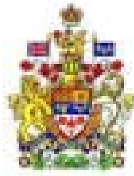
Federal Court of Appeal



Cour d'appel fédérale

Date: 20090612

Dockets: A-305-07
A-306-07

Citation: 2009 FCA 201

CORAM: **BLAIS J.A.**
EVANS J.A.
RYER J.A.

Docket: A-305-07

BETWEEN:

GRAIN WORKERS' UNION, LOCAL 333

Applicant

and

B.C. TERMINAL ELEVATOR OPERATIONS' ASSOCIATION; SASKATCHEWAN WHEAT POOL; JAMES RICHARDSON INTERNATIONAL LIMITED; UNITED GRAIN GROWERS LIMITED d.b.a. AGRIGORE UNITED; PACIFIC ELEVATORS LIMITED; CASCADIA TERMINAL

Respondents

and

PUBLIC SERVICE ALLIANCE OF CANADA; CANADIAN LABOUR CONGRESS

Intervenors

Docket: A-306-07

AND BETWEEN:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION – CANADA, INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500, and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION SHIP AND DOCK FOREMEN, LOCAL 514

Applicants

and

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION, WATERFRONT EMPLOYERS ASSOCIATION and VANCOUVER WHARVES LTD.

Respondents

and

PUBLIC SERVICE ALLIANCE OF CANADA; CANADIAN LABOUR CONGRESS

Intervenors

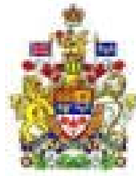
Heard at Vancouver, British Columbia, on March 30, 2009.

Judgment delivered at Ottawa, Ontario on June 12, 2009.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRING REASONS IN THE RESULT BY: BLAIS J.A.
CONCURRING REASONS: RYER J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] The applicant unions have applied for judicial review to set aside a decision of the Canada Industrial Relations Board ("Board"), dated June 8, 2007. In that decision (CIRB/CCRI Decision No. 384), the Board held that the unions had engaged in an illegal strike within the meaning of sections 3(1) and 88.1 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code"). During the existence of a collective agreement, the unions' members had not reported for work

because they were not willing to cross a lawful picket line established by members of another union in the course of a strike against their employer.

[2] The Board decided that the Code's broad definition of a "strike" included a work stoppage resulting from employees' refusal to cross the picket line, but did not infringe their rights to freedom of expression and association guaranteed by paragraphs 2(*b*) and (*d*) of the *Canadian Charter of Rights and Freedoms* and that, if it did, the infringement was justified under section 1.

[3] The issue before the Court is whether the Board was correct to conclude that the impugned provision of the Code did not violate the constitutional rights of the applicants' members.

[4] The applications for judicial review have been consolidated because they concern the same Board decision and raise the same issues. These reasons apply to both and a copy will be inserted in each file. The Public Service Alliance of Canada ("PSAC") and the Canadian Labour Congress have intervened in support of the consolidated application.

[5] For the reasons that follow, I have concluded that the statutory definition of "strike", as interpreted by the Board, infringes union members' right to freedom of expression under paragraph 2(*b*), but that it is justified under section 1. Since counsel agreed that the same section 1 analysis would apply to a breach of paragraph 2(*d*), I do not find it necessary to

determine whether the impugned provisions also violate union members' right to freedom of association.

B. FACTUAL BACKGROUND

[6] For the most part, the relevant facts are not in dispute. The applicant Grain Workers' Union, Local 333 ("GWU") represents employees of the grain terminals in the Port of Vancouver. A collective agreement is in force between GWU and the respondent B.C. Terminal Elevator Operators' Association ("BCTEOA"), a designated employers' organization representing terminal operators.

[7] The applicants International Longshore and Warehouse Union – Canada, the International Longshore and Warehouse Union, Local 500, and the International Longshore and Warehouse Union Ship & Dock Foremen, Local 514 (collectively, "ILWU"), represent employees of stevedoring companies who load grain for shipment. ILWU-Canada (including ILWU, Local 500) is party to a collective agreement with the respondent B.C. Maritime Employers Association ("BCMEA"), which represents stevedoring companies. BCMEA dispatches employees to worksites as required by its members.

[8] ILWU, Local 514 was at the material time party to a collective agreement with the Waterfront Foremen Employers Association ("WFEA"). WFEA dispatched foremen to worksites as required by the member stevedoring companies. WFEA has ceased to exist as a legal entity, and BCMEA has assumed legal responsibility for it in this matter.

[9] At all relevant times, collective agreements were in full force and effect, and contained clauses apparently permitting workers to refuse to cross picket lines established by other unions during job action:

> 19.01 The Union agrees that during the term of the Agreement there will be no slowdown nor strike, stoppage of work, cessation of work, or refusal to work or to continue to work. The Companies agree that during the term of the Agreement there will be no lockout.
>
> 19.02 The Union agrees that in the event of strikes or walkouts, the Union will not take similar action on the ground of sympathy, but will continue to work. The Companies do not expect members of the Union to pass a picket line. (Emphasis added).

[10] Under the *Canada Grain Act,* R.S.C. 1985, c. G-10, Canada Grain Commission ("CGC") personnel inspect the grain being stored and shipped at the Vancouver grain terminals. CGC inspectors are members of PSAC. There is no collective bargaining relationship between PSAC and any of the respondent employers.

[11] In 2004, PSAC members were engaged in a lawful strike against CGC and established picket lines at the Vancouver grain terminals. GWU and ILWU would have had to cross the PSAC picket lines in order to get to work. This they refused to do. The employers filed applications with the Board for declarations that their employees' interruption of work as a result of their refusal to cross PSAC's picket line constituted an illegal strike.

[12] On September 24, 2004, the Board held that the members of GWU were engaged in an illegal strike contrary to the Code and issued an interim back-to-work order. After a separate hearing, the Board issued similar orders against ILWU on October 4, 2004.

[13] In response to the unions' statement that they intended to rely on paragraphs 2(*b*) and (*d*) of the Charter in their defence, the Board ruled that it would hear the constitutional arguments at a later hearing. These arguments were heard in October 2004, but the Board did not render its decision until June 8, 2007.

[14] On that very day, the Supreme Court of Canada released its decision in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 S.C. R. 391 ("*Health Services*"), dealing with the extent to which paragraph 2(*d*) of the Charter protects collective bargaining. In a reconsideration decision, dated November 27, 2008 (CIRB/CCRI Decision No. 428), the Board affirmed its earlier decisions and held that *Health Services* made no difference to the result.

C. LEGISLATIVE AND CONSTITUTIONAL FRAMEWORK

[15] A "strike" is defined in subsection 3(1) of the *Canada Labour Code.*

> "strike" includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output;

> « grève » S'entend notamment d'un arrêt du travail ou du refus de travailler, par des employés agissant conjointement, de concert ou de connivence; lui sont assimilés le ralentissement du travail ou toute autre activité concertée, de la part des employés, ayant pour objet la diminution ou la limitation du rendement et relative au travail de ceux-ci.

[16] Strikes, as defined by subsection 3(1), and lockouts, are prohibited during the term of a collective agreement by section 88.1 of the Code, which was enacted in 1998, and came into force on January 1, 1999:

88.1 Strikes and lockouts are prohibited during the term of a collective agreement except if	**88.1** Les grèves et les lock-out sont interdits pendant la durée d'une convention collective sauf si, à la fois :
(*a*) a notice to bargain collectively has been given pursuant to a provision of this Part, other than subsection 49(1); and	*a*) l'avis de négociation collective a été donné en conformité avec la présente partie, compte non tenu du paragraphe 49(1);
(*b*) the requirements of subsection 89(1) have been met.	*b*) les conditions prévues par le paragraphe 89(1) ont été remplies.

[17] The relevant provisions of the *Canadian Charter of Rights and Freedoms* are section 1 and paragraphs 2(*b*), and 2(*d*):

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes :
…	[…]
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	*b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
…	[…]
(*d*) freedom of association.	*d*) liberté d'association.

D. DECISIONS OF THE BOARD

[18] In the decision under review, the Board, comprising a single member, concluded that the collective refusal of workers to cross PSAC's picket line constituted a mid-contract strike prohibited by subsection 3(1) and section 88.1 of the Code. The Board held that the clauses in

the collective agreements purporting to give workers the right to engage in this type of activity were "invalid and ineffective" (at para. 78).

[19] On the Charter issues, the Board concluded that the definition of "strike" in subsection 3(1) of the Code did not infringe paragraph 2(*b*) of the Charter because neither the purpose nor the effect of the statutory prohibition of mid-term strikes (including work stoppages caused when employees refused to cross a picket line) infringed employees' freedom of expression. It further held that the prohibition did not violate paragraph 2(*d*) because there was no constitutional right to strike. Alternatively, the Board concluded that any infringement of section 2 was saved by section 1.

[20] In its reconsideration decision, the Board, comprising three members, largely affirmed the reasoning and conclusions of the decision under review. It further held that *Health Services* did not affect the result, because, among other things, the prohibition of mid-contract strikes did not constitute a "substantial interference" with the right to collective bargaining (at para. 70), and was enacted only after extensive consultations (at para. 73). Further, the clauses in the collective agreements apparently permitting employees to refuse to cross a picket line still had some legal effect, because they prevented employers from suing for compensation for any loss caused by their employees' conduct or from otherwise disciplining them (at para. 74).

E. ISSUES AND ANALYSIS

(i) common ground

[21] In this proceeding, the applicants do not challenge the Board's determination that an illegal "strike" in subsection 3(1) and section 88.1 of the Code includes a refusal by union members to cross a picket line. They challenge only the constitutional validity of the Board's interpretation of these provisions.

[22] The parties rightly agreed that the Board's rulings on the constitutional validity of the relevant sections of the Code are reviewable on a standard of correctness: *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 58.

(ii) characterizing the issue

[23] The respondents say that by framing the question as one of freedom of expression the applicants have mischaracterized the essential issue at stake. They argue that the employees' conduct in this case was found by the Board to constitute an illegal strike. Hence, they say, the applicants are, in effect, attempting to use the right to freedom of expression to obtain an order that the Charter guarantees to employees a right to strike. They submit that this is inconsistent with the decisions of the Supreme Court of Canada in *Reference re Public Service Employees Relations Act (Alta.),* [1987] 1 S.C.R. 313 ("*Alberta Reference*"), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan* [1987] 1 S.C.R. 460 ("*Labour Trilogy*"), where the majority held that no such constitutional right exists.

[24] I do not agree. First, the issue in the *Labour Trilogy* was whether freedom of association in paragraph 2(*d*) includes the right to strike. In my view, it is not necessary to pass upon the applicability of paragraph 2(*d*) to the facts of the present case. Paragraph 2(*b*) is the relevant provision; the Court's reasons in the *Labour Trilogy* do not consider to what extent, if any, freedom of expression protects conduct in the course of an industrial dispute.

[25] Second, the Court has not hesitated to review under paragraph 2(*b*) the validity of legislation governing expressive activities undertaken during a strike. For example, in *U.F.C.W., Local 1518 v. KMart Canada Ltd*., [1999] 2 S.C.R. 1083 ("*Kmart Canada*"), employees were prohibited by a broad statutory definition of picketing from passing out leaflets on the strike to the public at secondary sites. The Court held that this breached the employees' freedom of expression under paragraph 2(*b*). Writing for the Court, Justice Cory said (at 1105):

> It is obvious that freedom of expression in the labour relations context is fundamentally important and essential for workers. In any labour dispute it is important that the public be aware of the issues. Furthermore, leafleting is an activity which conveys meaning. In light of the very broad interpretation that has been given to freedom of expression, it clearly falls within the purview of s. 2(*b*) of the *Charter*.

Similarly, in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8, [2002] 1 S.C.R. 156 ("*Pepsi-Cola*"), paragraph 2(*b*) was held to protect picketing by employees at both principal and secondary sites.

[26] Third, the *Labour Trilogy* is now over twenty years old and recent decisions by the Supreme Court of Canada indicate a more nuanced approach to paragraph 2(*d*) in the context of collective labour relations. Thus, in *Dunmore v. Ontario (Attorney General),* 2001 SCC 94,

[2001] 3 S.C.R. 1016 ("*Dunmore*"), the Court held that paragraph 2(*d*) includes the right of employees to organize and to undertake certain associated "core" activities. Further, building on *Dunmore*, a majority of the Court in *Health Services* departed from the reasoning of older cases, including the *Labour Trilogy*, and held that paragraph 2(*d*) includes a right to collective bargaining and protects the collective bargaining process from substantial interference by legislation.

[27] In summary, the Supreme Court has recognized the importance of picketing as expressive activity in labour disputes and has protected it by paragraph 2(*b*), and has held that paragraph 2(*d*) protects the right of employees to organize and to engage in collective bargaining. In these circumstances, I cannot read the *Labour Trilogy* as excluding the potential protection of paragraph 2(*b*) on the ground that the Board has interpreted the Code's broad definition of a "strike" to include refusing to cross another's picket line to report for work.

[28] On my analysis, therefore, two questions must be decided in this appeal: does the definition of "strike" in the Code infringe employees' rights under paragraph 2(*b*) of the Charter, and, if it does, is the infringement justifiable under section 1?

Issue 1: Does the definition of "strike" in the Code, as interpreted by the Board, offend paragraph 2(*b*) of the Charter?

[29] In *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 ("*Irwin Toy*"), the Supreme Court established a two-step inquiry for determining whether a law infringes the Charter right to freedom of expression. The first is to consider whether the prohibited activity falls within the

sphere of conduct protected by the guarantee (the definitional step). If it does, the second is to determine if the purpose or effect of the impugned law restricts expression (the infringement step).

[30] This test was refined in *Montréal (City) v. 2952-1366 Québec Inc.,* 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60-85, where the Court added at the definitional step an inquiry into whether the location or method of the expression removes it from the protection of paragraph 2(*b*).

[31] The respondents accept the conclusion of the Board that the refusal to cross a picket line is an activity with expressive content, and that there is nothing about the location or method of expression to defeat the claim at the definitional step. A refusal to cross a picket line is an activity that “attempts to convey meaning” (*Irwin Toy* at 969). The definitional step is thus satisfied.

[32] The more contentious issue in this case is whether the prohibition of mid-contract work stoppages resulting from a refusal to cross a picket line restricts freedom of expression in purpose or effect.

(i) ***purpose of the prohibition***

[33] In *Irwin Toy* (at 975-76), the Supreme Court said this about determining whether the purpose of legislation was to infringe freedom of expression.

> In sum, the characterization of government purpose must proceed from the standpoint of the guarantee in issue. With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. (Emphasis added)

[34] In my view, the purpose of the impugned provisions of the Code is not to restrict freedom of expression, but to prevent the negative consequences of mid-contract strikes, particularly the economic disruption caused by unpredictable work stoppages. The prohibition of mid-contract strikes is an important component of the Code's attempt to balance equitably the interests of labour and management.

[35] In reaching this conclusion, I note two points in particular. First, the statutory prohibition of mid-contract strikes is absolute, regardless of the expressive content of a work stoppage, if any. The effect-based definition of "strike" adopted by the Board may include conduct that would not normally be regarded as a strike. However, for the purpose of the present application for judicial review, the applicants do not challenge the Board's broad interpretation of subsection 3(1) and section 88.1. Second, the prohibition is temporary since it only applies while a collective agreement is in force.

[36] The applicants advance two arguments in support of their contention that the purpose of the prohibition of mid-contract strikes is to restrict expression. First, they say that since the

provisions are intended to ban all mid-contract work stoppages, including those with expressive content, they must necessarily be intended to restrict expression. Second, they argue, the form of the expression in this case is so closely tied to its content that to outlaw the activity is to outlaw the message (see *Irwin Toy* at 974-750).

[37] I agree with the Board that the harmful effects of the expressive activity, the work stoppage, are immediate and independent of any particular meaning being conveyed. Production or services cease as soon as employees refuse to work, regardless of whether they are refusing to cross a picket line, attending a political protest, or simply defecting *en masse* to go fishing.

[38] My conclusion that the purpose of the Code's definition of "strike" is not to curtail employees' freedom of expression, but to limit the adverse consequences of mid-contract work stoppages, is consistent with the decision of the British Columbia Court of Appeal in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39, 89 B.C.L.R. (4th) 96 ("*BCTF*"), where public sector unions relied on paragraph 2(*b*) to impugn a similarly broad definition of "strike" in the province's *Labour Relations Code*. An application for leave to appeal to the Supreme Court of Canada is pending.

[39] The Court held (at para. 34) that, while the statutory definition of "strike" is broad enough to include work stoppages resulting from employees' attendance at a political protest rally, the purpose of the legislation is to constrain

> the effects of work stoppages involved in political protests and not the otherwise free expression of the protest. That is the purpose of the definition of strike on the face of the wording.

The Court also noted (at para. 32) that British Columbia's *Labour Relations Code* only restricts employees' attendance at political rallies during working hours and that "the content and form of rallies is otherwise unconstrained."

(ii) ***effect of the prohibition***

[40] I frame my analysis of whether the statutory prohibition has the effect of limiting the freedom of expression of members of the applicant unions with the following three considerations.

[41] First, the jurisprudence on paragraph 2(*b*) indicates that a party alleging an infringement of freedom of expression has a relatively low threshold to cross, and that the main issue in the great majority of cases is whether the infringement is justifiable under section 1. This point is well made by Peter W. Hogg, *Constitutional Law of Canada*, 5th edition supplemented (Scarborough, Ontario: Thomson Carswell, 2007) at 43-6 ("Hogg"):

> … we shall see that the unqualified language of s. 2(b), reinforced by the broad interpretation that has been given to that language, means that, in most of the freedom of expression cases, it is easy to decide that, yes, the impugned law does limit s. 2(b). In that case the constitutionality of the law will turn on the outcome of the … s. 1 inquiry.

Indeed, the paucity of jurisprudence from the Supreme Court of Canada and intermediate appellate courts on whether a law has the effect of impinging on any of the values articulated in

Irwin Toy suggests that the "effects" requirement is not a significant impertinent for litigants alleging a breach of paragraph 2(*b*).

[42] Second, the Supreme Court of Canada has emphasized the fundamental importance of freedom of expression in labour disputes. In particular, in *Pepsi-Cola* at para. 35, Chief Justice McLachlin and Justice LeBel, writing for the Court said:

> Free expression in the labour context benefits not only individual workers and unions, but also society as a whole…As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the debate on labour conditions into the public realm.

[43] Third, it seems to me indisputable that the prohibition <u>in fact</u> limits employees' ability to express their support for the PSAC members on strike against their employer, CGC. This is because it prevents them from honouring the picket line (an admittedly expressive activity) during working hours. "Honouring a picket line" may take several forms: employees may choose to demonstrate their solidarity by joining it, by approaching it and turning back after discussion with the strikers, or by simply staying away from work. Indeed, by requiring employees to cross a picket line, the prohibition has the effect of forcing employees to engage in conduct that may convey the message that they do <u>not</u> support the strike.

[44] The question to be decided is whether, despite the low threshold for establishing a *prima facie* breach of paragraph 2(*b*) and the *de facto* limit on employees' expressive activity imposed by the prohibition, the prohibition has the effect, <u>in law</u>, of limiting freedom of expression.

[45] In *Irwin Toy* (at 976), the Supreme Court stated that in order to show that a law has the effect of restricting expression, the claimant must demonstrate that the prohibited activity (in this case, failing to report for work because of a refusal to cross a picket line) promotes at least one of the principles and values underlying the guarantee of free expression, namely:

> (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed…. [A] plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

[46] The focus of the argument in the present case is whether the expressive activity in question is related to "participation in social and political decision-making". In my respectful view, the value captured by this phrase should not be approached narrowly. Indeed, the Court's paraphrase of the phrase as "participation in the community" indicates that it is of broad application.

[47] The Supreme Court has stated, in other contexts, that labour disputes involve "fundamental" legal, political, and social issues (*Kmart Canada* at para. 29), and that picketing "brings debate about labour conditions issues into the public realm" (*Pepsi-Cola* at para. 35). I need not decide whether these statements mean that expressing support for a strike by not crossing a picket line and thereby failing to report for work always constitutes participating in "social and political decision-making" or "participation in the community". For the purpose of disposing of this appeal, I shall confine myself to situations where the strikers who have put up the picket line are in dispute with a government agency over their "labour conditions".

[48] Refusing to cross a picket line is a uniquely powerful means for employees to publicly express their solidarity with strikers. In addition to giving moral support and encouragement to the strikers, honouring a picket line is also intended to assist in bringing the issues of the strike to the attention of the wider public, to rally public support for the strike, and to bring pressure to bear on the strikers' employer. The fact that refusing to cross a picket line in order to report for work is likely to result in a loss of earnings amplifies the message of support.

[49] This issue was considered recently by the British Columbia Court of Appeal in *BCTF*. The question in that case was whether the definition of "strike" in the province's *Labour Relations Code*, which is virtually identical to that in the *Canada Labour Code*, infringes paragraph 2(*b*) by prohibiting employees from absenting themselves from work in order to attend a political rally protesting the enactment of legislation that "changed conditions of employment and overrode collective bargaining processes" (at para. 22).

[50] Finding that the definition had the effect of restricting expression, the Court noted that, since "the objectives [of the work stoppage] were not restricted solely to the economic interests of union members … the effect of the mid-contract strike prohibition is a restriction on an effective means of expressive action and for that reason alone, it trenches on the s. 2(b) guarantee of free expression" (*BCTF* at para. 37).

[51] The respondents in the present case argue that *BCTF* is distinguishable, on the ground that the reason for the work stoppage in that case resulted from employees' attendance at a

political protest rally aimed at the provincial government which was not limited to protesting about the terms of their employment by school boards. In contrast, they say, the refusals to cross the picket line in the present case were designed to support PSAC in its attempt to secure a more favourable collective agreement from the employer: PSAC was engaged in a purely commercial dispute with the employer. Accordingly, they submit, since there was no evidence that PSAC was striking in furtherance of political or social ends, rather than simply for better terms of employment for their members, the prohibition of mid-contract work stoppages did not have the effect of limiting employees' participation in "social and political decision-making".

[52] I do not agree. The expressive activity of refusing to cross a picket line by members of the applicant unions was in support of a strike by members of PSAC, who were in dispute with their employer, CGC, an agency of the Government of Canada. I agree with the following observations in *BCTF* (at para. 37) on the nature of strikes in the public sector.

> Public sector unions have been given the right to strike for collective bargaining purposes, apart from essential services staffing requirements, and the political dimension of such strikes cannot be ignored. Unlike the private sector, the primary target of the strike weapon is the government and public opinion; the strike is in that sense political…. Motivations are mixed and strike objectives in the public sector cannot be conveniently divided into political protest and collective bargaining categories. In both cases, the strike exerts pressure directed beyond the formal public sector employers to the governments that are their masters. It is a form of effective expression that is curtailed by its inclusion within the strike definition. (Emphasis added)

[53] I would only add that public sector strikes are also "political" because their resolution almost invariably implicates such public policy issues as the appropriate allocation of public resources, the level of public services to be provided and the manner of their delivery, and the

basis on which any additional costs of the services are to be defrayed. These are questions of community concern.

[54] By putting up a picket line in support of its strike and attempting to attract public support, and thereby to influence the government, PSAC was engaging in “political” action, regardless of the particular issues involved in its dispute with CGC, on which there is no evidence in the record before us. Accordingly, when members of the applicant unions refused to cross the PSAC picket line to go to work they were assisting them by adding their support to PSAC’s attempts to put the issues into the public domain, in order to win public support and increase pressure on the government.

[55] Thus, by including the work stoppages that occurred in the present case within the definition of “strike”, and prohibiting those that take place mid-contract, the Code has the effect of discouraging employees’ from participating “in social and political decision-making”, and “in the community” (*Irwin Toy* at 977), and thus infringes their rights under paragraph 2(*b*).

[56] The fact that members of the applicant unions have no right to participate in PSAC’s negotiations with CGC does not preclude their prohibited conduct from being sufficiently related to “social and political decision-making” within the meaning of *Irwin Toy*. Honouring picket lines in order to show support for public sector employees and to increase pressure on the government to settle a dispute by mobilising public opinion is aptly characterized as “participation in the community”, a value promoted by paragraph 2(*b*).

[57] In addition, not crossing another union's lawful picket line is widely regarded by members of the labour movement as an ethical obligation. Hence, I am inclined to think that, as applied to the facts before us, the impugned provisions of the Code also have a negative effect on the freedom of expression value of promoting "the diversity in forms of individual self-fulfillment and human flourishing": *Irwin Toy* at 976. However, despite the obvious breadth of this value, I express no concluded opinion on it in the absence of sustained argument.

[58] The respondents argue that the prohibition does not limit employees' freedom to express their support for the PSAC strikers because they have many other ways of doing this. I do not agree. Since, in my view, the impact of the prohibition on freedom of expression is more than minimal its partial nature is relevant to the inquiry under section 1, not paragraph 2(*b*). In my view, *Delisle v. Canada (Deputy Attorney General),* [1999] 2 S.C.R. 989, is of little assistance. The issue in that case was whether the government had a positive obligation to create a legislative framework for providing the most effective means for employees to express themselves or to associate.

ISSUE 2: Is the infringement of paragraph 2(*b*) justified under section 1?

[59] If a statutory limit on a Charter right is "reasonable" and "demonstrably justifiable in a free and democratic society", it will be upheld under section 1, even though it infringes a right guaranteed elsewhere in the Charter. The analytical framework for determining whether section 1 is satisfied was established in *R. v. Oakes*, [1986] 1 S.C.R. 103 ("*Oakes*").

[60] The *Oakes* analysis requires the party seeking to uphold the legislation to establish that the objective of the impugned law is "sufficiently pressing and substantial" and that the impugned law is proportional to that objective. "Proportionality" is determined on the basis of a three-pronged test: the law must be rationally connected to its objective; it must impair the constitutional right in question as little as possible; and it must not have a disproportionately severe effect on the right.

(i) ***importance of the statutory objective in prohibiting mid-contract strikes***

[61] In my view, the Board correctly held that the purpose of the broad statutory prohibition of mid-contract strikes is to avoid the social and economic costs of unpredictable interruptions to production and services. As the Supreme Court of Canada has acknowledged, strikes and picketing impose great social costs on both the immediate parties to a dispute and the broader community: *Retail, Wholesale and Department Store Union v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 591; *Alberta Reference* at 414.

[62] The British Columbia Court of Appeal reached a similar conclusion on the "pressing and substantial" nature of the objectives of nearly identical provisions in British Columbia's *Labour Relations Code*: *BCTF* at paras. 49-51.

(ii) ***Proportionality of the prohibition***

(a) rational connection between the prohibition and the statutory objective

[63] It seems clear on its face, as the parties appear to have accepted, that there is a rational connection between the prohibition of mid-contract strikes on the one hand, and, on the other, the statutory objective of limiting unpredictable work stoppages and the consequent interruption of services or production. See also *BCTF* at para. 55.

(b) minimal impairment of rights

[64] The applicant unions argue that the prohibition of mid-contract strikes impairs Charter rights more than is necessary in order to achieve the statutory objective, because Parliament could have carved out an exception for situations where a collective agreement permits employees to refuse to cross a lawful picket line. In the present case, it will be recalled, the collective agreements (as is apparently common in British Columbia (see Board reasons at para. 59)) provided as follows:

> 19.02 The Union agrees that in the event of strikes or walkouts, the Union will not take similar action on the ground of sympathy, but will continue to work. <u>The Companies do not expect members of the Union to pass a picket line</u>. (Emphasis added)

[65] I do not agree that such an exception is required. Despite the categorical language used in *Oakes* to describe the “minimum impairment” or “least restrictive” element of the proportionality test, the Supreme Court has allowed a significant margin of appreciation to legislatures in designing the means of achieving the objectives of statutory schemes. A measure of judicial deference is particularly appropriate when the scheme involves the resolution of

complex social issues and the balancing of the interests of competing groups in a way that advances the public interest. See Hogg at 38.35-42.

[66] In my opinion, the Code falls within the above categories of scheme to which a measure of judicial deference is due. It is not unreasonable to suppose that the suggested “carve-out” would undermine the statutory objectives of enhancing stability of industrial relations over the term of a collective agreement and the predictability of interruptions of services and production. To permit parties to contract out of a fundamental principle of the federal labour relations scheme might well jeopardize the Code’s statutory objectives, especially since the costs associated with unpredictable work stoppages are generally borne not only by the contracting parties, but also by the public.

[67] Support for this conclusion is found in a decision by the Board in *Saskatchewan Wheat Pool*, [1994] C.L.R.B. No. 1055, where the Board held (at 10) that the parties could not contract out of the statutory definition of a “strike”:

> Nor can the public purpose of “industrial peace” behind the no-strike provision be avoided by “contracting out” of the legal obligations of the Code…. Of course, the parties can negotiate an employee’s individual right to refuse to work and these clauses will be applied in accordance with their given interpretation, subject to arbitration. However, the union or its members cannot use such a clause to circumvent the Code by giving employees the right to refuse collectively to work contrary to [the Code].

In a subsequent decision, *Westshore Terminals Ltd.,* [2000] C.I.R.B. No. 61, the Board explained (at para. 28) that permitting parties to modify by contract the Code’s definition of a “strike”

> … would result in inconsistent and unequal rights and protections applying to parties that fall under the scope of the Code, depending on the negotiated provisions in the applicable collective agreements. The public interest aspects of the legislation and the Board’s

> attempt to encourage and support the development of good industrial relations and constructive collective bargaining practices could be subverted by individual agreements.

[68] Consequently, I am satisfied that the impugned provisions of the Code do not impair the freedom of expression of employees more than is necessary to achieve the statutory objective.

(c) proportionality of impact on the right

[69] Here the question is whether the extent of the impairment of employees' freedom of expression is disproportionate to the achievement of the statutory objectives. In my opinion, it is not. While the prohibition of mid-contract strikes does curtail employees' ability to express a message of union solidarity in a particularly powerful manner, it also leaves them free to express their support for striking employees in other ways, including joining them on the picket line outside work hours.

[70] In view of the well-recognized social costs of industrial conflict, I am not persuaded that the infringement is disproportionate to the benefits of achieving the pressing and substantial objective of the Code.

[71] Counsel argue that, unlike the "political protest strike" considered in *BCTF*, work stoppages resulting from employees' refusal to cross another union's picket line are relatively predictable, since unions can only strike at defined stages in the bargaining cycle. Moreover, it is open to an employer whose employees may refuse to cross to find out from the other employer when and whether picket lines are likely to go up.

[72] I do not agree. For one thing, while the timing of a strike following the breakdown of collective bargaining may be more predictable than that of a political protest, its duration is not. In addition, it is unreasonable to expect that one employer will always be able to learn from another about whether a strike is the likely outcome of its collective bargaining.

(iii) ***Conclusion***

[73] Accordingly, in my opinion, the Code's breach of employees' right to freedom of expression guaranteed by paragraph 2(*b*) is justified under section 1.

D. CONCLUSIONS

[74] For these reasons, I would dismiss the consolidated application for judicial review with costs. In accordance with the order of Justice Ryer, dated January 13, 2008, I would not award costs with respect to the interveners.

"John M. Evans"

J.A.

<u>BLAIS J.A.</u> (Concurring reasons in the result)

[75] I have read the reasons of my colleague, Justice Evans, and I agree that the applications should be dismissed.

[76] Nevertheless, I respectfully disagree with my colleague when he suggests that section 2(b) of the Charter is infringed in this particular case.

[77] I will rely on the facts as presented by my colleague in lieu of reproducing them here.

[78] After reviewing the jurisprudence, I conclude that the statutory limit on the applicants' right to strike does not engage the right to freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act 1982*, Schedule B, *Canada Act, 1982*, c. 11 (U.K.) [R.S.C. 1985, Appendix II No. 44] (the Charter). In essence, I agree with the Board that the definition of "strike" in subsection 3(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2, (the Code) does not infringe section 2(b) because neither the purpose nor effect of a prohibition on mid-term strikes infringes the applicants' freedom of expression.

Does the definition of "strike" in section 3 of the Code limit freedom of expression as guaranteed under section 2(b) of the Charter?

[79] Both parties rely on *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, (*Irwin Toy*) for the test for determining if freedom of expression had been infringed. Specifically the test examines: a) whether the activity was within the sphere of conduct protected by freedom

of expression; and b) whether the purpose or effect of the government action was to restrict freedom of expression.

[80] While not all activity is protected by freedom of expression, the Board determined that the applicants' refusal to cross the PSAC picket line was an activity with expressive content within the meaning of section 2(b) of the Charter. None of the parties dispute this.

[81] The parties disagree on whether the purpose or effect of the Code in limiting the applicants' freedom to refuse to cross a picket line was to restrict the applicants' freedom of expression.

Purpose of the provision

[82] I agree with the Board and my colleague that the purpose of the provision was not to restrict freedom of expression.

[83] The Code must be interpreted as an overall scheme, as suggested by the Board in both decisions. The strike provision and its associated purpose simply cannot be isolated from the provisions regarding limits on the employers' rights. The limits on strike activity do not have the intention of prohibiting expression when they are considered in context. As stated in the Board's original decision, the purpose of the definition of "strike" in conjunction with the prohibition in section 88.1 is "part of the comprehensive legislative scheme designed to introduce a measure of certainty into the labour relations environment, by regulating the right to lawfully engage in

strike activity” (see paragraph 91). Regulation of work stoppages is intended to control the physical consequences of the expression, namely, the cessation of work by the applicants, regardless of the meaning conveyed by it.

[84] The applicants’ strike action had a severe negative consequence on the employers’ businesses. The applicants’ employers are third parties not involved in the collective bargaining process at the root of the PSAC workers’ strike. They are the only parties who hold no power in the contractual negotiations associated with the legal PSAC strike nor in the strike action of their own workers.

[85] The purpose of limiting striking activities to certain periods during the collective bargaining cycle is to limit the negative consequences that strikes have on employers in the interest of providing certainty and stability in industry labour relations. These provisions did not have the aim of silencing workers wishing to express their solidarity with legally striking workers. It aimed to “control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression” (*Irwin Toy* at paragraph 49).

Effect of the provisions

[86] The effect of the impugned provisions is also to be considered at the second stage of the *Irwin Toy* analysis. In questioning the effect of the restriction, the Supreme Court indicated at

paragraph 53 of *Irwin Toy* that a plaintiff must demonstrate that its activity promotes at least one of the following principles:

a. seeking and attaining the truth;

b. participating in social and political decision-making; or

c. cultivating diversity in the form of individual self-fulfillment and human flourishing.

[87] The applicants suggest that their expression related to the PSAC employees' participation in social and political decision-making and individual self-fulfillment. The interveners claim that the applicants were attempting to influence political and economic decision-making in their community through a show of solidarity and that this demonstration was influential to the decision-makers. The interveners also argue that the form of the message (withdrawal of services) was indivisible from its content; that the message "we will shoulder the same burden as you" could not be demonstrated by other means.

[88] In my respectful opinion, the strike activity in which the applicants were participating had neither a social nor political purpose. It was an intrusion into a private contractual dispute between PSAC employees and their employer, the Canada Grain Commission. On this point, I differ in opinion with my colleague and the decision of the British Columbia Court of Appeal in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39 (*BCTF*). Whereas the Court in *BCTF* suggested that, in theory, strikes could be directed at political issues unrelated to employment, there is nothing to suggest that there was any political motivation in this case. The only aspect of the PSAC strike that could be construed

as relating to political decision-making is that the employer was a government agency. However, in my view, this does not result in a re-framing of the issues, which only involve the working conditions of the striking PSAC workers.

[89] In addition, the applicants were free to support the striking workers in other ways; the restriction to their activity only affected the applicants' withdrawal of services from their third party employer. The effect of the applicants' work stoppage was on their employer, it was not an attempt to draw attention to the strike from the wider public. The Charter does not guarantee individuals or groups their most effective means of expression. In *Delisle v. Canada (Attorney General)*, [1999] 2 S.C.R. 989, at paragraph 41, Justice Bastarache indicated that where the effectiveness of a message was diminished, there was not necessarily a violation of freedom of expression.

[90] If this Court were to accept the appellant's position that their work-stoppage was a form of expression protected by section 2(b) then it would be difficult to consider any regulation of human activity as not infringing this section. Taken to the extreme, all human activity conveys some form of meaning that can inevitably be framed in such a way as to appear to promote one of the principles enunciated in *Irwin Toy*. I do not believe it is appropriate to do so here.

Conclusion

[91] The respondent indicates that, despite the framing of the issues by the applicants (freedom of expression and association), the real issue is a claim to be permitted to engage in

strike activity during the term of a collective agreement, and that refusal to cross a picket line was a strike by the employees. Since strikes are not afforded constitutional protection, the applicants have reformulated the issues to try to avoid the consequences of engaging in an unlawful strike. I agree.

[92] For the reasons above, I would dismiss the applications with costs.

"Pierre Blais"

J.A.

<u>RYER J.A.</u> (Concurring Reasons)

[93] I have had the benefit of reviewing the reasons of my colleagues Blais J.A. and Evans J.A. I agree with them that the applications should be dismissed.

[94] I am in agreement with my colleague, Blais J.A., that the provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "Code") that prohibit strikes and lockouts during the term of a collective agreement do not infringe upon the applicants' right to freedom of expression under paragraph 2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. In support of the reasoning of Blais J.A. on this issue, I offer the following opinion.

[95] The point of contention with respect to this issue is whether the impugned provisions of the Code have the effect of restricting the applicants' right to freedom of expression. The applicants contend that those provisions inhibit their "participation in social and political decision making" as contemplated by the Supreme Court of Canada in *Irwin Toy v. Quebec (Attorney-General)*, [1989] 1 S.C.R. 927.

[96] In my view, this expression requires attention to be focused upon the decision making in respect of which the applicants seek to participate. In the circumstances of this appeal, the decision making that was addressed by the work stoppage by the members of the applicant unions, as manifested by their refusal to cross the PSAC employees' picket line, was decision making that related to the private contractual affairs of those PSAC employees and their

employer, the Canada Grain Commission. Decision making that takes place in a private context is, in my respectful opinion, not within the ambit of "participation and social and political decision making" as contemplated by the Supreme Court of Canada in *Irwin Toy*.

[97] It may well be that the ambit of this expression is limited to circumstances in which the party who wishes to participate in the decision-making has a legal right to do so. Thus, the participation of the British Columbia Teachers Federation and the Hospital Employees Union in the political protests against proposed British Columbia labour legislation, as described in *British Columbia Teachers' Federation v. British Columbia Public School Employees Assn.*, 2009 BCCA 39, may be seen as an example of participation in the *political* decision making, which the members of those unions clearly had the legal right to undertake.

[98] In the present circumstances, the only connection between the private negotiations between the PSAC employees and the Canada Grain Commission and any political decision-making is that the Canada Grain Commission is a government emanation. In my view, this connection is far too tenuous. Moreover, it is not apparent that the members of the applicant unions had any legal right to participate in the contractual negotiations between PSAC and the Canada Grain Commission.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-305-07
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PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 30, 2009
REASONS FOR JUDGMENT BY:	Evans J.A.
CONCURRING REASONS IN THE RESULT BY: **CONCURRING REASONS**	Blais J.A. Ryer J.A.
DATED:	June 12, 2009

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