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Essential Services Legislation: Will it facilitate or impair industrial relations?

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On Dec.19, 2007 the newly elected Saskatchewan Party introduced Bill Number 5, An Act Respecting Essential Public Services, the *Public Services Essential Services Act*. This Act is intended to assure the continuation of public services whose absence during a strike or lockout would constitute threats to health, safety, result in the destruction of property, environmental damage or disrupt court operations. "Public services", includes the traditional Public Service departments e.g.: highways, health etc, crown corporations, the province's two universities, the Sask. Institute of Applied Science and Technology (SIAST), regional health authorities, municipalities and police. As well, the Act permits the Government to extend the designation of public employer to any other "... person, agency or body or class of person or bodies, agencies or bodies that is prescribed." **(1)** As is evident, the Act's application is very broad. Indeed, Saskatchewan is the only jurisdiction in Canada to identify universities as an essential service.

The Act requires that 90 days before the expiry of a public service collective agreement the employer and union must meet and attempt to reach an essential services agreement, i.e.: what services will be performed in the event of a strike or lockout and which employees will perform those services. The employer will present the union with a list of the services it considers essential. Negotiations include the essential services themselves and the specific employees required to perform those services. For the Public Service, e.g.: departments of health, highways etc, essential services will be prescribed in regulations thus are basically non negotiable. In the event of failure to achieve an essential services agreement the employer will give notice to the union of the services that are essential and the employees who must perform those services.**(2)** The union can appeal that notification to the Sask. Labour Relations Board. The Board can confirm or revise the list of employees submitted by the employer but can not revise the listing of essential services.**(3)** As well, in the event of a strike or lockout, where no essential services agreement exists, the employer can identify additional essential services and employees; the union may similarly appeal the employees designated**.** **(4)** Employees identified as essential must perform their entire range of duties in the event of a strike or lockout.**(5)** Failure of an organization or union to abide by the Act can result in a fine of up to $50,000 and an additional $10,000 per day for a continuing offense. Individuals who contravene the Act can be fined up to $2000 and an additional $400 per day for a continuing offense.**(6)**

Why enact essential services?

The new Act was likely prompted by the recent strikes of the Health Sciences Association of Sask.(HSAS) in July 2007 as well as the Jan. 2007 withdrawal of snow plow services in Public Service negotiations. At that time the then opposition Saskatchewan Party raised the need for essential service legislation. A strike by Canadian Union of Public Employees (CUPE) university support workers in Nov. 2007 and its impact on health services at the University Hospital in Saskatoon was also a contributing factor. However, essential service legislation was not a key priority for the new government in the recent election. Nevertheless, the proposed Act was introduced in the first sitting of the legislature by the new government.

Essential service legislation attempts to ensure that such services continue to be delivered in the event of a strike or lockout while maintaining the collective bargaining rights of workers. However there can be unintended consequences. Given essential services continue, there is less incentive for the parties to settle with the result that strikes

are longer. For example, in a health strike, the already long delays

for elective surgery will increase. The provision of non essential services will be interrupted for longer periods. There is a tendency for employers to designate essential services in excess of requirements. Manitoba, with similar legislation, recently identified grounds keepers as an essential service as well as entire government departments, e.g.: Department of Agriculture, Department of Environment.**(7)**. The reasons for this apparent excess of caution are two fold; to ensure that any service the employer views as meeting the legal definition of a threat to public health and safety is included and, by increasing the number of essential employees, weaken the negotiating power of the union at the bargaining table. As noted, the proposed legislation does not permit the Labour Relations Board to alter essential services identified by the employer. Employees can be designated as essential even if there are non union staff available who could perform the essential duties. Essential service legislation, in reducing the power of unions, results in government being seen as taking sides in collective bargaining thus inhibiting its capacity to intercede as a dispute-resolving neutral. Finally, essential service legislation in other provinces has not been without incident, e.g., strikes and threats of strikes in Alberta, B.C. and Ontario. **(8)**

As mentioned, the introduction of essential service legislation in Saskatchewan was prompted by the withdrawal of services, or threats of withdrawal, during the most current round of public sector negotiations. To appreciate the significance of these threats one must understand the scope of public sector bargaining in Saskatchewan as well as the extent of recent strike action.

The Saskatchewan "public sector" includes:

- the traditional public service, e.g.: departments of Health, Highways etc;

- crown agencies, e.g.: SaskTel, Sask Power, Sask Government Insurance (SGI)

- agencies and boards, e.g.: Sask. Gaming, Legal Aid, Workers Compensation etc;

- education, e.g.: K to12, universities, colleges and,

- health, e.g.: nurses, technical and non medical services.

All told the Sask. public sector has approximately 40 separate management-union collective agreements covering approximately 60,000 full time equivalent employees. Typically negotiations of these agreements commence in the traditional public service where the government attempts to set a "wage pattern" for the public sector. This is usually followed by negotiations in education, then the crowns and agencies and finally by the health sector. Currently, several major health care sector agreements are outstanding, e.g.: Sask. Union of Nurses (SUN); Multi District Services and Sask. Government and General Employees Union (SGEU), etc. These will be renegotiated in the spring of 2008 and will likely be subject to the proposed essential service legislation.

Have past withdrawals jeopardized public safety?

During the current round of public sector negotiations, the Health Science Association, with a membership of approximately 1800 members, saw a withdrawal of service by 28 employees. In the public service negotiation, strike action was concentrated in correctional centres, i.e.: approximate 900 employees of the 9000 member Public Service bargaining unit of the SGEU. This is where SGEU- Public Service strike action has traditionally occurred and, as a result of contingency planning, has not resulted in injuries to inmates or staff or the destruction of property in the last 20 years. The work stoppage by SGEU snow plow operators was halted when winter storms threatened. Approximately 2700 support workers at the Universities of Regina and Saskatchewan in the fall of 2007 engaged in strike action. Of this number, approximately 70 to 75 effected the delivery of outpatient medical services at the University Hospital in Saskatoon. **(9)** All told, the proposed legislation was prompted by three strikes involving

approximately 5500 employees or approximately 9 % of public sector employees. As is evident, the actual threats to public health and safety were limited.

What are the fundamental weaknesses of Bill 5?

If an objective of "fair and balanced" labour legislation is to achieve collective agreements that serve the needs of all parties and foster good working relationships, it is questionable whether essential services legislation as proposed advances that goal. Without question some sort of mechanism for avoiding threats to health, safety and property as a result of a public sector work stoppage or lockouts must be available. The provision of such vital public services can not be held at ransom by management and union in the pursuit of their private agendas.

A difficulty with the proposed legislation is that it requires every public service union and management subject to the Act to engage in a designation process at the outset of negotiations that is time consuming, complex and costly. It treats every negotiation as if a strike or lockout is inevitable in spite of evidence the overwhelming majority of agreements are arrived at peaceably and strike action is limited. The early designation of essential services in every public sector bargaining unit reduces the negotiating power of the union in those units at the very beginning of negotiations. Thus the focus of the legislation appears to be on limiting union bargaining power and the impact of strikes and lockout action generally as opposed to ensuring the continued provision of essential services in those specific instances where they are threatened.

Currently, when strike or lockout action occurs in the Saskatchewan public sector, it is quite common for union and management to have an informal understanding to ensure the provision of essential services. Neither management, union nor employees wants to be held responsible for a serious adverse event. It is not uncommon for striking workers to drop their picket signs to attend to emergent situations and return to the picket line later. This response is grounded in the social ethic of the province. If we must have essential service legislation, this same ethic should serve as its foundation.

Is there an alternative to Bill 5?

Union and management in public sector negotiations could be required in law to establish a joint committee to identify essential services. This body would only function once an impasse was reached in negotiations. It would identify essential services and the employees required to provide those services within a specified time, e.g.: 30 days. No strike/lockout notice would be permitted during this period. It would continue to function dealing with emergent situations until a collective agreement was achieved. In such situations there is always the risk that a party will engage in delaying tactics or propose or oppose a service as essential etc. given the number of essential employees can strengthen or weaken the bargaining power of a party. To avoid this, a Labour Relations Officer of the Sask. Department of Labour would be an ad hoc member of the committee. That person could act in a mediating role in facilitating negotiations, resolving differences, confirming that essential services were in fact essential and that emergencies were true emergencies. If there was no resolution, that officer could recommend a solution to the parties and to the Minister of Labour. Failing resolution the latter could take a range of actions, e.g.: release the Department of Labour report to the public in order to pressure the parties, offer third party mediation, arbitrate directly the dispute, or order the provision of disputed services.

This approach deals with actual as opposed to theoretical threats to the provision of essential services. It builds on practices that already exist. As well, the primary focus of the parties in negotiations will be on concluding an agreement given the uncertainty as to which services and employees will be determined essential. The process involves a neutral party in fostering resolution between the parties and ensuring that essential services are in fact essential.

It places the prime responsibility for providing essential services where it properly resides, with the management, union and employees who provide

those services. It preserves Government's flexibility in responding to protect the public interests when the bargaining parties do not exercise their responsibilities.

It is unfortunate that the Essential Services Act has been introduced in acrimony, described in some circles as a settling of old scores with the labour movement and of favouring one collective bargaining party over another. The creation of a toxic relationship between government and labour is not a proper foundation for protecting the people of Saskatchewan from threats to their health, safety and security.

References

1) Essential Services Act, Sect. 1
2) Essential Services Act, Sect. 6, 7 & 9
3) Essential Services Act, Section 10
4) Essential Services Act, Sect. 9(4)
5) Essential Services Act, Sect.18 (1) (a)
6) Essential Services Act, Sect. 20 (2)
7) Manitoba Essential Services Act, Sect. 7, 8 and Schedule. Grounds keeper information provided by Manitoba Federation of Labour.
8) Alberta nurses struck in 1988, CUPE hospital workers in Ontario struck in 1981, British Columbia teachers struck in 2001
9) Confidential source, University of Saskatchewan

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