TableTalk update
The latest bargaining and mobilizing news for OPS members • April 2, 2015

Essential Services in light of the Saskatchewan Supreme Court decision

Your Corrections Bargaining Team has received numerous emails, calls and inquiries about Essential Service negotiations, and how they may be impacted by the Supreme Court of Canada's decision released in late January.

On January 30, 2015, the Court ruled in a 5-2 decision that the Saskatchewan government's Public Service Essential Services Act (PSESA) was unconstitutional, and suspended the legislation for one year to allow the Saskatchewan government to try to fix it. This was as a result of a challenge issued by the Saskatchewan Federation of Labour (SFL).

The court decision represents a significant victory for labour. The decision confirmed that the right to strike is a constitutional right, an "indispensable component" of meaningful collective bargaining, protected by Section 2(d) of the Canadian Charter of Rights and Freedoms.

We have discussed this decision with legal counsel in order to find out what affect, if any, this legislation has on the Crown Employees Collective Bargaining Act (CECBA) and our legal obligation to negotiate Essential and Emergency Services (EES) prior to an OPS strike or lockout. Here is the information we have received:

1. The SFL decision held that the Saskatchewan Public Service Essential Services Act (PSESA) was unconstitutional, and then suspended the declaration of invalidity for one year. The decision made no findings regarding the Crown Employees Collective Bargaining Act (CECBA), our essential services legislation in Ontario. CECBA continues to apply to the OPS and OPSEU members. It is not correct to say that CECBA or essential services are now illegal or somehow struck down by the SFL decision. Instead, the SFL decision expressly recognizes that essential services legislation may be lawful, and then details why the PSESA regime is unconstitutional.
2. The legal test applied was whether the PSESA amounted to "substantial interference" with collective bargaining and the right to strike. In this case, the Court found that it did amount to substantial interference because it prohibited employees from engaging in a work stoppage if they were declared essential. The same could be said of CECBA, in that it prohibits OPSEU members who are essential from exercising their constitutional right to strike. As such, CECBA would likely fail the first part of the legal test under Section 2(d) of the Charter in the same manner as PSESA.
3. However, after the finding of "substantial interference," Section 1 of the Charter could apply to "save" the PSESA from challenge if the interference with Charter rights were: 1) "rationally connected"; 2) to a "pressing and substantial" objective; and 3) it "minimally impaired" those rights. The PSESA failed the third requirement. In other words, the PSESA was not "carefully tailored so that rights are impaired no more than necessary". As a result, the PSESA was declared unconstitutional.
4. From a review of the SFL decision, it appears that three main aspects of the PSESA contributed to the conclusion that it was not "minimally impairing":
   - PSESA gave the Employer unilateral authority to determine how to provide what levels of essential services, with no duty to bargain essential services in good faith. This Employer discretion does not exist in

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CECBA. CECBA requires OPSEU and the Crown to bargain in good faith and make every reasonable effort to make an Essential Services Agreement. A strike or lockout is not lawful until an Essential Services Agreement is in place.

- PSESA had no means to appeal the Employer's decisions regarding essential services to an independent review or adjudication. This aspect of PSESA also does not exist in CECBA. Essential service levels may be determined by the OLRB on application by either Party.
- PSESA provided no access to a meaningful alternative to a strike in order to resolve an impasse in collective bargaining. Interest arbitration or final offer selection are two examples of alternatives to a strike or lockout (NOTE: Final offer selection is not the same as an employer's ability to make a final offer through the OLRB. Final offer selection arbitration would allow both the Union and the Employer to put forward proposals on outstanding issues and then the arbitrator would select one or the other parties' proposal and those proposals would form the collective agreement). Neither was available under PSESA. CECBA has a similar absence of alternatives. However, CECBA does provide a process by which the Parties may apply to the OLRB for a declaration that the essential services agreement has prevented meaningful bargaining. ***However, CECBA does not provide the OLRB with an express power to order interest arbitration as an alternative to a strike.*** Prior to amendments by the Harris government, CECBA did contain such a power. Legislation that applies to other sectors continues to permit the OLRB to order or the Parties to access interest arbitration (e.g. *Hospital Labour Disputes Arbitration Act, Ambulance Services Collective Bargaining Act*).

5. The SFL decision also refers to a few aspects of PSESA that are not central to the conclusion that the PSESA is more than minimally impairing. It is anticipated that OPSEU will advance legal arguments concerning these issues in the context of specific OLRB applications that may arise from essential services bargaining. However, none of these issues are expected to result in a major change to the structure of CECBA and the essential services regime for the OPS. For example, the Court reviewed and considered:
   - The possible scope of the work under PSESA that was properly considered essential. This is not likely an issue in dispute with the Correctional Bargaining Unit, as there is broad consensus that the essential services provided by the Unit are necessary to prevent a danger to life, health or safety, as set out by the statute.
   - The PSESA requirement to perform all work duties, rather than only essential work duties. This is not an issue for the Correctional Bargaining Unit. The OLRB has previously held that essential services workers are not required to perform their full work duties, or their "whole job", but rather only the duties that are essential. What duties are essential and non-essential is subject to agreement by the Parties, or failing agreement as determined by the OLRB.
   - The PSESA prohibition on considering other persons available to provide essential services when setting essential service levels, or "offsets". CECBA contains an identical prohibition. However, as noted above, the offsets issue was just one of many problems the Court identified with PSESA, and it was not a central factor in the Court's conclusion that PSESA was unconstitutional. It is far from certain that another court reviewing CECBA would find the ban on offsets, in and of itself, unconstitutional.

6. Some members would like OPSEU to access interest arbitration as an alternative to a strike in order to resolve the impasse in bargaining. ***OPSEU has no legal right to interest arbitration at present.*** If access to interest arbitration is an objective, the Corrections Team can consider the following:
   - The team could seek the Employer's agreement to voluntary arbitration in accordance with CECBA.

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- If OPSEU pursues a "meaningful strike" application under CECBA Section 42 (which could be filed only after a lawful strike is underway), a claim could be advanced for interest arbitration at that time. However, as noted above in Item 4, there is no power for the OLRB to order interest arbitration as a remedy to such an application. The outcome of an application is impossible to predict at present.
- A Charter challenge to the Courts concerning CECBA, even if successful, ***would not result in an order for interest arbitration.*** The outcome of the PSESA case was not interest arbitration, but rather a declaration of invalidity and a one year window to allow Saskatchewan to correct the legislation. As noted above in Items 4 and 5, there are significant differences between the CECBA and the PSESA.

In conclusion, it is clear that in no way does this Supreme Court decision make negotiating EES under CECBA illegal, nor does it substantially affect our obligation to negotiate these agreements under the Act. There is also nothing in this decision that allows the Corrections Team a legal right to access arbitration. It could only be achieved through mutual agreement with the employer.

Your Corrections Team is continuing to challenge the employer's decisions at the negotiating table, and we thank you for your continued support.

Don't listen to rumours!
TableTalk Update
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OPS Bargaining Teams.

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