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Labour & Employment

Faculty union faces uphill battle in suit against back-to-work bill, experts say

By Ian Burns

(November 30, 2017, 8:53 AM EST) -- Although Ontario's college students may be back in classrooms, the legal issues surrounding the five-week strike by college faculty are far from over.

The Ontario Public Service Employees Union (OPSEU), which represented faculty during the strike, announced Nov. 23 it was challenging the Ontario government's back-to-work legislation in court. The strike ended Nov. 20 after the Ontario legislature passed Bill 178, the *Colleges of Applied Arts and Technology Labour Dispute Resolution Act, 2017*. Bill 178 gave OPSEU and the colleges 90 days to settle outstanding issues of the current contract dispute at arbitration.

However, OPSEU president Warren (Smokey) Thomas said the bill violates s. 2(d) of the *Canadian Charter of Rights and Freedoms*, which protects freedom of association.

"For over a decade, the Supreme Court of Canada has viewed collective bargaining as a protected right under the Charter," he said. "In the case of the colleges, the provincial government had the power to direct the employer to make the moves necessary to bargain a settlement. The government chose legislation instead. They trampled on the right to collective bargaining when they clearly had other choices."

Thomas said, hours after 86 per cent of college faculty had rejected the colleges' contract offer on Nov. 16, Ontario Premier Kathleen Wynne met with both sides and gave them three hours to settle the strike.

"The government never gave collective bargaining an honest chance after the contract was rejected," Thomas said. "That three-hour deadline was a sham designed to provide legal cover for legislation that was already a foregone conclusion. Instead of directing the colleges to settle, the government let them walk away from the table, then came back with a hammer."

But legal observers say OPSEU may be fighting an uphill battle in its attempts to get the back-to-work legislation declared unconstitutional.



Eric Tucker, Osgoode Hall Law School

Eric Tucker, a professor at Osgoode Hall Law School, said it is "quite clear" after the Supreme Court's decision in *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4, that all back-to-work legislation violates the right to strike. He said the question that arises now is whether the violation is demonstrably justified under s. 1 of the Charter.

"In terms of a constitutional argument, I think the union has a tough case to make," he said. "Post-secondary education isn't an essential service, so it can't be addressed in that way. But my guess is a court will say that because of the amount of time lost the government had a pressing and substantial objective in that it was trying to protect the academic year for the students."

The court will also look at to whether the legislation was minimally impairing, said Tucker. He noted the one way the legislation in the Saskatchewan case was not minimally impairing is that it did not have an alternative dispute mechanism in place after the right to strike by workers deemed an essential service was banned.

"But in this case, I know the legislation provided for binding interest arbitration to resolve outstanding disputes, and I don't think the government tried to impose any restrictions on what the arbitrator could consider," he said. "I think it's fairly standard as to what has been done in the past, and I think that will be seen as an acceptable alternative by the court."



Michael Lynk, Western University's faculty of law

Michael Lynk, who teaches labour and employment law at Western University's faculty of law, said the Ontario government "seems to have been paying attention to the adverse reactions of the courts to previous back-to-work legislation" in drafting the bill that sent the college faculty back to work.

"Previous legislation that subsequently attracted reaction by the courts and was struck down was legislation where there might have been a question as to mediator-arbitrator's neutrality. That is certainly not the case here," he said. "And this bill does not designate the terms of the collective agreement for outstanding issues, which also had attracted negative judicial reaction during back-to-work legislation put in place by the federal Conservative government in 2011 and 2012."

But the constitutional challenge is not the only legal headache the government is facing as a result of the job action. A group of students, represented by Toronto law firm Charney Lawyers, has filed a class action lawsuit seeking to recover tuition and fees paid to the colleges during the strike's duration.

Charney Lawyers senior partner Ted Charney said the class action was commenced because, at the time of the lawsuit's filing on Nov. 14, there was "no indication [from the government] as to how it intended to compensate students for lost class time and the associated expenses they have occurred."

"The focus seemed to be on everybody but the students," he said. "We wanted to provide Ontario and the colleges with a not-so-gentle reminder the interest of the students had to come first."



Ted Charney, Charney Lawyers

The province has since announced students who quit due to the cancellation of classes can get a full tuition refund and those who stayed on can apply for up to \$500 in aid. Charney said this is a good interim solution but confirmed to *The Lawyer's Daily* that the class action was continuing.

"The class action will be contingent on what else Ontario and the colleges do to compensate the students," he said. "And in the meantime, we're there to protect them if they don't get a fair shake."

Lynk said the class action suit opens up an "interesting new aspect" on the right to strike.

"They couldn't sue the union for taking a legal strike action — we've had legislation for over a century that shields unions from liability during a lawful strike," he said. "But this is an interesting angle of going after employers, particularly public employers, for not living up to the contract between themselves and the students who pay the money. As to whether or not that argument will have a legal foundation remains to be seen."

Whatever the outcomes of the court challenges, Lynk said the major issue that primarily motivated the strike, the ratio of part-time to full-time employment and precarious work, is one that will not go away. He noted the hiring of part-time casual instructors to fill in the growing gaps at colleges and universities is rising significantly.

"This is probably the largest single strike in Canada with regard to precarious work anywhere in the country," he said. "I suspect we're going to see more tension across the board but particularly in the post-secondary sector, which is heavily unionized."