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Québec Superior Court Enforces Right to Collective Bargaining of State Employees

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The Québec Superior Court (QSC) recently struck down as unconstitutional back-to-work legislation (Bill 127¹) aimed at the Québec government's advocates and notaries. The decision, released on September 18, 2019, builds on the recent case law of the Supreme Court of Canada which declared that the right to strike is constitutionally protected by freedom of association. It provides new insights expected to be of interest to any association that periodically engages in a collective bargaining process with the state.

Background Facts

On February 28, 2017, Québec's National Assembly adopted Bill 127, which put an end to four months of strike action by the Québec government's advocates and notaries. The services deemed to be essential had continued to be provided during that period. Nevertheless, the concerted action had affected the workings of government and the administration of justice by causing, among other things, delays in the drafting of bills and regulations as well as the adjournment of several judicial or administrative proceedings involving the Attorney General of Québec.

In addition to removing the advocates and notaries' right to strike for a period of close to three years, Bill 127 established a framework for continued negotiation with the government during a short period of 60 days. This negotiation was to be followed by a mediation process of a maximum duration of 45 days. Any modification of the negotiation process applicable to the government's advocates and notaries was expressly excluded from the scope of the mediation, even though it constituted a principal aspect of the advocates and notaries' collective claims. Bill 127 finally identified the conditions of employment that would be applied if an agreement failed at the end of the legislated process.

The QSC Decision

The QSC concluded that Bill 127 substantially interfered with the Québec government's advocates and notaries' right to meaningful collective bargaining and therefore infringed their freedom of association, which is protected by both the *Canadian Charter of Rights and Freedoms* and the *Québec Charter of Human Rights and Freedoms*. The QSC specifically rejected the government's position that it was entitled to adopt Bill 127 after two years of bargaining and four months of strike action had failed to yield a collective agreement.

The QSC found that Bill 127 did not justifiably infringe freedom of association because it did not minimally impair the guarantees provided by it. Most important, the QSC held that the removal of the advocates and notaries' right to strike had not been compensated by a meaningful mechanism for resolving bargaining impasses. It found that the framework established by Bill 127 did not constitute such a mechanism because it adversely affected the Québec government's advocates and notaries' bargaining power. Among other things, the legislated framework was arbitrarily limited in time, a core collective claim was excluded from its scope and a default outcome favourable to the government was predetermined.

The Québec government's advocates and notaries asked the QSC to order the government to establish a meaningful impasse resolution mechanism. The QSC declined to do so as it opined that the appropriate bargaining structure was either to be negotiated between the parties or established by the National Assembly.

Key Insights

The QSC decision has features of interest for future cases, some of which are discussed below.

First, the Québec government's advocates and notaries' conditions of employment were, until 1995, unilaterally decided by the government rather than negotiated. Even after 1995, bargaining impasses led to the unilateral imposition of conditions of employment for several years. The QSC decision therefore illustrates the current potency of the right to collective bargaining even in contexts in which collective bargaining has historically achieved little success.

Second, the decision is insightful because it highlights the fact that, as the QSC notes, *Charter* rights do not expire. Simply put, there is no time limit to the right to collective bargaining. This decision confirms that the government cannot, without further justification, simply end an ongoing bargaining process once it considers it to have lasted for sufficiently long or to have reached an impasse.

A third interesting aspect of the decision comes from the QSC's examination of numerous prior pieces of legislation in the context of its analysis of whether the infringement of freedom of association could be justified. The QSC cited numerous acts adopted by the federal Parliament, the Ontario legislature and Québec's National Assembly to demonstrate that there were methods of providing meaningful mechanisms for resolving bargaining impasses that impaired freedom of association less than Bill 127 did (without stating that these methods themselves constituted the least-impairing available mechanisms). This analysis suggests that, through the adoption of favourable legislation in certain contexts, Parliament and legislatures may be setting a standard that they will be expected to meet in future bargaining impasses.

The QSC decision may still be appealed to the Québec Court of Appeal.

¹ *An Act to ensure the continuity of the provision of legal services within the Government and the renewal of the collective agreement of the employees who provide those legal services*, SQ 2017, c 2.

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