

Issue in Focus

February 2015

Saskatchewan's Essential Services Legislation Ruled Unconstitutional

Core Issue: Saskatchewan's essential services legislation, which limits the ability of public sector workers to go on strike, was ruled unconstitutional by the Supreme Court of Canada on January 30, 2015. In making this ruling, the majority of Supreme Court Justices determined that the right to strike is protected under the Canadian *Charter of Rights and Freedoms*. The decision has a significant impact on the interpretation of the freedom of association guaranteed by section 2(d) of *The Canadian Charter of Rights and Freedoms*. Protecting the right to strike under the *Charter* is a fundamental change in Canada's labour environment that could potentially impact both the public and private sector by unleashing a series of unintended consequences.

Background

In 2008, the Government of Saskatchewan introduced the *Public Service Essential Services (PSES) Act*, making it the last province in Canada to adopt essential services legislation. Under this Act, public sector employees who were recognized as being essential were no longer allowed to participate in a work stoppage. Under the PSES Act, employers and unions had a duty to sit down at least six months prior to the expiry of their collective agreement and determine what jobs are considered essential. If the parties could not agree on an essential services arrangement, the employer (i.e. the government) had the unilateral ability to determine what employees were designated essential. If there continued to be disagreement between the parties, the Saskatchewan Labour Relations Board had the ability to designate the number of employees required to work under each classification, but did not have the authority to review which services were designated essential by the employer or the specific persons who must work.

Shortly after the PSES was introduced, Saskatchewan's major public sector unions, led by the Saskatchewan Federation of Labour, challenged the constitutionality of the PSES Act. Similar to the intentions of the PSES Act, all other Canadian jurisdictions use a designation or "controlled strike model" for essential services, which places limits on which public sector employees can go on strike. However, Saskatchewan's legislation varied from the other provinces in several significant ways.¹ Unlike other jurisdictions, the PSES Act applied to a broad range of "public employers" including the Government of Saskatchewan, all Crown corporations, regional health

¹ "Saskatchewan v. Saskatchewan Federation of Labour, 2012 SKQB 62." 06 02 2012. [CanLII](http://www.canlii.org/en/sk/skqb/doc/2012/2012skqb62/2012skqb62.html?searchUrlHash=AAAAAQAGbGFib3VyAAAAAAE&resultIndex=7). 12 02 2015
<<http://www.canlii.org/en/sk/skqb/doc/2012/2012skqb62/2012skqb62.html?searchUrlHash=AAAAAQAGbGFib3VyAAAAAAE&resultIndex=7>>.

authorities and affiliates, the Saskatchewan Cancer Agency, the Universities of Saskatchewan and Regina, all cities, towns, villages and other municipalities, all Boards that employ police officers, the Saskatchewan Institute of Applied Science and Technology, and with respect to the Government of Saskatchewan, all persons agencies or bodies that the government may prescribe by regulations.² The application of Saskatchewan's essential services legislation to all of these public employers made it the broadest in Canada.³ In addition to its broad application, "no other essential services legislation is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential service workers and, where those designations have the effect of prohibiting meaningful strike action, an independent, efficient, overall dispute mechanism."⁴

The unions argued that the Act would prohibit those employees designated to provide essential services from participating in a strike. The right to strike, they argued, and in particular the activity of picketing during a strike, are forms of expression, assembly, and association protected by the Charter.⁵ They further maintained that when unions have no ability to strike, employers have no incentive to bargain in good faith. If employers know that workers are powerless to withdraw their services, they can act in a unilateral fashion.⁶ It is the creation of this power imbalance that violates the right of workers.

Supreme Court of Canada Decision

In a 5-2 majority, the Supreme Court found the right to strike was an integral component to meaningful collective bargaining and was constitutionally protected under freedom of association. After determining the PSESA limited the freedom of association, the Court further decided that the infringement was neither minimally impairing nor proportionate and therefore was not saved by s.1 of the Charter. Based on this determination the Court struck down the PSES Act as unconstitutional. One of the core reasons this ruling was made against Saskatchewan's legislation and not others was because there was no meaningful dispute resolution mechanism for determining which services were essential.⁷

² Ibid.,

³ Saskatchewan Federation of Labour. "Brief to Minister Norris: Bill 5, The Public Service Essential Services Act and Bill 6, An Act to amend The Trade Union Act." 15 February 2008. [Saskatchewan Federation of Labour](http://www.sfl.sk.ca/uploads/File/Bill%205%20and%206%20brief.pdf). 01 April 2012 <<http://www.sfl.sk.ca/uploads/File/Bill%205%20and%206%20brief.pdf>>.

⁴ "Saskatchewan v. Saskatchewan Federation of Labour, 2012 SKQB 62 ." 06 02 2012. [CanLII](http://www.canlii.org/en/sk/skqb/doc/2012/2012skqb62/2012skqb62.html?searchUrlHash=AAAAAQAGbGFib3VyAAAAAE&resultIndex=7). 12 02 2015 <<http://www.canlii.org/en/sk/skqb/doc/2012/2012skqb62/2012skqb62.html?searchUrlHash=AAAAAQAGbGFib3VyAAAAAE&resultIndex=7>>.

⁵ Ibid.,

⁶ Ibid.,

⁷ Schatz, Leah. "Supreme Court of Canada Finds Constitutional Right to Strike and Upholds Amendments to Saskatchewan's Trade Union Act." 02 02 2015. [Westrn Employers' Counsel](http://westernemployerscounsel.com/blog/post/supreme-court-of-canada-finds-saskatchewans-public-service-essential-services-legislation-unconstitutional/). 12 02 2015 <<http://westernemployerscounsel.com/blog/post/supreme-court-of-canada-finds-saskatchewans-public-service-essential-services-legislation-unconstitutional/>>.

In light of its ruling, the Supreme Court gave the Government of Saskatchewan one year to enact new, more balanced legislation. During this year, the PSES Act will continue to apply.⁸

Implications

The basis upon which Saskatchewan's PSES Act was recently found unconstitutional could have further and broader implications. The Supreme Court of Canada's decision as to how freedom of association, one of the key freedoms guaranteed by the Canadian *Charter of Rights and Freedoms*, applies in the context of labour relations may start to define an employer's obligations over and above those required by ordinary labour relations legislation. This is of particular concern for private sector employers who act both as a private employer and a provider of essential public services.

As the two dissenting Justices put it, striking is an economic and political weapon and "constitutionalizing a right to strike restricts governments' flexibility, impedes their ability to balance the interests of workers with the broader public interest, and interferes with the proper role and responsibility of governments."⁹ Giving the right to strike protection under the *Charter* could create a dangerous precedent that gives public sector unions the power to hold government hostage as they threaten to cut off essential services, an experience not unheard of in Saskatchewan labour relations history, and one that this legislation was specifically designed to prevent in the future.¹⁰

Further to these concerns, "constitutionalizing a right to strike introduces great uncertainty into labour relations: it will make all statutory limits on the right to strike presumptively unconstitutional."¹¹ The ramifications of this are currently unknown as it will be left to future Supreme Court rulings to determine when an infringement of the right to strike is justified as a reasonable limit on the right to freedom of association. "In practical terms, this means costly litigation with no predictable outcome."¹²

The establishment of the scope of a justified, reasonable limit on the right to strike will have an impact across the country, most notable within the federal government's own labour laws that govern collective bargaining in the federal public service. The provisions dealing with essential

⁸ Schatz, Leah. "Supreme Court of Canada Finds Constitutional Right to Strike and Upholds Amendments to Saskatchewan's Trade Union Act." 02 02 2015. [Westrn Employers' Counsel](http://westernemployerscounsel.com/blog/post/supreme-court-of-canada-finds-saskatchewans-public-service-essential-services-legislation-unconstitutional/). 12 02 2015 <<http://westernemployerscounsel.com/blog/post/supreme-court-of-canada-finds-saskatchewans-public-service-essential-services-legislation-unconstitutional/>>.

⁹ "Saskatchewan Federation of Labour v. Saskatchewan." 30 01 2015. [Judgements of the Supreme Court of Canada](http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do). 12 02 2015 <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do>>.

¹⁰ Canadian Constitution Foundation. "R v. Saskatchewan Federation of Labour." 2015. [Canadian Constitution Foundation](http://theccf.ca/court-cases/r-v-saskatchewan-federation-labour/). 12 02 2015 <<http://theccf.ca/court-cases/r-v-saskatchewan-federation-labour/>>.

¹¹ "Saskatchewan Federation of Labour v. Saskatchewan." 30 01 2015. [Judgements of the Supreme Court of Canada](http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do). 12 02 2015 <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do>>.

¹² Honickman, Asher. "Asher Honickman: A troubling decision on the 'right to strike'." 05 02 2015. [National Post](http://news.nationalpost.com/2015/02/05/asher-honickman-a-troubling-decision-on-the-right-to-strike/). 12 02 2015 <<http://news.nationalpost.com/2015/02/05/asher-honickman-a-troubling-decision-on-the-right-to-strike/>>.

services federally are particularly similar to Saskatchewan's and could well be the next set to be legally challenged.¹³ "With the passage of Bill C-4, federal public service employees are faced with very similar legislation which grants the government carte blanche over essential services designations, leaving bargaining agents with little recourse."¹⁴ However, unlike Saskatchewan's law, the federal law allows unions access to arbitration but only in cases where 80% of employees have been designated essential. Whether this provision is enough to salvage the law will be determined as it works its way through the court system.

Regardless of what happens in relation to clarifying the justifiable, reasonable limit on the right to strike, the Supreme Court's ruling has bound the governments' hands in balancing the complex competing interests in labour relations, and significantly limited its ability to respond to changing needs and circumstances, and the public interest more broadly, in this regard.¹⁵ As a result, it is likely that government decision making will increasingly be focused on legal parameters and less on social and economic implications.

The ripple effect of this ruling is also currently unknown and again will likely be determined through costly and lengthy litigation. Over the long term protecting the right to strike under the freedom of association could potentially allow other labour practices.

Saskatchewan Chamber of Commerce Position

The provision of essential services during public sector work stoppages impacts the private sector business community, and the provincial quality of life as a whole. As such the Saskatchewan Chamber of Commerce supports the adoption of essential services legislation in Saskatchewan. The organization anticipates that the Government of Saskatchewan will be able to craft legislation that reflects a justifiable, reasonable limit on the right to strike for public sector employees within the year granted by Supreme Court. However, the Chamber is concerned with how protecting the right to strike in the *Charter* will impact private sector employers, through yet unforeseen implications. The provision of essential services is not solely within the domain of the public sector and the Chamber is particularly concerned with the potential ramifications that this ruling may have on private employer labour relations, during the execution of public-private partnerships for the delivery of services to name just one example.

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¹⁴ Ibid.,

¹⁵ "Saskatchewan Federation of Labour v. Saskatchewan." 30 01 2015. Judgements of the Supreme Court of Canada. 12 02 2015 <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do>>.

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