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CAVALLUZZO HAYES SHILTON McINTYRE & CORNISH

BARRISTERS SOLICITORS

43 Madison Avenue
Toronto, Ontario M5R 2S2
Telephone: 416-964-1115
Facsimile: 416-964-5895
Email: inquiry@chsmc.com

Paul J.J. Cavalluzzo
James K.A. Hayes
Elizabeth J. Shilton
Elizabeth J. McIntyre
Mary Cornish
David I. Bloom
Bernard A. Hanson
Karen Schucher
Victoria E. Reaume
David W.T. Matheson
Michael D. Wright
Ian B. Anderson
Harriet Simand
Sean FitzPatrick
Jeffrey M. Andrew
Amanda Pask
Fay C. Faraday
Sheilagh M. Turkington

98-0847

26 August, 1998

Tel: 925-2493
Fax: 925-7764

Ontario English Catholic
Teachers Association
65 St. Clair Ave. East
4 th Floor
Toronto, Ontario
M 4T 2Y8

Mr. M. Jarvis

Dear Marshall:

Re: Legal Issues related to a Partial Strike/ Work-to-Rule Strategy

On August 21, 1998 Paul Cavalluzzo provided you with some preliminary views on the implications of a "partial strike" strategy in which teachers support their bargaining position on workload by withdrawing their services for the seventh assigned classroom teaching period per day. In that letter, he indicated that we would be conducting further research, and would provide you with a more detailed opinion. The following are our more fully developed views on the issue, which confirm Paul's preliminary opinion.

The facts as we understand them are as follows. Teachers in the secondary units have been negotiating a first collective agreement under Bill 160, with the key issue being workload. Prior to Bill 160,

most teachers taught classes for 6 out of 8 periods, which equalled 1200 instructional minutes per week. Under Bill 160, secondary teachers are required to teach for 1250 minutes for every five day period pursuant to section 170.2 of the *Education Act*. District school boards are relying heavily on the Act in support of their bargaining position; as we have previously advised, there is much ambiguity in the language of s.170.2, and therefore, in our view, much scope for bargaining about its meaning and application in local situations. Presently, many local groups are in a legal strike position.

In our opinion, the withdrawal of services during a seventh assigned teaching period will constitute a "strike" under the Ontario *Labour Relations Act*. Provided, the teachers are in strike position, such a withdrawal will be lawful.

The district school boards may respond to the teachers' partial withdrawal of services in the following ways:

(a) lock-out employees;

(b) take measures designed to limit the disruptive effect of the partial withdrawal of services, such as increasing use of managerial personnel and non-striking employees; and

(c) deduct wages for work not performed.

The boards will be restricted in terms of responsive action in the following ways:

(a) discipline and discharge for participation in a legal strike action is prohibited by the *Labour Relations Act*; and

(b) wages may not be deducted in a manner which is disproportionate to the work not performed, or which is discriminatory.

If the boards respond in ways which exceed these restrictions, teachers may enforce their rights through an unfair labour practice complaint.

Our reasons for this opinion are set out below.

I. DEFINITION OF STRIKE UNDER THE ONTARIO *LABOUR RELATIONS ACT*

The Ontario *Labour Relations Act* provides the following definition of "strike" [emphasis added]:

> **1.(1)** "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

Section 1(2) of the Ontario *Labour Relations Act* provides that employment status will not be lost if an employee ceases to work for the employer while engaged in a legal strike. Section 1(2) provides:

> **1.(2)** For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of the person's ceasing to work for the person's employer as the result of a lock-out or strike or by reason only of being dismissed by the person's employer contrary to this Act or to a collective agreement.

II. DISCUSSION

1. Partial Withdrawal of Services Constitutes a "Strike"

The Ontario *Labour Relations Act* does not have provisions analogous to the work-to-rule provisions under Bill 100, and therefore does not explicitly address the issue of "partial" withdrawals of service. The Ontario Labour Relations Board has said that only two conditions are essential in order for the Board to find that there has been a strike: 1) some concerted employee activity, and 2) disruption (or intent to disrupt) the employer's operations. The OLRB has stated in cases where there has been concerted employee activity but no actual disruption of the employer's operation, the Board may still find that a strike has occurred if it finds that the participants engaged in activity which was "designed to restrict or limit output"

The definition of a strike in Ontario has evolved to the extent that it encompasses a wide range of activities. Most of the case law defining a strike is in the context of determining whether certain job actions constitute an illegal strike when initiated by employees in response to mid-contract disputes or during negotiations. However, it has been held that when these same activities are initiated by employees in a legal strike position, they are lawful.

There is very little Ontario case law on "partial strikes" or work-to-rule implications when employees are in a legal strike position. In ***The City of Brampton* [1981] OLRB Rep. January 1 (Springate)**, the Board was asked to consider the actions of employees who were in a legal strike position and who, in an concerted manner, refused to work "voluntary overtime". In this case, "voluntary overtime" was work performed in addition to a driver's regular schedule. Drivers traditionally had the right to either accept or reject this type of overtime. The Board found that the action was indeed a legal "strike" under the Act:

> It perhaps bears repeating that our conclusion follows from the definition of the term "strike" set out in the Act. In most instances, the definitions acts in management's interests in that employees cannot during the term of a

> collective agreement act in concert to refuse voluntary overtime as a means of restricting or limiting output... However, the other side to the definition is that it makes a concerted refusal to work overtime a right of employees when they are in a legal strike position. Such action may well result in disruptions to an employer's operations and a corresponding increase in the union's bargaining power, but that is the scheme envisaged by the Act (p.5).

Likewise in ***Graham Cable TV/FM* (1985), 62 di 136 (Jamieson)**, a case decided under analogous provisions of the Canada Labour Code, employees in a legal strike position opted for a work-to-rule program rather than a full strike. The job action included slowdowns in some areas and a speed up in others; no overtime was to be worked; and employees would cease training others to perform their job functions. In response, the employer initiated progressive discipline steps against those who did not perform their work in accordance with past practice, their job descriptions, and company standards.

The Canada Labour Relations Board considered whether these actions were lawful and within the meaning of "strike" as defined by the *Canada Labour Code* :

> Having repeatedly told trade unions and their members that those activities are unlawful when they are done at the wrong time, are we now going to tell them that the same activities are not lawful strike activities when they are in a legal strike position? Surely when we are faced with the reverse situation to an unlawful strike as we are now and are being asked to extend the protection of section 184(3)(a)(vi) to concerted job related activities that have been taken when a strike can lawfully occur, the same standards must apply. It must then naturally follow if the same standards are

> applied to determine lawful strike activities as the Board has applied to unlawful strikes in the past that almost any concerted activity on the part of employees in relation to their work would fall within the protection contemplated by section 184(3)(a)(vi) of the Code. We say almost any activity because it goes without saying that however broad the protection under the Code, it cannot be used to shield criminal or other unlawful acts (p.149).

2. Scope of Employer Response in a Partial Strike

It should be noted at the outset, of course, that school boards may lawfully respond to a partial strike by imposing a lockout. Indeed, under the *Labour Relations Act* boards may lockout after a "no board" report regardless of whether or not teachers take strike action. While a retaliatory lockout may be perceived by the teachers as punitive, absent special circumstances it is a perfectly lawful "bargaining tool" for school boards to use.

Short of a lockout, however, there are limits on the ways in which employers may respond to partial strikes. A legal framework is imposed by the basic legal requirements that employees are protected against discrimination, intimidation and coercion, and discipline and discharge for having participated in a lawful strike. If an employer imposes such penalties, it will be found to have committed an unfair labour practice under the Ontario *Labour Relations Act*.

The leading case on point in Ontario is ***The City of Brampton*** **[1981] OLRB Rep. January 1 (Springate),** discussed above. During the Union's ban on voluntary overtime, the employer took steps to ensure continued operation of its transit service which included: assigning supervisors to drive buses, directing employees to work what had been normally regarded as voluntary overtime, and advising employees that if they refused to perform the work they would be disciplined and might

face dismissal. The employer eventually issued letters of discipline to three employees for refusing to come in during the ban. The City maintained that its only intent was to maintain a proper level of service in its transit department and that its actions were not motivated by any event to interfere with the employees' right to strike.

The Board ordered that the letters be removed from the employees' files and in doing so defined the scope of an employer's actions in such circumstances:

> An employer, for its part, is free to take measures designed to limit the disruptive effect of this type of strike activity, such as the increased use of managerial personnel and non-striking employees. An employer is free to take responsive action through its right to lock out employees. An employer is not, however, free to discipline or punish employees for engaging in a lawful strike.

This case was cited with approval by the Canada Labour Board in *Graham Cable TV/FM* **(1985), 62 di 136 (Jamieson).**

Based on the above discussion, the district school boards may take actions to minimize the disruption caused by the withdrawal of services from the seventh period by having principals and vice-principals or non-striking replacement teachers fill in. However, the Board will not be able to take any action which disciplines or results in a teacher's dismissal. Thus, the Board cannot issue letters of discipline or issue ultimatums that if the teachers do not return to the classroom for the seventh period they may lose their jobs. Teachers may file unfair labour practices under the Ontario *Labour Relations Act* if the Board engages in any of these activities.

Can an employer deduct wages for work not performed in a partial strike or work-to-rule program? While we have not been able to find any Ontario cases which address this point, the answer is almost certainly yes.

The Saskatchewan Labour Relations Board and Courts have considered a case which may be analogous to our present situation. In ***Regina (City) Police Commissioners*** **(1994), 23 CLRBR (2d) 200 (Bilson)**, the Saskatchewan Labour Relations Board was asked to consider whether the employer committed an unfair labour practice by making deductions from wages of employees who were engaged in strike action. On the facts, the Union while bargaining with the Board of Commissioners directed police officers to use their discretion in issuing traffic tickets. The number of tickets issued dropped dramatically. The employer began deducting from officers' wages the time normally attributable to issuing tickets.

The employer calculated the wage deduction by making an estimate of the proportion of an officer's duties occupied by the issuing of tickets. To allow for a generous margin of error, it was decided that the actual deduction should reflect half of this. Thus, it was estimated that the issuing of traffic tickets constituted 70% of the duties of members of the Traffic Safety Unit; a figure of 35% was used to calculate the deduction from their wages. In the case of officers on patrol, the comparable figures were 10% and 5%.

The Saskatchewan Labour Board found, in response to an application by the employer, that this was an illegal form of strike activity. In its decision, however, it discusses the content and implications of partial forms of **legal** strike action and the difficulties that may arise in differentiating the job action from the ordinary performance of duties. At pp. 210-211, the Board noted:

> The use of partial forms of strike action complicates the picture somewhat. The choice of these forms of industrial action clearly has the benefit of reducing the costs which must be borne by the party taking the action, though this must be weighed against its relative effectiveness in exerting pressure against the other party to give in. At the same time, the shrewd use of limited industrial action - rotating strike involving small groups of particularly critical workers, for example, or

> short and frequent study sessions - may keep up the pressure on the other party to either give in or respond with industrial action of its own.

Furthermore, the Labour Board discussed the question of pay deduction as it related to **lawful** strike activity. Counsel for the employer argued that since the Union had announced that members would be taking strike action and withdrawing their services, the Employer was not compelled to pay police officers for those duties they were not performing. Counsel for the Union argued that the deduction in wages was improper and coercive. He argued that, though the officers had followed the directives in the job action notices issued by the Union, they had been performing full-time work, and had substituted other duties for any they did not perform. He argued that the employer could not refuse to pay them, as they had reported for work and "done the job".

The Labour Board responded to the Union's argument at p. 214 [emphasis added]:

> In the absence of provisions to that effect in the collective agreement, it does not lie within the jurisdiction of individual employees to choose their own assigned duties, or to substitute duties they wish to do for duties they do not. An employee who reports for work comes under the control and direction of management, and owes the employer a duty to work conscientiously and in good faith. This obligation does not diminish the right of employees to participate in a lawful strike. That right, however, is limited to the right to withdraw labour, and does not extend to a right to provide labour of a different kind or quality than that for which the employer has contracted for. In principle, we think it consistent with the logic of the use of strike action that an employer should be able to identify what part of their assigned duties

> employees have not done, and reduce their wages accordingly.
>
> ...
>
> The practical difficulties which an employer may face in disentangling those duties which have been performed from those which have not, does not necessarily support the somewhat unappealing position of the Union that it is possible for employees to be both on strike, in that they are free to exert pressure on their employer, and not on strike, in that they cannot be exposed to any financial penalty.

While finding that the Police Commissioners had the right to withhold wages for work not performed in a partial strike, the Board found the employer had committed an unfair labour practice based on the manner in which it exercised this right. The Board's found that:

1. The Employer had failed to make it sufficiently clear in the months prior to the deduction of wages that it did not regard the substitution of other duties by police officers as "doing their job"; and

2. The method chosen for the deduction of wages was discriminatory on grounds which were connected with the union activity being carried out by the employees. No claim could be made that it represented an accurate assessment of the extent to which each employee had refrained from duties to participate in the job action. It was targeted at only some employees on the basis of the assumption, rather than actual knowledge, that they were not performing their duties.

With respect to the first point, the Labour Board held at p. 217:

> It is our view... that it is incumbent on an employer to make it clear in some form that employees cannot themselves redefine their assigned duties in order to avoid the harsher

consequences of their choice to take job action.

The Board summarized its holding with respect to the second point at p. 218:

> An employer assigns duties to an individual employee, and owes that employee wages for the duties which are performed. If an employee fails to perform duties because of participation in a legitimate collective withdrawal of labour, an employer cannot discipline that employee for breaching responsibilities to the employer, although the employer can withhold wages if it is clear what duties the employees has failed to perform.

In withholding wages, however, the employer must meet certain standards in order to avoid a finding that it has acted punitively and contrary to the Act:

> In determining what duties have not been performed... an employer must exercise some care in selecting the parameters for deducting wages, in order to ensure that the deduction is proportionate to the withdrawal of services, and must also avoid discrimination between two groups of employees.

This decision was judicially reviewed and quashed in ***Regina (City) Police Commissioners v. Police Assn. (Regina)*** **[1995] 8 WWR 194 (Sask. Q.B.)**. However, the Board's decision was reinstated when the appeal of the Queen's Bench decision was allowed: ***Regina Board of Police Commissioners v. Regina Police Assn.*** **(1996), 134 D.L.R. (Th) 313 (Sask. C.A.)**. Leave for appeal to the Supreme Court was denied.

While this case is not binding in Ontario, it is well reasoned, and in our opinion, it is likely to be persuasive if this issue comes before the Ontario Labour Relations Board. It is therefore our opinion that while some deduction of salary by district school boards may be appropriate if teachers withhold services, any attempt to withhold all salary, or

disproportionate amounts of salary, could be challenged as an unfair labour practice.

III. ADDITIONAL CONSIDERATIONS

In addition to the matters discussed above, we add the following briefer comments on some related issues. First of all, we note that in addition to collective agreements and the *Labour Relations Act* which regulate the performance of work by teachers, teachers must also be mindful of their professional obligations under the *College of Teachers Act*. Any strategy of partial withdrawal of services should ensure that professional obligations continue to be met. If the teachers involved are in strike position, obviously it cannot be "unprofessional" to exercise that right, either in whole or in part. There may, however, be particular situations which give rise to concerns of a health and safety nature, for example, and teachers may be wise to ensure that school boards are fully informed of a contemplated withdrawal of services in order that alternative arrangements may be made to ensure the safety of students.

Secondly, we have considered in detail only one form of partial strike: the withdrawal of teaching services during the seventh teaching period. Most of our comments would be equally applicable to the more conventional form of partial strike for teachers: the work-to-rule. It would be much more difficult and controversial, however, for school boards to assign a value to co-curricular services withdrawn in a work-to-rule.

Thirdly, we note that a partial withdrawal of services, as opposed to a full withdrawal of services, raises some questions with respect to the union's continued ability to collect union dues through the dues check-off. Under *Bill 100*, dues were checked off and collected pursuant to statute, and this continued, as long as teachers were still teaching and collecting salary, regardless of whether or not there was a collective agreement. Under *Bill 160*, however, dues are collected under the collective agreement, which terminates once teachers are in strike position. We are doing some further research on the question of whether or not there may be problems with respect to the continued check-off of dues, and will provide you with further information on that point.

I trust this will assist you in advising your members. If you have any further questions or concerns, please do to hesitate to contact me.

Yours truly,

CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH

Elizabeth J. Shilton

EJS:jm

Copy: Claire Ross