Charter's Freedom of Association Now Includes the Right to Strike: A decision 28 years in the making may profoundly alter labour relations in Canada

Introduction & Background

In January 2015, the Supreme Court of Canada recognized that a union's right to strike is an "indispensable component"[1] of collective bargaining, and therefore is protected under the *Canadian Charter of Rights and Freedoms*.[2] This recent 5-2 decision in *Saskatchewan Federation of Labour v Saskatchewan* (*Saskatchewan Federation of Labour*) was a fundamental change from the Supreme Court's initial 1987 interpretation on the *Charter's* freedom of association, that said, where unionized employees were concerned, freedom of association was limited to a right to form and maintain a union.

In 1987 the Supreme Court flatly rejected the notion that collective bargaining and striking merited protection under the *Charter* in the *Alberta Reference*.[3] The Supreme Court interpreted freedom of association to protect individuals; since individuals themselves could not collectively bargain or strike, these were not protected activities. On the other hand, Chief Justice Dickson wrote a dissenting opinion arguing that the history of workplace injustice meant that association was meaningless without access to collective bargaining and the ability to strike, and therefore both were fundamental rights.

In the intervening years, the Supreme Court slowly, although unevenly, adopted Justice Dickson's reasoning as it pertained to collective bargaining, finding it to be protected from government interference.[4] But the Court did not explicitly rule on striking until now. The majority's decision in *Saskatchewan Federation of Labour* relied heavily on Justice Dickson's dissent to find that freedom of association guarantees unionized workers recourse to strike (or an alternative, in the case of essential workers) as part of collective bargaining. The majority decision specifically pointed out that this interpretation of the freedom "has arrived at the destination sought by Dickson C.J"[5]

Although the Supreme Court finally made a definitive ruling on the right to strike, the ramifications of recognizing a right to strike are uncertain. Critics of the decision, including two justices in the minority, argue that the decision will upset the balance between employees, employers and the public. Because no one can anticipate the decision's effects on labour relations, labour and government are considering their options, so that the

balance will be tilted in their favour.

A Snapshot of the Decision

In *Saskatchewan Federation of Labour*, the question the Supreme Court was asked was whether Saskatchewan's 2007 *Public Service Essential Service Act* (*PSESA*) violated public sector unions' freedom of association because it allowed the government to determine which public sector employees were "essential" and were therefore prohibited from striking. The Act notably included no alternate dispute resolution mechanism in cases where collective bargaining between the parties broke down. If the Supreme Court determined the Act violated freedom of association, it then had to determine if the Act's provisions were only a minimal interference to collective bargaining so the Act could nonetheless stand.

The majority decision, written by Justice Abella, found the *PSESA* to be unconstitutional because the right to strike is "constitutionally protected because of its crucial role in a meaningful process of collective bargaining."[6] The Supreme Court articulated a new test for such legislation, asking "whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining?"[7] Applying the test to the *PSESA*, the Court found that because it prevented any work stoppage it was a substantial interference to collective bargaining.[8] The Act could also not be justified under section 1 of the *Charter* because it allowed the government a broad brush in defining who, among a whole host of departments, agencies and Crown Corporations, was an essential worker. Since essential workers could take no action to resolve bargaining impasse (i.e. like binding arbitration), this impaired Saskatchewan public sector workers' freedom of association rights more than necessary.[9]

The Court's reasoning was rooted in labour history which demonstrated that statutory labour relation regimes are based on a "trade-off" where striking has been prohibited in certain instances (like during the life of a collective agreement) in return for recognition and protection of collective bargaining. Therefore, the ruling does not mean that government and employers must clear all barriers to ensure unionized workers unlimited access to strike as a tool in collective bargaining.

The government of Saskatchewan has been given one year to rewrite the legislation to comply with this ruling.

Supporters

Organized labour was heartened by the majority's direct recognition of the importance of striking as an "affirmation of the dignity and autonomy of employees in their working lives"[10] in, what they believe is, an unequal bargaining relationship that renders employees vulnerable.[11] The Saskatchewan Federation of Labour called the decision a "major victory" that "will help address the fact that workers need a critical counterbalance to the power wielded by employers."[12]

Detractors and the Dissent

On the other hand, critics in the media found the decision very "troubling."[13] For example, one Law professor alleged that the Court had "gone astray" by casually sweeping aside precedent with shaky legal reasoning.[14] He was most troubled because, in his opinion, the ruling "removed a significant policy question from the realm of democratic choice."[15]

The dissenting opinion of Justices Rothstein and Wagner mirror these criticisms; they stated that the majority is "wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike."[16] In their opinion, the majority's decision runs contrary to parliamentary supremacy, because democratically elected legislatures have the responsibility to balance interests between employer, employees and the public. Justices Rothstein and Wagner also argued, in their dissent, that since "strike action is one of many constituent elements factored into the statutory balance of power"[17] that decisions regarding it should remain in the realm of legislatures. Further, they argued that where the public expects essential services to be delivered, governments need flexibility to meet changing conditions, and the Court should be deferential. They stated that, "Where the right to strike is constitutionalized, elected legislatures are faced with an unwarranted hurdle that interferes with their ability to achieve this balance"[18]

The dissenting opinion also questioned the true scope of the new constitutionally guaranteed right to strike. It is troubled that the majority opinion left many uncertainties. For instance, will longstanding labour codes with limits on the right to strike be challenged? And who has a constitutional right to strike? Is it just public employees or are private sector workers also given the same protection?[19]

Because the dissenting Justices would not have overturned precedent, they found striking not protected under freedom of association and they found *PSESA* constitutional.

Early Contemplations

Because *Saskatchewan Federation of Labour* was such a victory for organized labour, unions and governments across Canada are already contemplating its potential impact in their own provinces. Patrick Nugent, counsel for Alberta Union of Public Employees as intervener to *Saskatchewan Federation of Labour*, predicts that for Alberta a lot of legislation will have to be revisited as a result of this decision.[20] In Nova Scotia, unions are in the process of challenging that province's essential service legislation. They feel that even though *PSESA* is different than Nova Scotia's legislation, Saskatchewan Federation of Labour is a "game changer" and its precedent will weigh in their favour.[21]

As for Saskatchewan, a few days after the ruling, Premier Brad Wall announced that if the government cannot both conform to the ruling and put the safety and welfare of the public foremost, it will invoke the controversial and rarely-used notwithstanding clause to override the public sectors' rights to freedom of association.[22] Interestingly, there is precedent for this in Saskatchewan; in 1986 after the Saskatchewan Court of Appeal found back-to-work

legislation violated freedom of association, the province invoked the clause. However, the Supreme Court subsequently found the legislation did not violate the *Charter*.

Conclusion

The ruling in *Saskatchewan Federation of Labour* has shifted the landscape of labour relations in Canada. The recognition of the right to strike as part of collective bargaining protected by the *Charter* has been hailed by supporters as constitutional support for workplace justice and has been criticized by detractors as upsetting legislative decision-making in the area of public policy. As indicated, the impact of the decision will be far reaching and, as of yet, unknown.

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[1] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3 <https://www.canlii.org/en/ca/scc/doc/2015/2015scc4/2015scc4.html>

[2] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] *Reference re Public Service Employee Relations Act* (Alta), 1987 CanLII 88 (SCC) <http://www.canlii.org/en/ca/scc/doc/1987/1987canlii88/1987canlii88.html>

[4] Mia Reimers, "Freedom of Association: The Constitutional Limits of Union Rights" online: Centre for Constitutional Studies <https://www.constitutionalstudies.ca/ccs/index.php/constitutional-issues/the-charter/fundamental-freedoms-section-2/796-freedom-of-association-the-constitutional-limits-of-union-rights>

[5] *Saskatchewan Federation of Labour*, supra note 1 at para 75.

[6] *Saskatchewan Federation of Labour,* supra note 1 at para 51.

[7] *Ibid* at para 78.

[8] *Ibid*.

[9] *Ibid* at para 80-81.

[10] *Ibid* at para 54.

[11] *Ibid* at para 55.

[12] Saskatchewan Federation of Labour, News Release "Supreme Court sides with Working Families" (30 January 2015) online: <http://www.sfl.sk.ca/news/releases/january-30-2015---supreme-court-sides-with-working-families/>

[13] Asher Honickman, "A Troubling Decision on 'the right to strike," *National Post* (5 February 2015) online: National Post < http://news.nationalpost.com/2015/02/05/asher-honickman-a-troubling-decision-on-the-right-to-strike>

[14] Dwight Newman, "A Court gone Astray on the Right to Strike" *National Post* (26 February 2015) online: National Post < http://news.nationalpost.com/2015/02/26/ed022715-newman/>

[15] *Ibid*.

[16] *Saskatchewan Federation of Labour* supra note 1 at para 105.

[17] *Ibid* at para 118.

[18] *Ibid* at para 127.

[19] *Ibid* at para 123.

[20] Alexandra Zabjek, "Alberta labour laws could face shakeup after Supreme Court decision" *Edmonton Journal* (30 January 2015) online: Edmonton Journal < http://www.edmontonjournal.com/Alberta+labour+laws+could+face+shakeup+after+Supreme+Court+decision/10775455/story.html>

[21] Selena Ross, "Essential Services Law in Nova Scotia should be repealed, group says" *CBC News* (30 January 2015) online: CBC News < http://www.cbc.ca/news/canada/nova-scotia/essential-services-law-in-nova-scotia-should-be-repealed-group-says-1.2938195>

[22] "Brad Wall open to using 'notwithstanding clause' over labour ruling" *CBC News* (4 February 2015) online: CBC News < http://www.cbc.ca/news/canada/saskatchewan/brad-wall-open-to-using-notwithstanding-clause-over-labour-ruling-1.2945304>