Supreme Court Declines to Hear B.C. Unions' Freedom-of-Expression Appeal

The Supreme Court of Canada has denied two public-sector unions leave to appeal a decision which upheld British Columbia legislation prohibiting mid-contract strikes.[1] Following its usual practice, the Supreme Court did not give reasons for dismissing the application; its refusal to hear the appeal, however, does not necessarily mean the Court thinks the lower court rightly decided the case.[2]

The British Columbia Teachers' Federation (BCTF) and Hospital Employees' Union (HEU) challenged the definition of "strike" in B.C.'s *Labour Relations Code*[3] on the ground that it "restricts their ability to engage in political protests" and thus infringes their fundamental freedoms protected by section 2 of the *Charter*.[4] In January 2002, the B.C. legislature passed new legislation to designate education as an essential service, prohibit school boards and teachers from bargaining over class sizes, and override other contractual rights.[5] In protest, a large majority of B.C. teachers voluntarily participated in a voluntary one-day work stoppage, keeping hundreds of thousands of students out of class.[6] One year later, the HEU engaged in a similar action to mark the anniversary of legislation which modified their collective bargaining rights.[7] The B.C. Labour Relations Board had declared both work stoppages illegal by issuing interim orders under the*Labour Relations Code*.[8] Section 1 of the B.C. Code defines "strike" as a cessation of work or a refusal to work "designed to … restrict or limit production or services."[9] The BCTF and HEU contended that this definition prohibits them from engaging in "protest strikes," thereby infringing their rights to freedom expression, association and peaceful assembly.[10] The decision of the B.C. Supreme Court found that freedom of expression protected by the *Charter* does not cover "protest strikes" and even if it did, the prohibition on such work stoppages was justified as a reasonable limit prescribed by law under section 1 of the *Charter* (the *Oakes test*).[11] Unlike the trial decision, the unanimous decision of the B.C. Court of Appeal ruled that the "strike" definition in the B.C. Code violated the unions' section 2(b) freedom of expression, but the court went on to find that the violation could be justified as a reasonable limit under section 1 of the *Charter*.[12] The appeal court applied the *Irwin Toy* test for freedom of expression, and determined that public-sector mid-contract "protest strikes" are protected by section 2(b). The court stated that "[a] public sector strike has a different impact than a strike in the private sector," and "a public sector strike is more a political than an economic weapon."[13] Therefore, the prohibition on the mid-contract work stoppages restricts "a form of effective expression," infringing section 2(b).[14] However, the appeal court concluded the prohibition satisfied the *Oakes* test because:

- the objective of preventing disruption of public-sector services is

"pressing and substantial";
- the prohibition is "rationally connected to that objective";
- the prohibition is minimally impairing because it does not impair forms of free expression other than work stoppages; and
- it struck a proportional balance between its harmful impact and free expression.[15]

The B.C. Court of Appeal found that the prohibition on mid-contract work stoppages did not violate union members' section 2(c) right to freedom of peaceful assembly, nor did it violate their section 2(d) right to freedom of association. By declining to hear this appeal, the Supreme Court has passed on the opportunity to address the debate over whether the Court found a "right to strike" in section 2(d) in its 2007 decision to strike down sections of B.C. legislation which infringed the HEU members' right to collective bargaining.[16]

---

[1] "Judgments in Leave Applications" *Supreme Court of Canada* (20 August 2009).

[2] Hogg, Peter W., *Constitutional Law of Canada,* 2008 Student ed., (Toronto: Thomson Carswell) at 256.

[3] R.S.B.C. 1996, c. 244.

[4] *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39 at para. 1.

[5] *Ibid*. at para. 5; *Education Services Collective Agreement Act*, 2nd Sess., 37th Parl., British Columbia 2002; *Public Education Flexibility and Choice Act*, 2nd Sess., 37th Parl., British Columbia 2002.

[6] *Ibid*. at paras. 6-7.

[7] *Ibid*. at para. 8; *Health and Social Services Delivery Improvement Act*, 2nd. Sess., 37th Parl., British Columbia, 2002.

[8] *Ibid*. at para. 6.

[9] *Supra* note 3 at section 1.

[10] *Supra* note 4 at para. 20.

[11] *HEU & BCTF et al. v. HEABC & BCPSEA*, 2007 BCSC 372 at para. 209.

[12] *Supra* note 4 at para. 4.

[13] *Ibid*. at para. 21.

[14] *Ibid*. at para. 37.

[15] *Ibid*. at para. 73.

[16] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391.