BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Spring 2015

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

Supreme Court Defines "A Meaningful Collective Bargaining Process"

In *Mounted Police Association of Ontario v. Canada (Attorney General)*, the Supreme Court of Canada decided that excluding members of the Royal Canadian Mounted Police ("RCMP") from collective bargaining under the *Public Service Labour Relations Act*, ("PSLRA"), and imposing a non-unionized labour relations regime violated the freedom of association guaranteed by section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter").

At the inception of collective bargaining in the public service in the 1960s, the *PSLRA* and its predecessor statute excluded the RCMP from collective bargaining. Instead, labour relations for the RCMP was composed of three bodies: the Staff Relations Representative Program ("SRRP"), the Pay Council and the Legal Fund. The core component of the scheme was the SRRP, the only form of employee representation recognized by management and the primary mechanism through which members could address certain labour relations issues.

In this recent decision, the Supreme Court determined that the SRRP was unconstitutional in two ways.

First, the Supreme Court established that the right to associate under the *Charter* requires a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable the determination and pursuit of collective interests.

Secondly, the Supreme Court determined that the *Charter* guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, which includes a right to collective bargaining. The Supreme Court held that freedom of association does not guarantee a particular model of labour relations, nor does it guarantee a particular outcome. It does, however, require a regime that does not substantially interfere with meaningful collective bargaining.

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca

For the foregoing reasons, the Supreme Court concluded that the SRRP process does not permit meaningful collective bargaining, and thus, is inconsistent with the *Charter*:

- through the imposition of the SRRP as the sole means of presenting concerns to management, RCMP members are represented by an organization they did not choose and do not control;
- as the SRRP is a structure and process that is part of the management organization of the RCMP, the RCMP Regulations imposes a scheme that does not permit members to identify and advance their workplace concerns free from the influence of management; and,
- the process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

The Supreme Court found these infringements unjustifiable under section 1 of the *Charter.* As for the appropriate remedy, the Court struck down the offending provision of the *PSLRA* and suspended the declaration of invalidity for a period of twelve (12) months.

The Supreme Court did not mandate a particular labour relations regime or bar the federal government from pursuing an avenue other than the PSLRA to govern labour relations within the RCMP. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits of the Charter.

Canada's Top Court Constitutionalizes the Right to Strike

In *Saskatchewan Federation of Labour v. Saskatchewan*, the Supreme Court of Canada established that the right to strike is constitutionally protected by the freedom of association guaranteed by section 2 of *Canadian Charter of Rights and Freedoms* (the "*Charter*").

The Saskatchewan Federation of Labour on behalf of several unions challenged the constitutionality of the *Public Service Essential Services Act*, S.S. 2008, c. P42.2 (*PSESA*), and the *Trade Union Amendment Act, 2008*, S.S. 2008, c. 26 (*TUAA*) shortly after their introduction by the provincial government.

Under the *PSESA*, in the event of a work stoppage, the government has the unilateral authority to maintain essential services. The *PSESA* then prohibits public sector employees who perform essential services from participating in strike action. These employees must continue their duties in accordance with existing terms and conditions of their employment and must not limit their duties to only those that are truly essential. Furthermore, no meaningful alternative mechanism for resolving bargaining impasses, such as arbitration, is provided.

At trial, the judge concluded that the right to strike was a fundamental freedom protected by section 2 of the *Charter*, accordingly, the *PSESA*'s interference with the right to strike was unconstitutional and unjustifiable. At the Court of Appeal, the government was successful in having this decision overturned.

On appeal to the Supreme Court of Canada, it concluded that collective bargaining is a constitutionally protected right, and that striking, as a vital and indispensable aspect of collective bargaining is also a constitutionally-protected right. The Supreme Court supported its conclusion on a historical, jurisprudential and international landscape:

- First, the Supreme Court reviewed its prior decisions on the issue to establish that a meaningful process of collective bargaining supports the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" further entrenching collective bargaining as a *Charter*-protected right.
- Secondly, the Supreme Court found that striking allows workers to participate in collective bargaining through the collective action of withdrawing their services and refusing to work under terms and conditions imposed by the employer, essentially stating that striking is an indispensable and crucial component of collective bargaining.
- Third, the Supreme Court concluded that striking promotes equality in the bargaining process to remedy what it termed as the "deep inequalities" between employees and employers by providing employees with "bargaining leverage".
- Fourth, the Supreme Court determined that Canada's international human rights obligations and general recognition of international law mandate a constitutional protection of the right to strike.

Turning to the *PSESA* in general, the Supreme Court found that:

1. its prohibition on striking for designated employees is a substantial interference with a meaningful process of collective bargaining and,
2. this breach could not be justified because while the maintenance of an essential public service is a pressing and substantial objective, the means chosen by the government of Saskatchewan were not minimally impairing.

Accordingly, the Supreme Court concluded that a right to collectively withdraw labour must not be interfered with,

and if such interference occurs, there must be a meaningful alternative dispute resolution process for workers.

This decision has a tumultuous impact on the jurisprudence regarding the right to strike as the Supreme Court has effectively overruled its own decisions and those of provincial Courts of Appeal which for the last thirty (30) years had denied constitutional protection of the right to strike. Employers can expect constitutional challenges in the future when provincial or federal governments attempt to limit the right to strike through legislation.

Suspension with Pay May Constitute Constructive Dismissal

In *Potter v. New Brunswick Legal Aid Services Commission*, the Supreme Court of Canada concluded that a non-unionized employee who is suspended with pay is constructively dismissed when there is no express or implied authority for the suspension of the employee and the suspension is both unjust and unreasonable.

Mr. Potter, the employee, was a lawyer serving on a seven-year appointment pursuant to the New Brunswick *Legal Aid Act* as Executive Director of Legal Aid for the New Brunswick Legal Aid Services Commission ("Commission"). The Employee had completed nearly four years of his contract when negotiations for the early termination of his employment contract commenced. During these negotiations, the Employee took a period of three months off work for medical reasons. While on sick leave and without his knowledge, the Commission recommended that the Employee be dismissed for cause. He was advised that while his salary would continue, he was "not to return to work until further notice".

A few weeks later, the Employee commenced an action claiming that he had been constructively dismissed by the imposition of an indefinite suspension. He claimed general and punitive damages, and declarations that the Commission had no authority to suspend him and had unlawfully obstructed and delegated his statutory duties. In response, the Commission ceased to pay his salary taking the position that the Employee had resigned.

At trial, the judge and then the Court of Appeal disagreed, holding instead that the Employee elected to repudiate the contract when he commenced legal action against the Commission. The lower courts held that although his appointment was pursuant to the *Act*, the Commission was authorised to supervise the position. Furthermore, given that the Employee did not know that the Commission had recommended his termination; he had no reason to conclude that he was being terminated; in fact, the Court of Appeal found that this was not the Commission's intention.

Before the Supreme Court of Canada, the issue was narrowed to whether and in what circumstances a non-unionized employee who is suspended with pay may claim to have been constructively dismissed.

The Supreme Court began its analysis by reviewing the law of constructive dismissal in Canada. It recognized that the law characterizes an employer's conduct which evinces an intention to no longer be bound by the contract as a dismissal. The test to be applied identifies a term of the employment contract that the employer has unilaterally changed to the detriment of the employee without the employee's acquiescence, and determines whether a reasonable person in the same situation would view the employer's action or series of actions as an intention to no longer be bound by the contract.

The Supreme Court then articulated the following principles, which now govern the allegation of constructive dismissal where a non-unionized employee is suspended:

- Constructive dismissal does not require formal termination of employment; therefore, where there are common employers, the action of either of the two common employers short of termination can result in constructive dismissal. Therefore, the fact that only the Crown and not the Commission could formally terminate the Employee's appointment was not determinative.
- Constructive dismissal can be established by an unauthorized suspension. Where there is an express or implied term of a voluntarily executed employment contract which authorizes suspensions, then a suspension will not be a unilateral act and thus not a constructive dismissal.
- A suspension can result in constructive dismissal because no employer is at liberty to withhold work from an employee either in bad faith or without justification given that modern developments in employment law view work as an essential component of ones' sense of self-worth, identity and emotional well-being and as inclusive of a duty of good faith and fair dealing.
- An administrative suspension must be both reasonable and justified; all employers must meet the basic requirement of a good faith business justification. Factors to determine whether the employer has met this threshold include: the existence of legitimate business reasons, good faith, minimal duration of the suspension, and whether the suspension was with pay.

In applying these principles to this case, the Supreme Court found that the Employee was constructively dismissed:

1. The employment contract was breached because the suspension was unauthorized and unilateral. The *Act* did not expressly authorize the Commission to suspend the

Employee. Furthermore, there was no implied authority to suspend the Employee given that the nature of the employment relationship required the Commission to provide the Employee with work or to provide reasonable justification for failing to do so. The Commission failed in this regard because even though the Employee's salary was maintained, the following facts constituted bad faith:

- his being uninformed about the reasons for the suspension;
- the indefinite duration of the suspension;
- the delegation of the Employee's duties to another; and
- the Commission's pretense of negotiating a buyout of his contract when in fact the Commission sought to terminate it.

2. It was reasonable for the Employee to perceive that the unauthorized unilateral suspension was a substantial change to the contract because he had been indefinitely suspended without being provided with a reason.

Finally the Supreme Court determined whether pension benefits received by the Employee should be deducted from his damages. The pension plan in question was governed by the *Public Service Superannuation Act* which was a contributory plan not intended to compensate in the event of a wrongful dismissal. The *Act* prevents a retired employee who returns to the public service from collecting pension benefits while at the same time receiving a salary as an employee. However, the *Act* does not establish a general bar on the receipt of both a pension entitlement and employment income and it does not apply to an employee who has been wrongfully dismissed and is entitled to receive damages as a result of that wrongful dismissal. Accordingly, the Supreme Court held that the benefits should not be deducted.

This Supreme Court of Canada decision is a caution to employers to clearly outline in the employment contract its authority to unilaterally suspend an employee with or without pay as an administrative or disciplinary measure.

Legislative Updates:

Bill C-45 and Bill 525 – Amendments to the *Canada Labour Code*

New formula for holiday pay

The *Jobs and Growth Act, 2012* ("Bill C-45"), amended the *Canada Labour Code* (**"***Code*") on March 16, 2015 to simplify the formula for calculating holiday pay for all employees of federally regulated employers, replacing the various formulae that have been used to date.

It should be noted that this new calculation may lead to additional costs for employers.

Vote-based majority for certifications and de-certifications processes

Under Bill C-525, new rules on union certification for federally regulated employers will take effect June 16, 2015. Bill C-525 amends the *Code*, the *Parliamentary Employment and Staff Relations Act* and the *Public Service Labour Relations Act* to provide that the certification and decertification of a bargaining agent must be achieved by a secret ballot vote-based majority.

Reminder: Your January 1, 2015 *AODA* Compliance Obligations

January 1, 2015 marked the deadline for public and private sector employers with less than 50 employees to have fulfilled certain obligations under the *Accessibility for Ontarians with Disabilities Act, 2005* ("*AODA*").

Also beginning this year, public and private sector employers with over 50 employees must also satisfy specific requirements under the *AODA*.

Failure to comply can expose an organization to administrative penalties (which can range between $500 to $15,000).

Amendments to the *Employment Standards Act* – Elimination of Cap on Wages Due and Time Limit for Wage Recovery Extension

On February 20, 2015, under the *Stronger Workplaces for a Stronger Economy Act, 2014*, the following amendments to the *Employment Standards Act, 2000* (the "*Act*") came into force:

Elimination of cap on wages due to employees

In respect of any unpaid wages that came due on or after February 20, 2015, there is now no limit on the amount of wages due that an employee can recover under the *Act*.

Time limits for recovery of wages

The time limits were increased from six months to two years. An employment standards officer may not issue an order for wages due to the employee if the wages became due more than two years before the complaint was filed.

For employers, these amendments provide greater protection for employees under the *Act* and may lead to an increase in the number of claims made.