in ss. 188(c)-(e) and 192(1)(f) of the *Public Service Labour Relations Act* does not entitle a union to impose such fines.”

Dissent

The dissenting judge did not take issue with any of this. He said that “nothing in the statutory context ... would permit the enforcement of a fine that the court found to be unconscionable”.

***Were Mr. Birch and Ms. Luberti required to proceed in alternative forums to challenge the validity of the penalty clause in the PSAC constitution?***

Majority

The majority gave this argument short shrift, underscoring that it was the union, and not Mr. Birch and Ms. Luberti, who had initiated the action in the Small Claims Division of the Superior Court of Justice.

The majority proceeded to say:

[I]t would be a surprising result to permit the union recourse to the courts to enforce a fine or penalty and deny the union member the right to advance a defence that the penalty was not enforceable because it was unconscionable.

Dissent

The dissenting judge did not dispute the conclusion that once the UTE commenced a court action against its members, the union members were entitled to raise any defence available to them.

**Conclusion**

*Birch v. Union of Taxation Employees, Local 70030* is a significant decision for a couple of reasons.

For one thing, it demonstrates that the courts are reluctant in cases of this kind to pass judgment on the enforceability of a penalty clause *exclusively* on the basis of the common law rule against penalty clauses. The dissenting judge in *Birch v. Union of Taxation Employees, Local 70030*,

---

<sup>2</sup> *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2.

in fact, went so far as to outright assert that “the common law rule that penalties are *per se* unenforceable” has no application to “the disciplinary provisions of a union constitution”.

Perhaps more significantly, the decision illustrates that – in the absence of legislation authorizing a trade union to levy fines against its members who cross the picket line during a lawful strike, and any statutory direction as to the permissible amount of such fines – the courts will take their guidance from equitable principles and, more specifically, the test of unconscionability.

In our view, the analysis that will be undertaken by the courts in cases similar to *Birch v. Union of Taxation Employees, Local 70030* will not focus so much on the question of whether or not there was inequality of bargaining power between the union and its members. That will, more

likely than not, be assumed. The lines in such cases will really be drawn on the question of whether or not the contractual terms in question give rise to a high degree of unfairness.

The question we pose in closing is whether the decision in *Birch v. Union of Taxation Employees, Local 70030* provides dissenting union members with more freedom, in the course of a lawful strike, to cross the picket line. We believe so, but caution that expulsion from union membership may, in cases where the employer has a “closed shop” (i.e. mandatory union membership), result in a union request for termination of the employee’s employment.

As a representative of employers, we applaud employees who make an individual assessment of their bargaining position, but note that unilateral action on the part of employees is not without some risk.

*If you have questions regarding the issues raised in this newsletter 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 telephoning us at (604) 806-0922 or visiting our website at [www.ropergreyell.com](http://www.ropergreyell.com).*

\*\*\*\*\*

\* Every effort has been made to ensure accuracy in respect of this newsletter. 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 newsletter. \*