

# Right to Strike Upheld by the Supreme Court of Canada

Date: February 17, 2015

Original Newsletter(s) this article was published in: Employment Update: February 2015

The Supreme Court of Canada has upheld employees' right to strike as a meaningful part of the collective bargaining process guaranteed under the *Canadian Charter of Rights and Freedoms*.

## Background

In 2007, the Saskatchewan government passed legislation which limited the right to strike of public sector employees who performed "essential services." The legislation provided for the government and the union representing its employees to enter into a negotiation as to the identity of the "essential service employees." However, in the absence of agreement, the government was given the sole right to make the final determination without appeal.

The Supreme Court had already held that the freedom of association guaranteed under the *Charter* included the right to engage in meaningful collective bargaining. However, the Court has been careful not to mandate the process by which that collective bargaining had to take place.

## Analysis

As a result of this decision, we now know that, as a minimum, the right to collective bargaining must include "the ability to engage in the collective withdrawal of services." The Court has held that this is a "necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals."

This decision does not stand for the proposition that essential service employees have an unfettered right to strike. On the contrary, the Court recognizes that some employees may indeed perform services which are so essential that their ability to stop work must be curtailed.

What the Supreme Court found objectionable in this case was that the legislation did not define essential services to mean services that truly were essential; the category of workers deemed essential was subject to the government's unilateral discretion; there was no impartial and effective dispute resolution process by which the unions could challenge the government's

designation of an essential service employee and there was no meaningful alternative mechanism for resolving bargaining impasses.

The effect of the decision has been suspended for a period of one year to allow the Saskatchewan government to amend its legislation.

### Summary

In 1987, the Supreme Court of Canada held that the right to freedom of association guaranteed under the *Charter* did not include the right to collective bargaining. Twenty years later, in 2007, the Court reversed itself and held that the *Charter* did indeed protect the right of employees to “engage in a meaningful process of collective bargaining.”

In 2011, the Court held that “a meaningful process of collective bargaining” included a right to join together to pursue workplace goals, to make collective representations to the employer, to have the employer consider those representations in good faith and to have a right of recourse in the event that the employer did not bargain in good faith.

Finally, in its recent decision, the Supreme Court further expanded these requirements by finding that in order to engage in meaningful collective bargaining, employees had to have the right to bargain independent of their employer and the right to determine how to pursue their collective interests. This decision further expands the protection guaranteed to workers under the *Charter*.

We anxiously await the next step.