



## Resolving Strikes in Essential Services – The Supreme Court of Canada Weighs In

### **Labour Disputes and Essential Services**

#### **- The Challenge**

For decades the *Wagner Act* model of labour relations has provided the framework for the negotiation of collective agreements between unions and employers in the U.S. and Canada. The model provides for the right of employees to form unions which, through a certification process, obtain the statutory right to require collective bargaining with their employer. The model also provides an employer with the right to lock out and employees with the right to strike in the event of an impasse in collective bargaining, to apply economic pressure on both sides to reach a collective agreement. This has worked well in most sectors of the economy, as most collective agreements are resolved without resort to strikes or lockouts.

But that is not the case in every sector. The traditional labour relations model has struggled at times to provide an effective framework for the resolution of collective bargaining disputes in certain critical areas of the public sector, or in private sector industries which provide services deemed essential to the health and welfare of the public at large. When collective bargaining fails to achieve an agreement, the pressure of a strike or lockout in such a setting directly impacts the public interest, often leading to

government intervention, typically in the form of either essential service designations (the “controlled strike”) or back to work legislation. The recent decision of the Supreme Court of Canada in *Saskatchewan Federation of Labour v. Saskatchewan*<sup>1</sup> issued on January 30, 2015 will require governments to rethink the form of such intervention in order to ensure compliance with the *Canadian Charter of Rights and Freedoms* (the *Charter*).

### **Traditional Solutions for Essential Services Labour Disputes**

The federal and several provincial governments in Canada have, as a matter of public policy, established legislation to regulate strikes and lockouts in sectors or industries providing essential services to the public. Such legislation creates a framework for the so-called “controlled strike.” In British Columbia, for example, the Labour Relations Board is mandated to determine whether a labour dispute poses a threat to the health, safety or welfare of the residents of British Columbia, or to the provision of educational programs. In the event of such a threat, the Board is further empowered, through either mediation or an adjudication process, to designate the services essential to prevent immediate and serious danger to public health, safety or welfare, or to prevent immediate and serious disruption to

<sup>1</sup> *Saskatchewan Federation of Labour v. Saskatchewan* [2015] SCJ No. 4.

educational programs. The *Labour Relations Code* then requires the employer and union to continue to provide those designated services, which effectively means that management employees will work longer hours and some union members will be required to continue working during the labour dispute. The labour dispute is “controlled” in the sense that, while non-essential services are withdrawn by employees locked out or engaged in the strike, essential services must continue, with management employees expected to shoulder some of the burden. Pressure is applied to both sides while protecting the public interest.

However in certain cases, designation of essential services may mean that employees are effectively precluded from striking altogether. For example, virtually all services provided by ambulance drivers/paramedics are deemed to be essential, with the result that almost all employees within a bargaining unit comprised of such employees will be precluded from striking. Disputes in those settings can become protracted and intractable because the pressure of a strike is effectively removed in order to protect the public interest.

In the case of firefighters and police, whose services are considered almost universally essential, most governments have special legislation in place that precludes strikes or lockouts and requires that collective agreements be resolved, instead, by binding interest arbitration, absent agreement. The history or pattern of arbitrated settlements in fire and police services has been criticized by municipal employers and some academic

commentators who argue that multiple arbitrated settlements have resulted in escalating salaries that go beyond public sector norms.

Indeed, governments are generally adverse to third party interest arbitration to settle collective agreements because arbitrators are not accountable to the electorate for their decisions, nor otherwise constrained from spending from the public purse. Recent cases in which arbitrators have exceeded government mandates for wage increases in the public sector add fuel to governments’ discomfort with this form of dispute resolution.

In addition to essential services designations and legislation that substitutes binding arbitration for strike/lockout, there are also many examples of governments resorting to specific back to work legislation to end labour disputes in essential industries such as air and rail transportation and shipping in addition to traditional public services. This type of legislation orders an end, or at least an interruption, to strike or lockout activity; it may also impose a collective agreement or an alternate form for the settlement of the agreement such as binding arbitration or mediation. Between 1980 and October 2014 governments in Canada resorted to back-to-work legislation on 90 separate occasions (19 Federal and 71 Provincial) and imposed a collective agreement in 51 of those cases.<sup>2</sup>

All of these forms of legislation – essential services designations, third party arbitration, and back to work legislation – flow from the inability of the typical labour relations system of collective bargaining to

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<sup>2</sup> [Canadian Foundation for Labour Rights](#).

produce voluntarily negotiated collective agreements in some essential services disputes.

**New Solutions May be Necessary –  
The Supreme Court of Canada Weighs In**

The future of these forms of legislation to address collective bargaining in essential services disputes will be directly impacted by the recent *Saskatchewan Federation of Labour* decision. In that case, a majority of the Court struck down the province's essential services legislation that stipulated employers providing such services to unilaterally determine the number and classification of employees required to continue to work during an otherwise lawful strike.<sup>3</sup> The Supreme Court of Canada held, for the first time in judicial history, that the right to strike is a fundamental part of the freedom of association protected by s.2 (d) of the *Canadian Charter of Rights and Freedoms*. The Saskatchewan legislation was found to have infringed upon that right in a manner that was not, in the Court's view, justified in a free and democratic society.

In the course of its decision to constitutionally protect the right to strike, the Court made two statements that will set the framework for determining how essential services disputes are to be resolved in the future:

**24** ...Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative,

<sup>3</sup> The Saskatchewan legislation at issue (*Public Service Essential Services Act*, S.S. 2008, c.P 42.2) differs substantially from Part 6 of the B.C. *Labour*

the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(d). As the trial judge observed, without the right to strike, "a constitutionalized right to bargain collectively is meaningless".

**25** Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the *Charter*. In my view, the failure of any such mechanism in the *PSESA* is what ultimately renders its limitations constitutionally impermissible.

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**61** The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically been, the "irreducible minimum" of the freedom to associate in Canadian labour relations. (emphasis added)

The Supreme Court of Canada's recognition of a constitutional right to strike is the latest development in the Court's move over time to "constitutionalize" collective bargaining rights generally. This movement began in

*Relations Code* which protects essential services during strike or lockouts in British Columbia.

the *Health Services* case,<sup>4</sup> which overturned twenty years of jurisprudence holding that freedom of association did not protect collective bargaining. Not only is the right to engage in a meaningful process of collective bargaining now protected within the freedom of association, the right to strike is a now a fundamental component of that protected process.

This case has a number of implications for governments. First, the determination of “essential services” must be as narrow as possible so as to avoid an undue interference with the right to strike. Governments may designate only those services that are clearly essential to the health, safety or welfare of the public. The Court described as the “determinative issue” whether the means chosen by government to protect the public were minimally impairing, meaning “carefully tailored so that rights are impaired no more than necessary” (at para. 80).

The Court held that the Saskatchewan legislation was unconstitutional because it went beyond what was reasonably required to ensure the uninterrupted delivery of essential services during the strike. The Court said (at para. 81):

The *unilateral* authority of public Employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify

the trial judge’s conclusion that the PSESA impairs the s.2(d) rights more than is necessary.

It is not clear from this reasoning whether the Court found the legislation to be unconstitutional due to the combination of factors recorded (i.e. unilateral determination of essential service levels without adequate review and the absence of an alternative dispute resolution for the bargaining impasse), or whether either factor alone would have led to a similar result. The Court referred again to a combination of factors in the following paragraphs:

**91** ...Requiring those affected employees to perform both essential *and* non-essential work during a strike action undercuts their ability to participate meaningfully in and influence the process of pursuing collective workplace goals.

**92** All this is in addition to the absence of an impartial and effective dispute resolution process to challenge public employer designations ... a particular concern in light of the significant definitional latitude given to public employers.

If the Court’s reasoning supports a conclusion that either the scope and unilateral nature of essential service designations or the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses constitute an unwarranted entrenchment on the freedom of association, governments will need to

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<sup>4</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia* [2007] 2 S.C.R. 391.

carefully craft the scope of essential services and develop an effective dispute resolution mechanism for essential service and other intractable disputes in order to avoid running afoul of the *Charter*. For example, designating all or virtually all of the services impacted by a strike as essential, or issuing back to work legislation, may no longer be options unless accompanied by some form of alternative dispute resolution. Governments may have to rethink their resistance to binding arbitration and/or be prepared to establish that any legislated criteria for such arbitration proceedings are consistent with the *Charter*.

For years, governments have been challenged with the conundrum of supporting the voluntary resolution of collective bargaining disputes in essential services while at the same time protecting the public interest. That challenge has become more complex and indeed more urgent now that the Court has included both the right to a meaningful process of collective bargaining and the right to strike within the scope of the freedom of association that is protected by the *Charter*. Just last month the Alberta government stated that it would repeal Bill 45, which had been passed late last year but not yet proclaimed into law, prohibiting “strike threats” in the public sector. Premier Jim Prentice stated that the repeal was to signal a new relationship with public sector unions, but it was likely motivated as well by the Supreme Court’s decision to enshrine the right to strike in the *Charter*. On April 1, 2015 the Alberta Court of Queen’s Bench, in an unopposed application by the Alberta

Union of Provincial Employees,<sup>5</sup> declared unconstitutional sections of the *Labour Relations Code* and the *Public Service Employee Relations Act* that prevented certain classifications of employees from striking, suspending the declaration for one year.

We are very likely to see other provinces reviewing their essential services legislation to ensure it does not substantially interfere with collective bargaining and the right to strike. For policy-makers, it is time to reassess how the public interest (and perhaps the public purse) can be protected short of legislating an end to a lawful strike and imposing a collective agreement.

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This edition of  
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<sup>5</sup> *Alberta Union of Provincial Employees et al v. Alberta* (Court File No. 1403 00279).