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Essential Services and Essential Rights: *Saskatchewan Federation of Labour* and the New Constitutional Right to Strike


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In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, the Supreme Court of Canada held that the right to strike is protected under the right to freedom of association, guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms*. The 5-2 decision overrules legal precedents standing since 1987, dramatically increases the legal power of unionized employees (particularly in the public sector), and promises to have a profound impact on labour relations in Canada.

In 2007, the Saskatchewan government passed the *Public Service Essential Services Act* (*PSESA*) and the *Trade Union Amendment Act* (*TUAA*). *PSESA* gave the government power to unilaterally designate "essential" services and employees. *PSESA* also prohibited essential services employees from engaging in strike action. However, the legislation provided no meaningful alternative (such as interest arbitration) for resolving bargaining impasses. The *TUAA* changed the union certification process by increasing the required level of employee support, reducing the time period for unions to gather evidence of employee support, and eliminating automatic certification. The legislation also expanded rights to employer free speech.

The *PSESA* and *TUAA* were challenged by a number of unions, including the Saskatchewan Federation of Labour. The trial judge held that the right to strike was a fundamental freedom protected by s. 2 (d) of the *Charter*, and that the prohibition on strikes substantially interfered with employees' right to freedom of association. He also concluded that the *TUAA* did not breach the *Charter*. The Saskatchewan Court of Appeal reversed the trial judge's decision. Relying on the Supreme Court precedents in the 1987 "Labour Trilogy" cases, the Court of Appeal refused to recognize a constitutional right to strike.

However, the majority of the Supreme Court of Canada agreed with the trial judge. Overruling the "Trilogy" cases, the Court found that the right to strike is an

essential part of the *Charter*-protected right to a meaningful collective bargaining process. *PSESA's* strike prohibition substantially interfered with this right, violated s. 2 (d) of the *Charter*, and was not justified under s. 1 of the *Charter*. The Court declared *PSESA* to be invalid, but suspended the declaration for one year.

The Court wrote that workers must have a means of recourse should an employer not bargain in good faith, or should collective bargaining reach an impasse. The ability to engage in the collective withdrawal of services provides employees a vital way to pursue collective workplace goals and bargaining. Without the right to strike, the constitutionally protected right to bargain is "meaningless".

The Court analyzed whether *PSESA* infringed the right to strike in a way that substantially interfered with a meaningful process of collective bargaining. *PSESA*'s prohibition on strike action met this threshold, and breached the *Charter.*

The Court ruled the breach of the *Charter* was not demonstrably justified in a free and democratic society, since the *PSESA* strike restrictions went beyond those reasonably required to ensure the delivery of essential services. *PSESA* allowed the government to designate many services as "essential", even where the services are not actually required to prevent serious harm to the life, health, or personal safety of the population, and required "essential service" workers to perform even non-essential tasks during a strike. The legislation provided no process for independent review of the government's designations by the Labour Relations Board, and created no "adequate, impartial and effective" alternative mechanism for resolving bargaining impasses (such as interest arbitration).

The Court agreed that the *TUAA* did not violate the *Charter*, since the changes to union certification requirements, when compared to certification requirements in other Canadian provinces, did not pose an "excessively high threshold" for certification.

Court recognition of a constitutional right to strike reflects a very generous view of employee *Charter* rights, and considerably increases the bargaining power of unions, particularly in the public-sector. *Saskatchewan Federation of Labour* is likely to have a significant impact in the "era of austerity", by limiting governments' previously-held power to restrict the right to strike, and restricting government ability to unilaterally impose terms and conditions of employment through legislation.

However, it remains unclear how courts and labour relations boards will apply the right to strike in other circumstances. Many questions remain, such as:

- Can governments ever limit the right of non-essential workers to strike?
- If it remains possible for governments to limit the right of non-essential workers to strike, what sort of prohibitions are permissible (ex. prohibitions on certain types of strike activity, prohibitions on the duration of a strike, etc.)?
- What, other than interest arbitration, might suffice as an "impartial and effective" dispute resolution mechanism to resolve bargaining impasses?
- Can governments impose legislated collective agreements, or changes to collective agreement provisions, without infringing the right to strike, and if so, under what conditions?

- Does the *Charter* allow unions to respond to legislated limits or rollbacks in employment conditions with strike action?
- Will governments unilaterally amend existing legislation prohibiting strikes (for example, the Alberta *Public Sector Employee Relations Act*) in response to *Saskatchewan Federation of Labour*?

As lower courts and tribunals start applying *Saskatchewan Federation of Labour*, *Workwise* will report on any major developments impacting employers, unions, and employees.

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