COURT OF APPEAL FOR ONTARIO

CITATION: Canadian Union of Postal Workers v. Canada (Attorney General), 2026 ONCA 75
DATE: 20260206
DOCKET: COA-24-CV-0885

Pepall, Lauwers and Dawe JJ.A.

BETWEEN

Canadian Union of Postal Workers/Syndicat des travailleurs et travailleuses des postes, Jan Simpson, Myron May and Sophie Grenier

Applicants (Appellants)

and

His Majesty the King in Right of Canada as represented by the Attorney General of Canada

Respondent (Respondent)

and

Canada Post Corporation

Intervener (Intervener)

Paul Cavalluzzo, Adrienne Telford and Balraj Dosanjh, for the appellants

Jonathan Bricker, Marilyn Venney and Monisha Ambwani, for the respondent

Sean Hanley, Rochelle Fox and Sean Kissick, for the intervener His Majesty the King in Right of Ontario as represented by the Attorney General of Ontario

Christopher Pigott and Rachel Counsell, for the intervener Canada Post Corporation

Steven Barrett and Colleen Bauman, for the intervener Ontario Federation of Labour

Heard: September 8-10, 2025

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice, dated July 11, 2024, with reasons reported at 2024 ONSC 3787, 560 C.R.R. (2d) 315 and at 2024 ONSC 4589.

By the Court:

A. INTRODUCTION

[1] In the fall of 2018, Canada enacted back-to-work legislation called the *Postal Services Resumption and Continuation Act*, S.C. 2018, c. 25 (the "Act"), which ended five weeks of rotating strikes by units of the Canadian Union of Postal Workers. The union and the other appellants (collectively, "CUPW") applied for a declaration that the Act limited CUPW members' freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* and their freedom of expression under s. 2(b) of the *Charter* in a manner that could not be demonstrably justified under s. 1. Accordingly, they sought a declaration that the Act is of no force and effect under s. 52 of the *Constitution Act, 1982*. CUPW also sought a declaration that Canada's "conduct" preceding the Act was unconstitutional and claimed damages and "other appropriate forms of remedial relief" under s. 24 of the *Charter*.

[2] The application judge dismissed the application as moot because the Act was "spent": at para. 20. The Act's limitation on strike activity had expired. The interest arbitration process created by the Act was completed, and, after the expiry of the collective agreements imposed under the arbitral award, the parties had extended them for another two years and had then reached new negotiated collective agreements. The application judge declined to exercise his discretion to decide the moot application on the merits. However, he also provided an "abbreviated" analysis of the *Charter* issues explaining why he would have found that the Act violated s. 2(d) but was justified under s. 1: at paras. 51 and following.[1]

B. ISSUES

[3] Between them, the parties raise three issues on appeal:

(1) Did the application judge err in finding CUPW's application to be moot and in finding that, as a matter of discretion, the criteria from *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14 did not favour deciding the application on the merits?

(2) Did the application judge err in alternatively finding that the Act limited CUPW members' s. 2(d) *Charter* right to freedom of association

[1] The application judge also heard an application brought by the Ontario Public Service Employees Union (OPSEU) alleging that a different piece of back-to-work legislation, the *Colleges of Applied Arts and Technology Labour Dispute Resolution Act, 2017*, S.O. 2017, c. 21, infringed OPSEU members' rights under s. 2(d) of the *Charter*. The application judge dismissed that application on July 11, 2024: see *OPSEU v. Ontario*, 2024 ONSC 3644, 561 C.R.R. (2d) 289. This court's reasons for dismissing OPSEU's appeal from the application judge's decision are reported at *Ontario Public Service Employees Union v. Ontario (Attorney General)*, 2026 ONCA 74.

relating to strike action and declining to find the other s. 2(d) and s. 2(b) limits alleged by CUPW?

(3) Did the application judge err in finding that the Act's limit of s. 2(d) of the *Charter* was justified under s. 1?

[4] We address these issues in some detail after describing the factual context.

[5] In general terms, CUPW's primary aim in the application was to secure a strong finding that it should be very difficult, if not virtually impossible, for Parliament to enact back-to-work legislation. As the chief negotiator of CUPW's urban bargaining unit during the 2017-2018 bargaining round put it, CUPW's objective was to ensure future collective bargaining will proceed "without government influence by way of it introducing – or even signalling that it will introduce – back-to-work legislation." This sets the frame for the constitutional analysis.

[6] In brief, we agree with the application judge that the application was moot and defer to his discretionary decision not to address CUPW's challenges to the Act on the merits. In the alternative, and consistent with our reasons in *Ontario Public Service Employees Union v. Ontario (Attorney General)*, 2026 ONCA 74 ("*OPSEU*"), we find that the Act limited CUPW members' s. 2(d) freedom of association *Charter* right, but that Canada justified ending the strike under s. 1 of the *Charter*. We would not find that the government's conduct, which consisted of

a comment made by Prime Minister Justin Trudeau to reporters, limited CUPW members' s. 2(d) freedom of association, or that the Act limited CUPW members' s. 2(b) freedom of expression. We therefore dismiss the appeal.

C. FACTUAL CONTEXT

[7] CUPW represents employees of Canada Post who process and deliver mail across Canada. Its members are divided into an urban and a rural bargaining unit. Canada Post, the employer, is a Crown corporation whose sole shareholder is the Government of Canada.

[8] CUPW served Notices to Bargain for both the urban and rural bargaining units on November 14, 2017, which triggered the formal collective bargaining process under the *Canada Labour Code*, R.S.C. 1985, c. L-2. The parties bargained from November 2017 until November 2018 but were unable to reach an agreement. CUPW announced on September 11, 2018 that its membership had voted in favour of strike action. On October 22, 2018, postal workers began a series of rotating strikes in several cities. The strikes lasted for five weeks. The application judge found, at para. 52 of his reasons, that the rotating strikes caused "serious social and economic dislocations". CUPW strongly disputes the severity of the strike's impact on appeal.

[9] On November 8, 2018, Prime Minister Justin Trudeau told reporters that "all options [would] be on the table" to resolve the labour dispute if the two parties did

not reach a resolution shortly. On November 22, 2018, the Act was tabled in Parliament. The Act received Royal Assent on November 26, 2018. The preamble to the Act noted that the parties had engaged since November 2017 in collective bargaining to reach new collective agreements and that the work stoppages were disrupting the delivery of mail and parcels across Canada and having a significant adverse impact. It also noted the need for an exceptional solution.

[10] The Act:

- Required Canada Post to resume regular postal services and employees to resume the duties of their employment (s. 3);
- Required the union, its officers and representatives to notify employees of their obligation to return to work (s. 5);
- Extended previously negotiated collective agreements between Canada Post and CUPW until new collective agreements were reached (s. 6);
- Prohibited lockouts and strikes during the life of the extended collective agreements (s. 7);
- Required the Minister of Labour to refer to a mediator-arbitrator all matters in dispute between the parties related to the amendment or revision of the collective agreements (s. 9); and
- Imposed fines for non-compliance (s. 15).

[11] In December 2018, Minister of Labour Patty Hajdu exercised her authority under the Act to appoint Elizabeth MacPherson, who appeared to be acceptable to both sides, as mediator-arbitrator. The 42-day arbitration, which involved oral testimony, took place between February 2019 and May 2020. On June 11, 2020, the arbitrator released her decision. She applied the replication principle in her decision, crafting an award that attempted to mirror what CUPW would have likely achieved in free collective bargaining. The parties agreed that the arbitral award would be effective for four years with a retroactive start date. In September 2021, the parties extended the collective agreements for another two years.

[12] CUPW brought an application arguing that the Act limited its members' ss. 2(b) (freedom of expression) and 2(d) (freedom of association) *Charter* rights, and that the Prime Minister's November 8, 2018 statement limited members' s. 2(d) rights, all in a manner that was not demonstrably justified under s. 1. They sought three constitutional remedies: (1) a declaration that the Act and the impugned statement unjustifiably limited ss. 2(b) and 2(d) of the *Charter*; (2) a prospective declaration of invalidity of the Act to the extent of the *Charter* violations, pursuant to s. 52 of the *Constitution Act, 1982*; and (3) an order under s. 24(1) of the *Charter* directing the parties to reach a resolution to the *Charter* breaches, failing which the court would retain jurisdiction to order remedies.

D. ANALYSIS

[13] We address the issues in turn.

1. Did the application judge err in finding CUPW's application to be moot and in finding that, as a matter of discretion, the *Borowski* criteria did not favour deciding the application on the merits?

[14] The application judge dismissed the application as moot. CUPW makes two overarching arguments on appeal. First, the *Charter* challenges are not moot, at least not all of them. Second, the challenges all meet the *Borowski* criteria for hearing them despite any mootness.

[15] We first address the governing principles on mootness and then their application to this appeal.

a. Governing Principles on Mootness and the Discretion to Hear a Moot Matter

[16] The seminal Supreme Court of Canada case on when a court may exercise its discretion to hear a moot case or appeal is *Borowski*. If the decision of the court will have no practical effect on the rights of the parties, then the court will ordinarily decline to decide the matter, subject to a residual discretion: *Borowski*, at para. 15.

[17] The Supreme Court mandated a two-step analysis. The first step is to decide whether the case or appeal is moot, that is, whether there remains a "live controversy" that affects the rights of the parties: *Borowski*, at paras. 16-17.

[18] The second step is to determine whether the court should exercise its discretion to hear and decide the case or appeal despite its mootness: *Borowski*, at para. 16. In making this determination, the court considers three factors.

[19] First, the court considers whether the necessary adversarial context remains despite the matter becoming moot. This is because the court's "competence to resolve legal disputes is rooted in the adversary system," which "helps guarantee the issues are well and fully argued by parties who have a stake in the outcome": *Borowski*, at para. 31.

[20] Second, the court asks whether hearing the matter would comport with judicial economy: *Borowski*, at para. 34. This includes considering whether special circumstances justify applying scarce judicial resources to adjudicate the matter, including, for example, whether an important, recurring issue is raised that is evasive of review because it will always be moot by the time it reaches court, or whether the case raises an issue of public importance that it is in the public interest to resolve: *Borowski*, at paras. 36-37.

[21] Third, having regard to the limits of its adjudicative law-making function, the court must avoid "intruding into the role of the legislative branch" by deciding the matter in the abstract: *Borowski*, at para. 40.

[22] The standard of appellate review of the application judge's exercise of discretion in the context of mootness is deferential; the decision is reviewable for an error in principle, a palpable and overriding factual error, or a failure to exercise the discretion judicially: *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, 500 D.L.R. (4th) 279, at para. 32 (discussing the

standard of review applicable to discretionary judicial decisions, which in that case was the choice of remedy for abuse of process).

b. Application of the Governing Principles on Mootness

[23] As we noted, CUPW argues that its *Charter* challenges are not moot, at least not all of them. CUPW argues there were three distinct *Charter* claims before the application judge, which we address in this order:

(i) The Act, which ended the strike, limited the rights of CUPW members to freely associate in striking under s. 2(d).

(ii) The Act's requirement for CUPW members to cease striking, including picketing, and the requirement that the union, its officers and representatives notify members of their obligation to return to work, limited the s. 2(b) rights of the union's members, officers, and representatives to freedom of expression.

(iii) The Prime Minister's statement on November 8, 2018 that "all options will be on the table" to resolve the strike limited CUPW members' s. 2(d) rights.

i. The Constitutionality of Back-to-Work Legislation

[24] The core *Charter* claim in the application was the first one – the constitutionality of back-to-work legislation in the context of the CUPW strike and the Act. The application judge's mootness determination turned on the fact that

CUPW was not seeking a declaration with retroactive effect and did not seek to unwind the collective agreements reached through arbitration. We agree with him, largely for the reasons he gave at paras. 17-20. As he said at para. 18:

> All of this is to say that there is no further practical effect or legal relevance to the legislation in issue. Both sides agree with that. In bringing this challenge, CUPW has expressed no desire to re-create the 2018 state of affairs. Both CUPW and Canada Post are content to continue abiding by the currently in-force collective agreement regardless of the outcome of the present Application.

[25] The application judge added, at para. 19: "Importantly, the [Act's] limitation on strike activity – i.e. the very thing that this Application challenges as an infringement of the *Charter* – has expired and is no longer in force."

[26] The application judge continued, at para. 20, that the Act "is a matter of history – not just because the parties agree to treat it that way, but because there is no other way to view it. Its force is spent." We see no error in his application of the test for mootness.

ii. The Freedom of Expression of CUPW Members and Union Officials

[27] CUPW argues that the Act limited the rights of the union's members, officers, and representatives to freedom of expression under s. 2(b) of the *Charter* in three ways: by stopping the strike, by limiting picketing, and by compelling speech on the part of the union, its officers and representatives.

[28] The first limit was accounted for in the application judge's mootness analysis. He referred to freedom of expression in the act of striking itself. He observed, at para. 60: "While a strike is expressive activity in the most generalized understanding of that term, the right to strike has been addressed by the Supreme Court directly under s. 2(d) rather than obliquely under s. 2(b)."

[29] We agree with the application judge that the freedom of expression exercised by striking was fully subsumed in the strike action itself, which was properly analyzed under s. 2(d) and was therefore encompassed by his mootness determination. The other two claimed s. 2(b) limits on free expression in picketing and compelled speech were also subsumed in the s. 2(d) analysis as strike-related activity because each of these alleged s. 2(b) limits arises directly from the very thing being challenged under s. 2(d) – the legislated end of the strike and resumption of employment duties. Accordingly, they are also moot for the reasons given by the application judge.

[30] A granulated approach that differentiates between s. 2(d) and s. 2(b) *Charter* rights in the context of back-to work legislation would be unwise. We agree with the Attorney General of Ontario, who was an intervener in this appeal, that "[a]dopting a s. 2(b) analytical approach in the context of back-to-work legislation would upset the labour relations balance established by statutory collective bargaining regimes, undermine the principled application of the s. 2(d) analytical framework, and place ss. 2(b) and 2(d) in potential conflict" (footnotes omitted).

We see no benefit in prolonging the dispute between these parties by giving additional life to the contextually peripheral s. 2(b) claims.

iii. The Prime Minister's Statement

[31] CUPW points out that the application judge did not expressly address its claim that the Prime Minister's statement that "all options will be on the table" to resolve the strike also limited union members' s. 2(d) rights. CUPW argues that the Prime Minister's statement signalled back-to-work legislation was imminent and in doing so substantially limited collective bargaining. CUPW argues this conduct was distinct from and preceded the impugned Act and entitles it to a *Charter* remedy.

[32] In our view, it is not necessary to address whether the Prime Minister's statement was implicitly captured by the application judge's mootness analysis, because, as we explain below, the s. 2(d) challenge based on this statement would have failed in any event.

c. Application of the Governing Principles on Discretion to Hear a Moot Matter

[33] We turn to the three factors to be assessed in determining whether to hear a moot matter. First, it is common ground that the necessary adversarial context remained, and the parties were well represented to make the arguments.

[34] The second factor concerns judicial economy. CUPW argues that it had assembled a voluminous record and that the additional judicial time to consider it would have been minimal and would have been time well spent. CUPW points out that the significant delays between postal labour disputes and constitutional litigation mean that if the application judge's mootness analysis is correct, there will be "little to no judicial scrutiny" of governments' back-to-work laws. CUPW asserts that whether back-to-work legislation limits s. 2(d) of the *Charter* is a matter of "public importance such that a resolution is in the public interest."

[35] In our view, the collective bargaining issues raised by CUPW have not been especially evasive of review, as the numerous cases cited in *OPSEU* and in this appeal demonstrate. Further, the proposition that back-to-work legislation limits the right to strike contrary to s. 2(d) of the *Charter* has now been established: see *OPSEU*, at paras. 17-18.

[36] We agree with the application judge's view that a determination on the merits would have limited precedential value. He noted, at para. 34, that "answering a *Charter* question – especially a s. 2(d) question – in a factual vacuum is for the most part an exercise in futility." We agree, and we add that this applies equally to a s. 1 analysis flowing from a s. 2(d) limit. In the labour relations context, s. 2(d) and s. 1 questions turn heavily on the specific legislation at issue and the specific factual context leading to its enactment. The factual context leading to the current dispute is unlikely to be replicated in future labour disputes, and the legislative

measure in future back-to-work legislation is unknown. The second *Borowski* factor regarding judicial economy did not favour hearing the moot application on the merits.

[37] Third, having regard to the limits of its adjudicative law-making function, if a court heard the moot case on the merits, it could not avoid "intruding into the role of the legislative branch" by deciding the matter in the abstract: see *Borowski*, at para. 40.

[38] The s. 2(d) and s. 1 analysis draw the court into considering the constitutional validity of the legislation. The application judge noted that the parties had the benefit of the decision in *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*, 2016 ONSC 418, 130 O.R. (3d) 175 ("*CUPW 2016*"), and that the excesses of the legislation then under attack were not repeated in the Act. The interest arbitration under the Act was not limited in terms of the issues to be arbitrated or tilted in favour of the employer. The application judge noted, at para. 71, that "[t]he parties were free to fashion the issues that were important to them." The application judge offered this analysis in the alternative, after his mootness analysis. He recognized that to decide these contextual questions on the merits, absent any live dispute between the parties, would be akin to deciding a private reference on the law. To offer an opinion on the constitutionality of the government's policy choice in these circumstances would trench inappropriately on the role of the legislature.

[39] We defer to and agree with the motion judge's discretionary decision not to hear CUPW's constitutional challenges on the merits.

2. Did the application judge err in alternatively finding that the Act limited CUPW members' s. 2(d) *Charter* right to freedom of association relating to strike action and in declining to find the other s. 2(d) and s. 2(b) limits alleged by CUPW?

[40] We reach this issue in the alternative and address it briefly, giving four reasons for concluding that the application judge did not err in his alternative analysis. First, for the reasons set out in *OPSEU*, at paras. 14-18, applied with necessary modifications, we conclude that the Act, as back-to-work legislation, limited CUPW members' s. 2(d) right to strike. As a matter of principle, back-to-work legislation that ends a strike that was properly called under the legislation, as was CUPW's strike, limits the rights of affected union members under s. 2(d) of the *Charter* and must be demonstrably justified by the government under s. 1.

[41] Second, we find that the Prime Minister's statement did not limit CUPW members' s. 2(d) rights. The Prime Minister was engaged in political speech about government policy in a matter of national interest. Courts should be loath to interfere with or condemn political speech of this nature given the respective roles of the legislative, executive and judicial branches. Further, the Prime Minister's statement was made well into a lengthy strike and could not have surprised the bargaining parties or affected their bargaining positions. The parties' long history of collective bargaining is marked by strikes sometimes ended by legislation.

These sophisticated bargainers were fully alive to the options and how they might unfold.

[42] Third, CUPW argues that the Act indirectly prohibited picketing because the legislative extension of the previous collective agreements triggered the application of s. 88.1 of the *Canada Labour Code*, which prohibits mid-contract "strike" activity including picketing. Picketing is a traditional form of strike activity aimed at disrupting the employer's business. Ending picketing is normal under strike-ending legislation. As explained earlier, it would not be appropriate to treat separately the Act's effect on the act of striking under s. 2(d) of the *Charter* and its effects on the expressive rights of CUPW members under s. 2(b). CUPW's constitutional position gathers no extra force by drawing on s. 2(b) rights related to picketing.

[43] Fourth, CUPW asserts that in requiring the union, its officers, and representatives to notify employees of their obligation to return to work, the Act limited their personal freedom of expression. Section 5 of the Act provides:

> The union and each of its officers and representatives must
>
> (a) without delay on the coming into force of this Act, give notice to the employees that, by reason of that coming into force, postal services are to be resumed or continued, as the case may be, and that the employees, when so required, are to resume without delay, or continue, the duties of their employment[.]

[44] CUPW's argument does not distinguish between the personal expression of individuals and their responsibilities as union officers and representatives. This

distinction is critical. Union officers and representatives gain official status from labour relations legislation, which also imposes certain duties on them, for example, to follow the legislation in arriving at and implementing a strike mandate. But nothing in the Act prevented the union, its officers and representatives from expressing their personal views by deploring what the legislation did in ending the strike.

[45] We find that the Act did not limit the personal expressive rights of CUPW members under s. 2(b) of the *Charter*.

3. Did the application judge err in finding that the Act's limit of s. 2(d) of the *Charter* was justified under s. 1?

[46] The s. 1 *Charter* analysis we carried out in *OPSEU* applies to this appeal, with necessary modifications.

[47] CUPW did not concede that the Act's objective was pressing and substantial, and it disputes the application judge's finding, at para. 52, that the rotating strikes caused "serious social and economic dislocations". This finding was open to him, and we defer to it.

[48] Further, in his abbreviated s. 1 *Charter* analysis, the application judge inferentially adopted, at para. 67, the findings of Firestone J. in *CUPW 2016*, that "the statute had the pressing and substantial objective of securing a 'vital' service to vulnerable and rural Canadians", and that the "'prohibition on the right to strike ... is rationally connected to the ... objective.'"

[49] In addressing minimal impairment, the application judge observed, at para. 73:

> The expert on industrial relations put forward by CUPW, Professor Robert Hebdon of McGill University, confirmed in his testimony that the [Act] is a fair and neutral piece of legislation. Indeed, he went so far as to opine that the government had effectively cured all the deficiencies of the previous legislation [from the *CUPW 2016* case].

[50] The application judge concluded, at para. 74:

> In terms of the final stage of the *Oakes* test, I will note that the fair arbitral process that accompanied the termination of the strike served to reduce any deleterious effects of the [Act]. As indicated, the statutory arbitration process produced a new collective agreement that the CUPW membership has ratified, and which has, in turn, led to an even newer collective agreement, none of which CUPW seeks to overturn.

[51] The application judge found, at para. 78, that the interest arbitration provision in the Act provided an appropriate substitute for the right to strike, citing *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, 491 D.L.R. (4th) 385, at para. 119, *per* Côté J. (concurring).

[52] To conclude, the application judge did not err in finding that the Act's limit on the *Charter* rights of CUPW members was justified under s. 1.

E. DISPOSITION

[53] For these reasons, the appeal is dismissed. If the parties are not able to reach an agreement on costs, they may each file brief written submissions of no more than five pages in length, within one week of the date these reasons are released, and responding submissions of no more than five pages in length are to be filed within one week of the first filing.

Released: February 6, 2026 “S.E.P.”

“S.E. Pepall J.A.”
“P. Lauwers J.A.”
“J. Dawe J.A.”