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Labour and Employment

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Essential services in the health sector: the Tribunal administratif du travail declares section 111.10 of the Labour Code unconstitutional

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In a decision rendered this past August 31st by Justice Pierre Flageole,[1] the Tribunal administratif du travail (the "Tribunal") declared section 111.10 of the *Labour Code*[2] to be constitutionally inoperative. This provision requires that a set minimum percentage of employees must remain on the job during a strike in health and social services institutions.

The decision was rendered in the context of proceedings filed by unions affiliated with the Confédération des syndicats nationaux (the "**Unions**"). The proceedings were filed in the context of common front negotiations in 2015, prior to strike action being taken.

Among other things, the Unions argued that the minimum percentages set by this provision are arbitrary and bear no relation to what should be considered necessary for the maintenance of the truly "essential" services in the event of a strike. Based on testimony of the employees, the Unions argued that several of the tasks performed by those employees were not "essential" and that the Tribunal did not have jurisdiction to reduce the percentages set out in section 111.10 to what truly constituted essential services to be rendered during a strike. Referring to the principles set out by the Supreme Court of Canada in *Saskatchewan Federation of Labour* v. *Saskatchewan*[3] (the "***Saskatchewan* decision**"), the Unions contended that this regime did not minimally impair the rights granted by the *Canadian Charter of Rights and Freedoms*[4] and the Québec *Charter of Human Rights and Freedoms*.[5]

The Attorney General countered that the legislator's objective in adopting the provisions regarding the maintenance of essential services was to recognize the primacy of the population's right to healthcare over the employees' right to strike. The percentages set out in section 111.10 were not set at random, but rather were determined after learning from the situation that existed prior to the adoption of the provision. According to the Attorney General, the percentages were adapted so as to ensure that the necessary services were rendered.

According to the Attorney General, there were major differences between the provisions at issue in the *Saskatchewan* decision and those in effect in Québec insofar as section 111.10 did not prohibit the right to strike, but only limited it. In this sense, contrary to the *Public Service Essential Services Act*[6] in effect in Saskatchewan, this provision did not constitute a "substantial interference with collective bargaining" which had the effect of totally prohibiting the right to strike of the designated individuals. Moreover, the reduced effectiveness of the strikes alleged by the Unions was a result of their own decision to maintain services in all institutions across the board at 90%, notwithstanding the fact that section 111.10 allowed them to maintain lower levels of service in certain hospital centres and in the CLSCs (80% and 60% respectively).

Basing himself on the *Saskatchewan* decision, Justice Flageole noted that the right to strike has risen to the level of a protected right under the *Canadian Charter of Rights and Freedoms*. Furthermore,

1 *Syndicat des travailleuses et travailleurs du CIUSSS du Centre-Ouest-de-l'Île-de-Montréal – CSN et Centre intégré universitaire de santé et de services sociaux du Centre-Ouest-de-l'Île-de-Montréal*, 2017 QCTAT 4004.

2 *Labour Code*, CQLR c. C-27.

3 *Saskatchewan Federation of Labour* v. *Saskatchewan*, [2015] 1 SCR 245.

4 *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

5 *Charter of Human Rights and Freedoms*, CQLR c. C-12.

6 Chapter P-42.2 of the *Statutes of Saskatchewan*, 2008.

in setting these minimum percentages, the *Labour Code* does not minimally impair the employees' right to strike. Also, the fact that the application of these percentages is mandatory depending on the care unit and the category of service and there is no right of review of those percentages before a tribunal or independent body, "goes beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike".[7] According to the Tribunal, the situation created by section 111.10 is not very different from the situation which was considered in the *Saskatchewan* decision.

Consequently, the Tribunal declared section 111.10 of the *Labour Code* to be constitutionally inoperative and gave the Québec government one year to revise it.

We are following this matter closely and will keep you informed of any further developments.

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[7] Paragraph 241 of the decision.

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