



Guide for Negotiating Essential Services

BASED ON THE SUPREME COURT OF CANADA
SFL v. Saskatchewan decision
(JANUARY 30, 2015)

May 2015

Introduction

On January 30, 2015, the Supreme Court of Canada (SCC) issued a landmark decision, declaring that the right to strike is constitutionally protected. In *Saskatchewan Federation of Labour v. Saskatchewan* (2015 SCC 4), the SCC found that the Public Service Essential Services Act (PSESA), which created an absolute ban on the right to strike for unilaterally designated “essential service employees,” infringed on Canada’s *Charter of Rights and Freedoms* (Charter).

In 2008, the trial judge concluded that the prohibition on the right to strike in the PSESA infringes on a fundamental freedom protected by section 2 (d) of the Charter. Subsequently, the Saskatchewan Court of Appeal unanimously allowed an appeal by the Government of Saskatchewan, stating that the jurisprudence did not warrant a ruling that the right to strike is constitutionally protected by section 2 (d) of the Charter. Justice Abella (a former head of the Ontario Labour Relations Board), writing for the majority of the SCC, overturned the Court of Appeal decision and agreed with the trial judge.

The SCC held that the right to strike is an essential part of a meaningful collective bargaining process in Canada’s system of labour relations. The Court also determined that the legislative means chosen by the Saskatchewan government to meet its objectives of providing essential services during a strike was not justified under section 1 of the Charter.

Principles

For Essential Services Designation

In reaching their decision, the SCC justices referenced previous decisions of the Supreme Court and decisions of the lower courts in this case, as well as the International Labour Organization (ILO) Committee of Experts, the ILO Committee on Freedom of Association, the European Court of Human Rights, and academic sources.

The primary test for the Court is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with a meaningful process of collective bargaining [para 78]. The Court found that the PSESA prohibition on designated essential employees participating in strike action as part of the collective bargaining process meets the threshold of substantial interference, and therefore amounted to a violation of section 2 (d)—freedom of association—of the *Charter of Rights and Freedoms*.

In several paragraphs on the SCC decision, the SCC justices, relying on Canadian and international law jurisprudence, set out a clear definition of “essential service.”

Outlined below are the main principles upon which the SCC based its decision to declare Saskatchewan’s PSESA unconstitutional, as well as the Court’s comments on what actually constitutes an essential service. They provide an important guideline for unions engaged in essential service negotiations and a basis for a possible challenge to essential services legislation. They may also be useful as a basis for unions to challenge previous essential service agreements or decisions by labour relations boards, which remain in effect today.

PRINCIPLE

Interference with the Right to Strike

- The right to strike is protected by virtue of its unique role in the collective bargaining process [paras 3, 4, 52 and 77].
- Essential services' levels must not result in substantial interference with collective bargaining and the right to strike of these employees [paras 78 and 96].
- The maintenance of essential public services is self-evident and a pressing and substantial objective [para 79].

*** Commentary

In recent decisions the SCC has been very clear in that section 2 (d)—freedom of association—gives meaning and protection to collective bargaining. In *SFL v. Saskatchewan*, the majority of SCC justices are clear that the Charter-protected right to collective bargaining also includes the right to strike, at the same time it recognizes the need to maintain essential services.

In the June 2007 *BC Health Services* decision, the Court stated that the government cannot substantially interfere with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining [para 90, 2007 SCC 27]. This was confirmed in the 2015 *Mounted Police Association of Ontario v. Canada* (Attorney General) decision [paras 5, 71 and 80, 2015 SCC 1].

In the *SFL v. Saskatchewan* decision, the Court stated that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations. A legal system that suppresses that freedom to strike

puts the workers at the mercy of their employers. This, in all its simplicity, is the essence of the matter. This applies, too, to public sector employees.

As Justice Rosalie Abella said in writing the decision: “The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction” [para 3].

The key point for union negotiators is that full and free collective bargaining and the strike option are constitutionally protected in Canada.

PRINCIPLE

Definition of Essential Services

- A service is deemed essential if its interruption “would threaten serious harm to the general public or to a part of the population” (former Chief Justice Brian Dickson) [para 84].
- The Court also put this another way—there must be a “clear and imminent threat to ‘the life, personal safety or health of the whole or part of the population’ ” (ILO) [para 92].

*** Commentary

The definition of essential services adopted by the SCC is narrower than federal and most provincial legislative definitions. Further, it is narrower than the definitions some unions have agreed to in essential services negotiations.

In the Court's definition, there is no reference to harm to the economy or to business. There is no reference to the interruption of government services, even those providing social services and payments. Whether unions agree to provide these services is a decision made in terms of maintaining public support, not one based on these services being considered as essential.

If a union decides it will maintain social assistance payments, for example, it would be better to agree to it in a separate memorandum, and not as part of an essential services agreement. Similarly, the same goes for any other "non-essential" services that the union agrees to provide (e.g., ferry services or park rangers).

The Court is clear, however, that the interruption of services that would threaten serious harm to people would be considered essential services and must be provided.

The decision also addressed possible situations which negotiators may confront in negotiating essential service agreements. Employers often say, "If we do not provide this service there could be possibly, maybe, sometime in the future, a problem." The Court did not see this as a reason in itself to provide the service. As the SCC justices noted, there must be a "clear and imminent threat to the life, personal safety or health of the whole or part of the population" (ILO) [para 92].

Public sector unions have been providing many services described as "essential" that clearly do not meet this definition. Whether they are "global orders" applying to different unions and in different bargaining situations, labour board orders, or voluntary essential service agreements, they should be reviewed in light of the principles in this decision.

PRINCIPLE

Essentiality of Public Services

- The Court also stated that the fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered “essential” [para 85].
- It therefore emphasized that not all services provided by public sector workers are essential [para 85].
- In accordance with international law, the Court recognized that services essential to the maintenance and administration of the rule of law and national security would also be included within the ambit of essential services [para 86].

*** Commentary

The Court made it very clear that the fact that a service is a public service does not make it essential. It does not matter if it is delivered by the government or other public sector entity. Even if the public sector has a monopoly on the delivery of that service, it is only essential if it meets the requirements for being essential as spelled out in the SCC decision.

PRINCIPLE

Designation of Service Levels and Employees

- Essential services’ levels are to be set with minimal impairment, that is, “carefully tailored so that workers’ rights are impaired no more than necessary” [para 80].

- Complete classes of personnel should not be deprived of the right to strike, because the interruption of the job functions they perform does not in practice affect life, personal safety or health [para 86].
- If qualified personnel are available to deliver requisite services, it should not matter if they are managers or administrators [para 88].
- The reason behind having managers carry out essential duties is to reinforce the principle that it is the service that is considered essential, not the employee.
- The employee is required to tailor his or her responsibilities only to the performance of essential services alone and cannot be required to carry out other job duties not declared essential [para 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 [para 91].

*** Commentary

Negotiating essential services' levels will require a change in the mindset and approach of employer negotiators and of some union negotiators.

It is best to begin with first principles as stated by the SCC. The right to collective bargaining and the right to strike are guaranteed by section 2 (d) of the Charter. Following from this, essential services' levels are to be set so that there is minimal impairment of these rights, given the definitions of essential services.

The Court was also clear that it is the services that are essential and not employees. This means that employers

cannot expect to have a complete class of employees, such as home care workers or highway maintenance workers, declared essential. The focus needs to be on the services that are essential before consideration is given as to who provides those services.

The Court also stated that if there are qualified managers, supervisors or other excluded personnel, they can be required to provide the essential service before depriving a union member of her or his right to withdraw their labour.

Unionized employees that are designated to provide an essential service are required to provide only that particular service. Their job must be tailored to the essential services, and they cannot be required to carry out any non-essential work.

The exception is that the right to strike can be restricted for those exercising authority in the name of the state, such as police forces, military (national defence) and the courts (administration of justice). It remains unclear how this principle applies to correctional workers and other peace officers, and therefore clarification may need to be sought through the courts.

PRINCIPLE

Independent Review

- If a union and employer cannot agree on the designations, the employer is not entitled to designate unilaterally without an independent review process [para 96].
- This is part of the principle outlined by the Court that “no strike” legislation must provide for “access to independent, effective dispute resolution processes:

[because] mechanisms of that kind can operate as a safety valve against an explosive buildup of unresolved labour relations tensions” [para 95].

*** Commentary

The Court was very clear that if a union and employer cannot agree on the designation of essential services, the employer is not entitled to designate unilaterally. There must be an independent review process such as arbitration, or other body, that provides effective dispute resolution.

The question of the effectiveness of the adjudication process is an important one. For example, are the members of a labour board qualified to rule on whether a service is essential? One senior union negotiator has stated labour board members are often reluctant to make the right decision in case there is some controversy about it.

PRINCIPLE

International Law and Restrictions on the Right to Strike

- The Court makes reference to the jurisprudence established under ILO Convention No. 87, which recognizes the right to strike may be restricted or prohibited in the following essential services categories:
 - a) in the public service only for public servants exercising authority in the name of the state
 - b) in essential services in the strict sense of the term (that is, “services the interruption of which would

endanger the life, personal safety or health of the whole or part of the population”) or

c) in the event of an acute national emergency and for a limited period of time [para 86].

- With respect to ILO jurisprudence regarding essential services, the SCC justices stated that, “ though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court” [para 69].

*** Commentary

Based on jurisprudence established by the ILO Committee on Freedom of Association over the past sixty years, the following can be construed as to what the Court would deem as “considerable persuasive weight”:

- Paragraph (a) would include police forces, military (national defence) and the courts (administration of justice). It remains unclear how this principle applies to correctional workers and other peace officers. It will probably have to be tested in the courts.
- With respect to paragraph b), the ILO has not developed an exhaustive or fixed list of essential services. The types of services the ILO has considered essential in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, have been hospitals, electricity services, water supply services, telephone services, and air traffic control.
- Acute national emergency referred to in paragraph c) has been defined by the ILO as “genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural disaster in which the

normal conditions for the functioning of society are absent.” The ILO has also maintained that the possible long-term serious consequences of a strike for the national economy do not justify its prohibition.

Again, it’s important to keep in mind that the Court is not bound by the ILO jurisprudence, but it does consider it to be “persuasive” evidence. The *SFL v. Saskatchewan* decision, however, appears to reflect ILO jurisprudence on essential services.

Conclusion

It goes without saying that *SFL v. Saskatchewan* is a significant decision in terms of the rights of workers and their unions. Combined with previous SCC decisions such as 2007 *B.C. Health Services* and 2015 *Mounted Police Association of Ontario*, it appears that the jurisprudence established by the so-called labour trilogy of 1987, which found that section 2 (d) did not include a right to collective bargaining, has been overturned.

It is too early to say whether these recent decisions represent the beginning of a more robust and progressive interpretation of labour rights by the Courts in Canada, but what we can say is that there is an entirely new balance in the relationship between unions and employers.

This decision is simply too important to ignore. We must make every effort to ensure that the principles outlined in the *SFL v. Saskatchewan* decision are taken seriously and that negotiated essential services agreements reflect them. We also need to review existing essential services provisions in federal, provincial and territorial legislation to ensure that they too are in accordance with the Supreme Court’s decision.