28 YEARS LATER: CONSTITUTIONAL RIGHT TO STRIKE CONFIRMED BY SUPREME COURT

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Nearly 28 years after former Chief Justice Brian Dickson wrote passionate – yet dissenting – reasons in favour of extending constitutional protection to the right to strike, the Supreme Court of Canada has taken up his call. In *Saskatchewan Federation of Labour v. Saskatchewan*,[1] the Supreme Court has held that the right to strike is an essential component of the freedom of association guaranteed by the *Canadian Charter of Rights and Freedoms* ("***Charter***").

Background

At issue before the Court was whether legislation prohibiting designated employees from participating in strike action amounted to a substantial interference with their right to participate in meaningful collective bargaining. Specifically, the Court was asked to consider the constitutionality of two statutes:

1. *The Public Service Essential Services Act* ("**PSESA**"), which imposed narrow limits on the ability of public sector employees who perform "essential services" to strike; and
2. *The Trade Union Amendment Act*, 2008 ("**TUAA**"), which imposed changes to the union certification process and the rules regarding communications between employers and employees.

The PSESA gave public employers unilateral authority to determine whether and how essential services are to be maintained and therefore which employees could not strike. In the view of Court, the PSESA did not provide for an acceptable review mechanism or a meaningful dispute resolution mechanism.

The Right to Strike

A majority of the Court found that the PSESA was unconstitutional and that the ability of employees to take strike action played a crucial role in meaningful collective bargaining. The majority also found that the right to strike helped balance the "deep inequalities" that exist between employers and employees. The Court held that the right to strike is protected under s. 2(d) of the *Charter*.

The majority also confirmed that the broad restrictions in the PSESA were neither minimally impairing nor proportionate and went beyond what is reasonably necessary in order to ensure the delivery of essential

services to the community during labour disputes.

Regarding the TUAA, however, the Court held that introducing amendments to the process by which unions obtain and/or lose bargaining representative status did not substantially interfere with the freedom of association.

Remaining Questions

The largest question that remains from this decision was raised by Justices Rothstein and Wagner in their dissent: what is the scope of this new constitutional right to strike? Is this new right only available to public employees and unionized members of the private sector? Will governments now have to rationalize existing statutory limits on the right to strike?

We will be following the impact of this decision closely as legislatures and employers alike pivot to rebalance the scales of the Canadian labour ecosystem.

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1 2015 SCC4.

A Cautionary Note