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Labour & Employment in the News

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Ontario Superior Court Rules that Union Fines are Not Enforceable in the Courts

In a significant decision limiting the rights of trade unions, the Ontario Superior Court of Justice has ruled that the courts will not enforce financial penalties levied by trade unions against members who choose to cross a picket line during a legal work stoppage. The ruling in *Birch and Luberti v. Union of Taxation Employees Local 70030* will make it more difficult for trade unions to use the threat of fines and other penalties to enforce picket line solidarity. It will also enhance the right of employees to decide for themselves whether they wish to participate in a work stoppage.

Background to the Decision

During a seven day PSAC strike in 2004, numerous members of the Union of Taxation Employees Local 70030 (Union), a division of PSAC, decided to cross the picket line and report for work. The Union responded by imposing a fine on each member equivalent to the employee's gross salary for each day worked during the strike. Many members refused to pay the fines, so the Union resorted to Ontario's Small Claims Court to recover the fines. The Union relied on a provision of its Constitution that purported to authorize the imposition and collection of fines.

Jeffrey Birch and April Luberti were two Union members who crossed the picket line, were fined by the Union, and were subsequently sued by the Union in Small Claims Court. Instead of defending in Small Claims Court, Birch and Luberti jointly brought an application in the Superior Court of Justice seeking two orders: (1) a declaration that the Ontario courts will not enforce the Union's financial penalties, and (2) an order dismissing the Union's lawsuits in Small Claims Court. Birch and Luberti were represented in the Superior Court of Justice by John Craig and Richard Sinclair of Heenan Blaikie LLP.

The Decision

Justice Smith ruled in favour of Birch and Luberti on all the issues and granted the orders they were seeking. Justice Smith based his decision on the following considerations.

First, neither Birch nor Luberti had availed themselves of an internal appeal that was permitted under the Union's Constitution. The Union argued that failure to take advantage of an internal Union appeal meant that Birch and Luberti could not seek the assistance of the courts. Justice Smith disagreed, pointing out that the Union had resorted to the courts by suing Birch and Luberti. Birch and Luberti were entitled to defend themselves regardless of the existence of an internal Union appeal mechanism.

Second, Justice Smith confirmed the common law position that Ontario's courts will not enforce penalty clauses in contracts. The Union's Constitution was effectively a contract between the Union and its individual members. Therefore, if it contained a penalty clause, then that clause would not be enforceable in the courts. Justice Smith considered the specific provision of the Union Constitution at issue. He concluded that the provision permitted a financial penalty to be imposed that was excessive since the penalty (*i.e.* gross salary for the time worked) bore no relation whatsoever to actual losses suffered by the Union as a result of members crossing the picket line. The financial penalty therefore fell into the category of penalties that will not be enforced by the courts.

Third, the Union argued that the financial penalties were not unconscionable in the labour relations circumstances and therefore should be enforced in the courts. Justice Smith disagreed, finding that the financial penalties were "extremely onerous" and based on speculative assumptions. Significantly, he rejected the idea that a financial penalty for picket line crossing could be based on the supposed financial benefit of such crossing *to the employer*. The Union also asserted that the financial penalties were justifiable to deter "free riders" who would benefit from strike activity while continuing to report to work. In response, Justice Smith observed that trade unions should use strategies other than onerous financial penalties to encourage respect for picket lines (*e.g.* persuasive information campaigns and better strike pay).

Fourth, Justice Smith rejected the submission that the *Public Service Labour Relations Act (PSLRA)* authorized the imposition of financial penalties for crossing a picket line. The relevant provisions of the *PSLRA* are very similar to provisions of the *Canada Labour Code*. At best, these *PSLRA* provisions refrain from making it an unfair labour practice for unions to levy financial penalties against their members. However, there would have to be a clear statutory provision authorizing such penalties before the courts would enforce them.

Significance of the Decision

Recently, many Canadian trade unions have threatened financial penalties to deter their members from reporting to work during a legal work stoppage. Such threats fly in the face of the traditional right of unionized workers to decide for themselves whether they wish to participate in a strike or report to work. Justice Smith's decision makes it clear that the courts will be reluctant to sanction coercive union strategies designed to achieve picket line solidarity. Moreover, Justice Smith held that absent express statutory authority, a trade union cannot resort to the courts to recover penalties levied against members under the union's constitution. At present, only Saskatchewan has such legislation.

Since the decision is premised on common law principles concerning the unenforceability of penalty clauses, trade unions may respond by amending their constitutions so that financial penalties for picket line crossing are reduced and/or are characterized as a "reasonable pre-estimate of damages." However, Justice Smith's decision makes it clear that the courts will look at the substance of a union's penalty clause as opposed to its form. If, *in substance*, a union is imposing a penalty to deter picket line crossing, then it is unlikely that the courts will order union members to pay such a penalty.

For further information about the decision in *Birch and Luberti v. Union of Taxation Employees Local 70030*, please contact John Craig at 416-360-3527 / jcraig@heenan.ca or Richard Sinclair at 613-236-1628 / rsinclair@heenan.ca. Copies of the decision are available upon request.