

Roper Greyell Case Law Update – March and April 2009

Regulation of Mid-Contract Strikes

In *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39 (CanLII), the B.C. Court of Appeal addressed constitutional challenges in which it was alleged that application of the B.C. *Labour Relations Code* (the "Code") definition of "strike" to prohibit "political protests" or "political strikes" contravened the guarantees of freedom of expression, freedom of peaceful assembly and freedom of association enshrined in sections 2(b), (c) and (d) respectively of the *Canadian Charter of Rights and Freedoms* (the "Charter").

In practical terms, the Court of Appeal was considering whether or not the B.C. Labour Relations Board (the "LRB") could continue to regulate all mid-contract strikes, including those capable of being characterized as "political" in nature.

Facts

These constitutional challenges arose out of mid-contract job action undertaken by the British Columbia Teachers' Federation (the "BCTF") and the Hospital Employees' Union (the "HEU") in response to the provincial government's introduction of legislation which purported to impose a collective agreement on the BCTF (Bills 27 and 28) and to re-open and modify the terms of the HEU's existing collective agreement (Bill 29). In particular, Bill 29 permitted contracting out, restricted rights concerning bumping and lay-offs, and completely precluded the HEU from engaging in collective bargaining on certain issues.

On January 28, 2002, the BCTF conducted a mid-contract work stoppage in response to the introduction of Bills 27 and 28. The work stoppage lasted one day and involved BCTF members' attendance at protest rallies in Vancouver and at the Legislature in Victoria. The BCTF rallies were entirely peaceful in nature. Schools were closed during the BCTF's day of protest.

On January 28, 2003, the HEU conducted a mid-contract work stoppage to mark the one-year anniversary of the introduction of Bill 29. The HEU work stoppage lasted one day and involved HEU members' peaceful attendance at protest rallies. However, the HEU work stoppage also resulted in acts of violence and intimidation on the picket line.

On at least one occasion, union members banged on the hood of a vehicle driven by a management employee who was attempting to enter a healthcare facility. Healthcare services were disrupted during the HEU's day of protest and several surgeries were cancelled as a result.

Both the BCTF and the HEU work stoppages were undertaken in contravention of interim unlawful strike orders that had been issued by the LRB in anticipation of the work stoppages. The unions claimed their members had engaged in "political protests" or "political strikes" that were aimed at government and protected by the guarantees of freedom of expression, freedom of assembly and freedom of association under the *Charter*.

Procedural History

The BCTF and the HEU raised *Charter* challenges to the *Code* definition of "strike" in the B.C. Supreme Court. The Court, however, directed the LRB to consider the challenges first.

Vice-Chair Ken Saunders of the LRB dealt with the BCTF work stoppage. He determined that there was an infringement of section 2(b), but that it was justified under section 1 of the *Charter*.

Vice-Chair Jan O'Brien of the LRB dealt with the HEU work stoppage. She held that, in the typical case, there would be an infringement of section 2(b) that was unjustifiable under section 1 of the *Charter*. However, due to the improper conduct that had occurred on the picket line, Vice-Chair O'Brien ruled that the HEU "political protest" or "political strike" was not protected under the *Charter*.

Both Vice-Chairs accordingly upheld the unlawful strike orders that had been issued by the LRB.

Each of the BCTF and the HEU applied for reconsideration of the decisions and the LRB considered the applications together.

A reconsideration panel of the LRB dismissed both the BCTF and HEU applications for reconsideration. One of the members of the three-member panel was in dissent.

The majority of the reconsideration panel, delivering two separate decisions, ultimately agreed with Vice-Chair Saunders (infringement of section 2(b) of the *Charter* saved by section 1). The dissenting member of the panel felt that it was constitutionally necessary to have a "day of protest" exemption to the *Code's* general prohibition against mid-contract strikes.

The reconsideration panel's decision then went on judicial review. In the B.C. Supreme Court, a chambers judge ruled that the "political protests" or "political strikes" did not attract protection under section 2(b) of the *Charter* and, in the alternative, held that, even if there was a *Charter* infringement, it was justified under section 1.

The unions appealed the judicial review decision to the B.C. Court of Appeal.

B.C. Court of Appeal Decision

The Court of Appeal issued a unanimous decision dismissing the unions' appeals and upholding the LRB's right to:

- (a) regulate all mid-contract work stoppages, including "political protests" or "political strikes"; and
- (b) declare such work stoppages to be illegal and to order unions and employees to cease and desist from engaging in such activity.

The Court began by setting out the definition of "strike" in the *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 ...*

[Emphasis added.]

The Court defined the issues before it as follows:

1. Does the definition of strike, in conjunction with s. 57 of the *Code*, infringe the appellants' right to freedom of expression under s. 2(b) of the *Charter*?¹ BCTF also raises the issue of infringement of the rights of freedom of peaceful assembly and freedom of association under ss. 2(c) and 2(d) of the *Charter*.
2. If "strike" so defined infringes s. 2 rights, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
3. Does the engagement by some individual members of the HEU in some acts of intimidation and violence exclude the entire protest strike from the protection of s. 2(b)?

¹ Section 57 of the *Code*, incidentally, sets out the general prohibition against mid-contract strikes.

The Court of Appeal made it clear that it was focusing on mid-contract work stoppages and not typical, end-of-contract work stoppages. The Court also distinguished public sector strikes from private sector strikes, noting that the former are more of a political weapon than an economic weapon.

In considering section 2(b) of the *Charter* (freedom of expression), the Court accepted that the purpose of the unions was political protest directed at the provincial government, rather than any public sector employer, and also that the work stoppages in question constituted “expressive activity”. The Court then accepted that the:

- (a) effect, but not the purpose, of the definition of “strike”, together with section 57 of the *Code*, is to restrict freedom of expression; and
- (b) general prohibition against all mid-contract strikes infringes on section 2(b) of the *Charter*.

Having found an infringement on freedom of expression, the Court of Appeal then turned to section 1 of the *Charter* and outlined the so-called *Oakes* test, the test that must be satisfied in order to justify a *Charter* infringement:

The objective of the law must be of “pressing and substantial” concern. The means chosen by the law must be reasonably and demonstrably justified under a three part test. The means must be rationally connected to the objective. They should impair the right as little as possible. Finally, there must be proportionality between the effects of the chosen measures and the objective.

In passing, we note that the Court considered the arguments made by the unions under sections 2(c) and (d) of the *Charter* (freedom of assembly and freedom of association respectively), and was of the view that those arguments were subsumed under the broader freedom of expression analysis.

In the alternative, with regard to the right of free association, the Court was of the view that the LRB’s regulation of “political protests” or “political strikes” raises issues about free expression and not free association, and that the issues raised by the unions in relation to free association were more properly addressed in the context of litigation regarding the legislation under protest at the time (Bills 27, 28 and 29).

“Pressing and Substantial” Objective

The parties to the appeals agreed that the objective of the general prohibition against mid-contract work stoppages is to create certainty and stability in the workplace during the term of a collective agreement. This was accepted to be a “pressing and substantial” objective.

“Rational Connection”

There was no dispute between the parties that a prohibition of all mid-contract strikes is intended to curtail the disruption to services or production caused by such strikes. This was sufficient to establish the “rational connection” required under the *Oakes* test.

“Minimal Impairment” and “Proportionality”

The parties were at odds when it came to the “minimal impairment” and “proportionality” requirements under the *Oakes* test. The parties disagreed on how to “impair the [Charter] right as little as possible” and how best to achieve “proportionality between the effects of the chosen measures and the objective”.

The unions advocated the “undue harm to the public” test that permits “short, occasional political protest strikes which neither threaten the integrity of the labour relations system nor have a significant adverse impact on the public interest”. The employers advocated the “bright line” test that simply considers whether a work stoppage is “designed to or does restrict or limit production or services”.

The Court of Appeal ultimately held that the “undue harm to the public” test is too vague and would result in undesirable instability and uncertainty in the workplace. In the view of the Court, the “bright line” test satisfies the requirements of minimal impairment and proportionality under the *Oakes* test.

The Court of Appeal concluded that the infringement on freedom of expression arising out of the definition of “strike”, together with section 57 of the *Code*, is saved under section 1 of the *Charter*. The infringement on the right to free expression is, in other words, reasonable and justifiable in our society.

Conclusion

British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn. is a significant case because the B.C. Court of Appeal sent a very clear message to the labour relations community that, going forward, it is the “bright line” test that will apply. The question will simply be whether or not a work stoppage is “designed to or does restrict or limit production or services”, and there will not be a need to engage in some vague, case-by-case analysis as to the harmfulness of any given work stoppage.

That said, it has come to our attention that an application for leave to appeal the Court of Appeal's decision in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.* will soon be filed with the Supreme Court of Canada.

As matters presently stand, the LRB can continue to regulate all mid-contract strikes, including those framed as "political protests" or "political strikes", and unions and their members remain free to engage in protest activities outside of working hours.

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.

• • •

Counsel for Business Council of British Columbia

The Business Council of British Columbia participated as an intervenor in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, and was represented in the appeal process by Delayne M. Sartison, a partner at Roper Greyell, and Barbara A. Korenkiewicz, an associate lawyer with the firm.



Delayne Sartison



Barb Korenkiewicz

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 legal issues and the development of persuasive written argument in the context of appellate and other work before provincial and federal administrative tribunals and the courts. Barb also practises in the area of workplace privacy law and regularly advises public and private sector employers concerning their rights and obligations under relevant privacy legislation, including the appropriate handling of access requests.

Delayne can be contacted at (604) 806-3851 or dsartison@ropergreyell.com.

Barb can be contacted at (604) 806-3866 or bkorenkiewicz@ropergreyell.com.

For more information about Delayne, Barb and our other lawyers, please visit the firm's website at www.ropergreyell.com.

* 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. *