Canadian Centre for
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Supreme Court Rulings on Labour Legislation: an Affirmation of Workers' Constitutional Rights

The January 30, 2015 decision by the Supreme Court of Canada was a very significant one for the labour movement, and in fact for Canadian society. In their decision the Court once more reaffirmed that a strong base of fundamental rights for union members is a cornerstone of Canada's democracy and is protected under our constitution.

The Supreme Court ruled, in a five to two majority decision, that the right to collective bargaining, including the right to strike, is a constitutional right for all workers in Canada, regardless of whether they work in the private sector or the public sector.

This case involved a Charter challenge against two labour laws passed by the Wall government of Saskatchewan in June 2008, especially Bill 5, the *Public Service Essential Services Act*. Bill 5 used the language of 'essential service employees' to effectively take away the right to strike from almost all public sector workers in Saskatchewan.

The Court ruled that "the conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations" and therefore found the *Public Service Essential Services Act* unconstitutional.

The Court also made it clear that some restrictions on the right to strike for workers who genuinely perform essential services may be justifiable, but in that event the means chosen by the government to deal with the issue must be "minimally impairing, that is, carefully tailored so that rights are impaired no more than necessary" in the words of the Court.

In order for such a limitation to be acceptable, there must be an "independent review mechanism" to determine whether services are truly essential, and further there needs to be a "meaningful dispute resolution mechanism" to resolve any bargaining impasse for workers who can't strike.

This means that a government, as employer, cannot just unilaterally declare a group of workers essential; there must be a legitimate independent process to determine who is actually providing a service that, if interrupted, "would threaten serious harm to the general public or to a part of the population". And if the decision about who is providing an essential service would result in a loss of the effective right to strike for some employees, there must be some kind of independent arbitration to deal with any bargaining impasse.

This is now the base for collective bargaining in Canada. It doesn't come out of a statute, but out of the very Constitution of the country.

This decision arose out of Saskatchewan. But it applies to the entire country, including all provincial governments, like in Nova Scotia, where the new Liberal government has been intentionally trampling the rights of public employees. Governments in all provinces will have to be much more respectful of the rights of their employees than they have in the recent past.

And the decision also has implications for the federal government. Yes, the very government that has a track record of attacking the rights of its employees. The ruling applies to Bill C-4, which amended the federal *Public Service Labour Relations Act* (PSLRA), to give the federal government the "exclusive right" to determine which services are essential and the number of positions required to provide those services.

Exactly the kind of law that the Supreme Court has ruled to be invalid.

Bill C-4 also radically altered the arbitration system. The list of factors that an arbitration board or Public Interest Commission (PIC) must consider when deciding on compensation issues is being reduced to

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retention and ability to pay – as unilaterally defined by the government.

No one could read the Supreme Court decision and come away thinking that this sort of predetermined arbitration would be considered as fair and independent.

The federal government will now have to revise its legislation to bring it into conformity with the Constitution of Canada. Anything less would be contempt of court.

There were two other recent Supreme Court decisions which should result in a serious re-thinking by the federal government.

In 2009 the Harper government passed the *Expenditure Restraint Act* (ERA), which imposed caps on salary increases for federal government employees, prohibited any additional compensation increases such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates.

In several cases, the legislation overturned previously negotiated collective agreements containing wage increases above the imposed salary caps.

Unions challenged this latter provision in particular, saying that retroactively changing collective agreements in this fashion was an infringement on the rights of public employees. Provincial courts in Quebec and BC found the law to be acceptable. These lower court decisions were appealed to the Supreme Court.

In a very unusual move, the Supreme Court has referred these cases back to the provincial courts which had already ruled against the unions. Lawyer Peter Engelmann, of Sack Goldblatt Mitchell LLP, has been quoted as saying; "If the court was signaling that the appeals will be unsuccessful they could have just denied leave, but they didn't do that." It seems clear that the Supreme Court was saying that, based on their recent rulings, the lower courts needed to revisit their decisions about the federal law.

The Supreme Court also recently overturned a long standing ban on unions in the RCMP. The government is reportedly still 'studying' that decision.

The Constitution of Canada includes the right of working people to choose and join an effective union that is independent of their employer. And it includes the right of that union to engage in collective bargaining, with the right to strike being a necessary part of that process.

The federal government's oft repeated attempts to attack the basic rights of their employees and their employees unions is not just legally unacceptable. These legislative attacks amount to denials of the basic right of Canadian citizens, rights that are promised to them in the Charter of Rights and Freedoms which is part of our Constitution.

How many times, in how many ways, must the Supreme Court rule on this, before federal and provincial governments realize that they are not above the law, but must actually honour the Constitution of the country?

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