Submission to the Government of Saskatchewan
Re: Saskatchewan Labour Legislation
Tuesday, July 31, 2012
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The Saskatchewan Federation of Labour

The Saskatchewan Federation of Labour (SFL) represents over 98,000 workers across the province in 37 affiliated unions. There are currently over 600 locals affiliated to our organization, along with 8 District Labour Councils and the Saskatchewan Federation of Union Retirees.

Our affiliated unions represent people in every sector of the economy and from every corner of the province. SFL members work in uranium mines in the far north, in electrical generating stations near the U.S. border and everywhere in between: steel plants, retail stores and warehouses, government offices, construction sites, group homes, chemical plants and oil refineries, grain elevators, daycare centers, correctional facilities, schools, nursing homes, universities, hospitals, hotels, fast food outlets, on trains, planes and buses, in municipal governments, lunch counters, restaurants, financial institutions, the media, in potash mines, credit unions, book stores, and in hundreds of other jobs.

For more than 50 years, the SFL has represented the interests of union and non-union working people. Our committees work on a variety of issues, such as occupational health and safety, human rights, the environment, political action, collective bargaining, women’s issues, aboriginal and youth issues, apprenticeship and shift work. Of course, our work also involves partnerships with community groups across the province, some of which include social justice and anti-poverty groups, health coalitions, farm groups, senior and student organizations. We also work with business organizations on issues like training, labour market intelligence, literacy and work-readiness skills.
A Note on the SFL Response

As a Federation, representing 37 individual affiliated unions and more than 600 locals in a variety of industries, our response will focus on general themes and, for the most part, leave specific questions to the expertise of the affiliates. Instead of addressing specific provisions of specific statutes, we will, through our submission, endeavour to provide critical context and guiding principles, consideration of which should be given prior to the development or amending of any labour legislation in Saskatchewan. The fact that the Federation is not responding to individual questions should not be assumed to mean that we will necessarily be complicit in the changing of the litany of statutes listed in the “consultation paper.” Because the shift in our province to a 60-hour work week or to further limiting collective bargaining rights, for example, would be in violation of the principles for which we are advocating in our submission, the Federation should be held to be opposed to such initiatives.

Our submission is offered on a “without prejudice” basis as it relates to any ongoing or future legal action and/or proceeding that relates to, or is derived under, any labour-related legislation.
Unions and Democracy

From the perspective of international law, the preservation of rights for working people has been an integral part of the preservation of human rights generally. As Toke and Tzannatos note:

The International Labour Organization (ILO) defines five core labor standards: (a) the prohibition of slavery and compulsory labor, (b) the elimination of discrimination, (c) the prohibition of exploitative child labor, (d) freedom of association (the right of workers to form unions of their own choice and of employers to form employers’ organizations), and (e) the right to collective bargaining (the right of unions and employers’ organizations to negotiate work conditions on behalf of workers and employers, respectively).

The ILO recognizes freedom, the foundation of a democratic society, is intimately related to one’s rights at work. In this way, constraining a person’s rights at work is tantamount to constraining a person’s rights as a person. Simply put, labour rights are human rights. Though some have questioned whether robust labour rights afford economic benefits, few deny that “the human rights argument in support of workers’ rights is compelling.”

The Canadian legal tradition has also long upheld the importance of people’s rights at work. In fact, the rights of working people have often been held as coterminous with human rights:

Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the Charter…all of these values are complemented and, indeed, promoted, by the protection of collective bargaining in s.2(d) of the Charter…the right to bargain collectively with an employer enhances the human dignity, liberty, and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work…

3 Ibid, 5.

The vast majority of Canadian people spend a significant portion of their lives at work. Consequently, where most people’s lives intersect their human rights is on the shop floor. The promotion of rights at work is the promotion of human rights, and the importance of such promotion should not be diminished or devalued.

In addition to being tantamount to the promotion of human rights, a lofty objective in and of itself, the promotion of labour rights is also a critical aspect of promoting and augmenting democracy. According to the Health Services Decision:


One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place. [p. 96]4

Extending rights for working people extends key features of democracy into the realm of work.

Far from being the province of any specific ideology or political party, in the Canadian legal tradition the promotion of rights at work and the facilitation of “industrial democracy” has long been seen as a moral imperative. As Andrew Sims explains, “…free collective bargaining was introduced in the public sector on principled grounds: because extending industrial democracy to more employees as a right of citizenship was thought to be the proper thing to do.”5 For Sims,

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and for the SFL, access to industrial democracy is a right by virtue of citizenship in Canada and promoting it is “the proper thing to do.”

The Saskatchewan Context

As in other Canadian jurisdictions, the Saskatchewan system of labour legislation is fundamentally based upon the Wagner Act\(^6\) model. In fact, “Saskatchewan adopted a model closer to the Wagner Act than any other province.”\(^7\) In adopting the Wagner Act model, the province established a system the intended result of which was to democratize work:

The adoption of the Wagner Act model of collective bargaining legislation was intended to promote industrial peace and economic stability, but also to foster democratic values in the workplace, and to enable workers to participate in workplace decision-making. In introducing the bill which became the Wagner Act, Senator Robert Wagner said that “we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood.”\(^8\)

It was precisely a recognition of the importance of industrial democracy that led Justice Dennis Ball to indicate that he is “satisfied that the right to strike is a fundamental freedom protected by s. 2(d) of the Charter along with the interdependent rights to organize and to bargain

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\(^6\) The principles of which are: ”(1) once a union gains the support of a majority of the employees in a workplace (majoritarianism), (2) it becomes the exclusive bargaining agent for all the employees in the workplace (exclusivity), (3) with whom the employer is obligated to bargain in good faith with respect to the terms and conditions of employment for all workers, (4) a ban on job action during the term of the collective agreement, (5) protections against employer coercion or interference with organizing activities, known as “unfair labour practices”, and (6) access to an independent body to resolve disputes and conclude collective bargaining.” Adams, G., *Canadian Labour Law, 2nd ed.* (Aurora: Canada Law Book, looseleaf) at s.1.250


collectively.” For Justice Ball, so intrinsic is a democratic character to work in Saskatchewan, and across the nation, and so fundamentally entwined are democratic rights with human rights, that laws infringing upon workplace democracy, embodied in the Government’s Bills 5 and 6, are in violation of the Charter.

In its “consultation paper,” the Government asks if the existing labour relations legislation adequately meets its intended purpose. If its purpose is to promote collective bargaining and industrial democracy, and if the purpose is to build upon the Wagner Act model, the principles of which have served as the basis for labour law across the nation, then the answer is a resounding “No.” Successive governments in the province have presided over a slow decline in unionization rates, which would seem to indicate that, quite contrary to undertaking upon amendments to limit industrial democracy, the current government should endeavour to improve access to people’s rights at work. It is, therefore, obvious that a greater commitment to promoting collective bargaining will be necessary to make labour relations legislation “successful.”

As Andrew Sims notes, “an analysis of labour law that ignores the underlying power relationships is doomed to failure.” Though it seems the provincial government, in drafting its “consultation paper,” has in fact identified an imbalance in the power relationships between employers and working people, it is the inverse of the relationship represented in scholarship or jurisprudence. Though the “consultation paper” is littered with leading questions that nudge respondents in the direction of constraining working people’s rights, it is the employer, in nearly every case, that has superior bargaining power in an employment relationship. Non-unionized working people face a number of practical obstacles in claiming even their basic rights as enshrined in the Labour Standards Act, while unionized employees can often find the provisions of a collective agreement practically unenforceable because of prohibitive costs of litigation. In light of the legal record in Saskatchewan, the government should reconsider its fundamental assumptions about the power relationship between working people and their employers.

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Industrial Democracy and Economics

In what was one of the most comprehensive studies of its kind, in 2002 the World Bank commissioned an exhaustive examination of the economic impacts of unionization. Though the study is not specific to Saskatchewan or even to Canada, it incorporates more than 1,000 primary and secondary studies and draws a number of tentative, though substantiated, conclusions:

- “There is some evidence from Canada and Malaysia to suggest that unions contribute to a reduction in the overall gender pay gap.”\(^{11}\)
- “In Mexico and Canada, unions have been found to reduce the discrimination against indigenous people.”\(^{12}\)
- “Union density per se has a very weak association, or perhaps no association, with economic performance indicators such as the unemployment rate, inflation, the employment rate, real compensation growth, labor supply, adjustment speed to wage shocks, real wage flexibility, and labor and total factor productivity. There is, however, one significant exception: union density correlates negatively with labor earnings inequality and wage dispersion.”\(^{13}\)
- “One of the key findings of our survey is that the impact of unions and collective bargaining at both the microeconomic and the macroeconomic levels is context specific.”\(^{14}\)

Though looking at individual studies yielded mixed results in terms of the economic impact of governments maintaining strong collective bargaining rights, there were clear benefits for historically disenfranchised groups, specifically women and indigenous peoples. At a time when our province is facing a crisis as we fail to involve First Nations, Métis, and Inuit people in our economy, extending collective bargaining rights may, at least, contribute to a solution.

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\(^{12}\) Ibid, 8.  
\(^{13}\) Ibid, 11.  
\(^{14}\) Ibid, 15.
When attempting to glean conclusions from a number of studies concerning the impacts of collective bargaining rights upon the gross domestic product (GDP) of a given nation:

One approach… is to identify countries that have undertaken major labor market reforms in the areas of freedom of association and the right to collective bargaining, and then to compare the performance of the economy before and after the reform. Using this approach, [the Organization for Economic Cooperation and Development] OECD (1996) has identified 17 countries that have undertaken significant labor market reforms over the past 20 years and has compared the average growth rate of GDP, manufacturing output, and exports in the five-year period before and the five-year period after the reforms…

...The evidence shows that on average, GDP grew at 3.8 percent per year before the improvement in labor standards and at 4.3 percent afterwards. Growth in manufacturing output increased by a smaller amount (from 3.4 to 3.6 percent).\(^\text{15}\)

Not only did the World Bank conclude that there is no “evidence that labor standards actually distort trade patterns in any significant way,”\(^\text{16}\) it concluded that, though each situation must be viewed in its context, establishing a democratic industrial system (ie. extending rights to organizing, collective bargaining, and to striking) may improve a nation’s economic fortunes. As the Federation has long argued, if more people have disposable income, as a result of negotiations with employers, not to mention the freedom to access the market, the economy can only benefit.

\(^{15}\) Ibid, 17.
\(^{16}\) Ibid, 20.
Recommendations of the United Nations International Labour Organization

In 2010, the International Labour Organization (ILO) issued a decision on a reference made by the SFL concerning the Government of Saskatchewan’s actions of 2007 and 2008 involving labour legislation and the Labour Relations Board. To date, the ILO’s recommended actions have remained undone. The SFL supports all of the recommendations:

a) The Committee expects that the Government will ensure that the provincial authorities hold full and specific consultations with the relevant workers’ and employers’ organizations in the future at an early stage of considering the process of adoption of any legislation in the field of labour law so as to restore the confidence of the parties and truly permit the attainment of mutually acceptable solutions where possible.

b) The Committee requests the Government to ensure that the provincial authorities take the necessary measures, in consultation with the social partners, to amend the Public Services Essential Services Act so as to ensure that the LRB may examine all aspects relating to the determination of an essential service, in particular, the determination of the sectors in question, classification, number and names of workers who must provide services and act rapidly in the event of a challenge arising in the midst of a broader labour dispute. The Committee further requests that the Public Service Essential Services Regulations, which sets out a list of prescribed essential services, be amended in consultation with the social partners. It requests the Government to provide information on the measures taken or envisaged in this respect.

c) The Committee requests the Government to ensure that the provincial authorities take the necessary measures so that compensatory guarantees are made available to workers whose right to strike may be restricted or prohibited and to keep it informed in this respect.

d) The Committee request the Government to ensure that the provincial authorities take the necessary measures to amend the Trade Union Act so as to lower the requirement, set at 45 per cent, for the minimum number of employees expressing support for a trade union in order to begin the process of a certification election. It requests the Government to keep it informed in this respect.
e) The Committee requests the Government to encourage the provincial authorities to endeavour, in consultation with the social partners, to find an appropriate means of ensuring that the LRB enjoys the confidence of all the parties concerned.

f) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.\(^{17}\)

We strongly encourage the Government of Saskatchewan to act upon each of the ILO’s recommendations, and to reaffirm a commitment to upholding our international obligations, as they relate to human rights, going forward.

Review of What, and for Whom?

One of the more troubling aspects of the Government’s “consultation” on labour law is that it seems completely unbidden. The “consultation paper” released at the outset of the process is replete with examples of questions that few, if any, working people in Saskatchewan, or elsewhere in Canada, are asking. Neither the SFL nor the affiliates have been asked to furnish any policy suggestions to serve as the basis for a legislative review. Consequently, we are left to wonder what the impetus for a comprehensive review was in the first place, as well as how the policies to be included in the review, and to be represented in the “consultation paper,” were determined.

There are relatively recent examples of legislative reviews in other Canadian jurisdictions that have been conducted in order to amend labour legislation, and the Government of Saskatchewan seems to have ignored them all when establishing our current process. In 1995, for example, Andrew Sims issued a report on his stewardship of the task force charged with reviewing Part 1 of the Canada Labour Code. In the report, Sims outlines the guiding principles that served the review, which seem to constitute a more effective process than the one the Government of Saskatchewan currently employs:

…in recommending reform, we will utilize the following premises:

- the existing Canada Labour Code (Part I) basically continues to serve its constituencies well;
- stability is desirable and pendulum-like changes to the Code do not serve the best interests of the parties or the public;
- consensus between the parties is the best basis for advocating legislative change;
- recommendations should be enactable, long-lasting and premised upon the overriding concept of voluntarism.

Therefore, any reform to the Canada Labour Code, Part I should be based upon the following criteria:

- Consensus has been achieved by the parties regarding the need for and the nature of the reform that is consistent with the public interest.
• There is a demonstrated area where the existing law is no longer working or no longer in line with public policy.

• It has been demonstrated that the provisions of the existing Code do not facilitate the intentions of the Parliament of Canada as set out in the Preamble of the Code.

• It has been demonstrated that the reform is necessary to:

  (a) encourage and ensure recognition of the social purpose of collective bargaining as an instrument for the advancement of fundamental freedom in Canadian industrial society;

  (b) ensure access to the fundamental rights to associate and act collectively;

  (c) maintain the general framework for collective bargaining and allow the parties to operate within that framework;

  (d) encourage voluntarism and good faith negotiations rather than prescribe results;

  (e) give recognition to the value in the workplace and society of collective bargaining between unions and employers;

  (f) facilitate the efficient resolution of workplace issues by the parties.\(^\text{18}\)

Sims’ principles are predicated upon the seemingly obvious premise that “consensus [should be] achieved by the parties regarding the need for and the nature of the reform that is consistent with the public interest.” The SFL has not been party to any consensus-building process related to the inadequacies of existing labour legislation and we could not, if asked, identify the issues that the government is so stridently attempting to resolve.

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**Pendulum Swing**

If not to address issues identified by consensus, it is also conceivable that a Government may establish a process, fraught though it may be, by which to alter labour legislation in order to achieve political or ideological goals. Again in his report *Seeking a Balance*, Sims expounds upon the dangers of a politicized labour law regime:

> We believe that labour legislation should provide a framework within which the parties can work out the details of their collective bargaining agreements. It is not designed to set the outcome of disputes; those are left to the parties, as long as they abide by the Code’s rules of fair conduct.

Throughout our deliberations, we heard both labour and management comment on the need for stability in our labour legislation. Both sides were reacting to what they view as excessive experimentation in the labour law reforms of a number of provinces. Undoubtedly there is room for political judgement about where the balance in our laws should lie. Some would push the pendulum one way, some the other. However, the concern identified by both sides is that the pendulum should not be pushed too far or too frequently. To do so destroys the predictability and underlying credibility upon which an effective collective bargaining system depends.

We identified a number of disadvantages of undue politicization of our labour relations laws. First, it distracts the parties from their primary role of negotiating appropriate collective agreements, tempting them instead to seek political “fixes” for what should be mutually bargained solutions. Second, it introduces an element of political confrontation into bargaining relationships, which undermines the ability of the parties to communicate frankly and directly with each other. Third, it creates the habit of seeking legislative intervention into collective bargaining disputes. This has a long-term corrosive effect and, in our experience, causes more labour disruption than it averts.

Fourth, it implies that labour relations is simply a political question, which denies the fundamental compromises and self-determination inherent in our present legislative scheme. Finally, it leads to competition between jurisdictions, where one jurisdiction is pressed to minimize the impact of its laws to attract jobs from another. In Canada, in
certain cases, this had led to a fragmentation of national bargaining structures and unnecessary variances in the various labour law regimes. This adds both cost and complexity to doing business in Canada.19

Somewhat ironically, a politically motivated desire to intervene in the collective bargaining process, even in the name of ensuring labour peace, could ultimately exacerbate labour discord. Swinging the pendulum further in the direction of employers by constraining working people’s rights, and imposing legislative remedies for problems that should be solved through free negotiation, fosters animus and “causes more labour disruption than it averts.”

Seen within a national context, the Provincial Government’s objective certainly seems to be to swing the pendulum in favour of employers and employer groups. In reference to the recent closing of the London, Ontario Caterpillar plant, Thomas Walkom notes both that “it is part of a coordinated attack across North America on unions and wages,” and that “the attack on wages is also being aided and abetted by governments.”20 Within such a context, the current “consultation process” certainly seems part of a coordinated effort to cede power to employers and employer organizations. We note with some concern, for example, that over 600 employers, employer organizations, and public bodies were invited to participate. By contrast, only forty organizations that represent working people were invited.21

21 http://www.lrws.gov.sk.ca/recipients-labour-legislation-review-invitation-consult
Scope, Breadth, and Timeline of the Review

Legislative Review: Too Much, Too Fast

As the SFL and numerous affiliates have already indicated, not only are the purpose and impetus for the review unclear, but its scope is too broad and its timelines unworkable. Though, undoubtedly, “it is necessary to keep the system [of labour legislation] attuned to changes in the environment,” the process “requires ongoing (but essentially modest) legislative review.”22 Reviewing 15, or more,23 pieces of labour legislation hardly constitutes “modest legislative review.” The Sims Task Force on Part I of the Canada Labour Code, for example, conducted its consultations and deliberations over a period of multiple years, and it did so over a single section of a single piece of legislation. Instead of thoughtful analysis and comprehensive consultation, the Government of Saskatchewan has deigned to give the people of the province 90 days to respond to questions that span 15 individual pieces of legislation. Furthermore, the Government has indicated an intention to introduce new legislation, based upon the results of the consultation, in the fall of 2012. It seems extremely unlikely that any thoughtful review of labour legislation in Saskatchewan, especially by comparison to reviews that have been conducted in other jurisdictions, can be concluded in such a short amount of time. The chances that the people of Saskatchewan can be adequately served by such a flawed “consultation” process are extremely remote. The review is simply too much, too fast. It seems that the Government has chosen to ignore the warnings issued in Justice Ball’s decision regarding Bills 5 and 6 and will continue to engage in “consultations” the results of which are predetermined.

23 As the Government’s discussion paper says, “the questions are not meant to be exhaustive but rather to initiate discussion.” Presumably, other pieces of legislation could be swept into the review in addition to the 15 mentioned by name.
Consultation

The most obvious method of ensuring that public policy decisions are informed and that they best serve the people of a given province is hold extensive, open, and public consultations. “In the absence of bi-partisan consultation or an attempt at consensus,” governments are often tempted “to please one constituency or the other – that is, to ’tilt the balance.’”\(^{24}\)

The Federation, and affiliates, have been insisting upon conducting meaningful consultation processes as a precondition of making major policy decisions – such as reviewing 15 pieces of labour legislation in one fell swoop – since the Government introduced its beleaguered Bills 5 and 6 in the Fall of 2007. As Justice Ball explains, “the Government responds by asserting, first, that it did engage in an extensive consultation process before enacting the impugned legislation, and second, that it had no duty to consult with SGEU in any event.”\(^{25}\) Of course, Justice Ball goes on to refute the Government’s assertions:

The Government’s first contention is not supported by the evidence. Although the Government made a valiant effort to prove otherwise, the evidence clearly establishes that substantive consultations with respect to the PSES Act took place only between the Government and employer groups. It also establishes that although the largest public sector Unions made every effort to meet with Government representatives in order to have meaningful input into the legislation, their efforts were unsuccessful. Any consultation with the Unions about the PSES Act was superficial at best.\(^{26}\)

The current “consultation process” can hardly be said to be an improvement over the failed process that ultimately lead to Bill 5 being deemed in violation of the Charter. In a letter to the Minister of Labour of July 12, 2012, the Saskatchewan Committee of the Canadian Association of Labour Lawyers says that “while this paper purports to set up a ‘consultation’ process, for the reasons which will be outlined below, CALL is of the opinion that the process envisaged by the


\(^{26}\) Ibid.
paper is anything but consultation, as that expression has come to be determined by the courts.”

CALL goes on to explain the major deficiencies of the current process:

Although described by its title as a “consultation” paper, the process offered is not consultation, for many reasons:

- It permits written submissions only
- Those submissions are not provided to the Advisory Committee in their original form, but are instead intercepted by the Ministry and “summarized” for the Advisory Committee
- There is no disclosure by the Government of any background papers, research, opinions or drafts relating to the proposed changes, policy considerations, etc.
- There is no transparency, or exchange of documents, so parties can see what others are submitting and respond as necessary
- There has been no identification of problems or identification of individuals/entities raising any such problems, with the exception of various statements by the Government that “During the last election, we heard on the doorsteps that…”
  Workers and their advocates are thus left shadow-boxing
- There are no oral hearings of any variety contemplated in the paper
- There is no process to allow unrepresented workers any voice whatsoever to be heard on significant changes – vacations, hours of work, etc. – many of whom would find making a “written submission” well beyond their ability or tradition
- Not insignificantly, it is an overwhelming task to attempt meaningful consultation on a single piece of legislation in the abbreviated time frame given (90 days), let alone 15 pieces of legislation

These are not the hallmarks of meaningful consultation. Instead, they are the hallmarks of failing to consult, or amount simply to notification and not true consultation.28

28 Ibid. 2-3.
In light of the Ball decision, the Federation of Labour and the healthcare unions of Saskatchewan issued consultation frameworks to Government, in an attempt to establish a process that is consistent both with the ruling of the Court of Queen’s Bench and the Charter.\textsuperscript{29} The principles of the framework are simple:

- Consultation should take place in advance of the tabling of legislation and before decisions are firmly made;

- The parties to consultation should include, at the least, working people’s organizations and employer groups affected, and others whose interests may be affected by the legislation;

- Consultation should be “full and detailed;”

- All parties should have access to all relevant information in the course of the consultation;

- Interested parties should be given sufficient time both to express their views and to ensure their submissions are seriously considered;

- Consultation must take place in good faith, confidence, and mutual respect;

- The government must take submissions seriously and discuss them in full, with a view to reaching a suitable compromise and/or demonstrably integrating submissions into the final outcome;

- The government must give weight to agreements it has made with working people’s organizations;\textsuperscript{30}

\textsuperscript{29} The Saskatchewan healthcare unions’ framework can be found here: \url{http://sk.cupe.ca/updir/sk/ckfinder/files/NEWS%20RELEASE_Healthcare%20unions%20propose%20consultation%20framework%20%20March%20%202012.pdf}
When developing its current “consultation process,” the Government had a number of relatively recent legislative reviews to draw from. CALL’s Saskatchewan Committee identifies three in its letter to the Minister:

1. Part I Canada Labour Code, 1995 – The task force established and chaired by Andrew Sims, Q.C. “The task force used a variety of methods to solicit input on the issues, including public hearings, informal consultations, as well as written submissions. All written submission were reviewed and considered by the Task Force in their entirety.” In stark contrast to the current “consultation” process, the task force “gathered information over a period of seven months and provided a final report to the federal government, reaching consensus between representatives of labour and management on many points.”

2. Part III Canada Labour Code, 2004 – Professor Harry Arthurs led the Commission on the Review of Federal Labour Standards (the “Arthurs Commission”), which conducted numerous public consultations. The Commission involved both the publishing of a consultation paper that solicited written submissions as well as two advisory panels: one of Canadian and foreign experts and the other of management and labour representatives. Informal consultations were also held, and all submitted material was made available on the Commission’s website. A report was published in 2006, two years after the commission was assembled.

3. “Looking closer to home, Saskatchewan governments have undertaken extensive consultations when changing labour laws. After the 1991 provincial election, the New Democratic Party government struck the Trade Union Act Review Committee that was comprised of equal numbers of employer and labour representatives and an independent chair, lawyer Dan Ish. The committee held public consultations throughout the province over a period of several months, with the goal of recommending changes that would be fair and balanced to both employers and unions. When the committee failed to come to a complete consensus, a second smaller committee made up of an employer representative,

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31 Letter from CALL to Minister Don Morgan. Page 8.
Mike Carr, presently Deputy Minister of Labour, a labour representative, Hugh Wagner of Grain Services Union and an independent chair, lawyer Ted Priel, was appointed and was able to achieve consensus on some issues.\textsuperscript{32}

Though the manner by which the Government has chosen to conduct “consultation” is troubling generally, we are particularly concerned about how the current process is contributing to the disenfranchisement of working people that do not have the benefit of belonging to unions. Workers that are not organized may have no organizational resources or capacity of which to avail themselves for the purposes of making written submissions. Limiting the process to written submissions alone is unrealistic and needlessly exclusionary. It is precisely the disenfranchisement of non-organized working people at the hands of the Government that led the SFL to call for the establishment of an advocacy vehicle to represent their interests and concerns,\textsuperscript{33} a call that the Government ignored.

Of course, it must be noted that no amount of consultation will save legislation that ultimately violates fundamental human rights. Having conducted the most thorough consultation process could not, for example, justify constraining rights to organizing, bargaining, or striking.

\textsuperscript{32} Ibid. 10.
\textsuperscript{33} http://www.sfl.sk.ca/news/releases/may-29-2012---sfl-calls-for-advocacy-vehicle-for-non-organized-working-people-in-saskatchewan
Striking/Picketing

Collective Bargaining

We are concerned with the assumption, represented by the “consultation paper,” that “collective bargaining is an adversarial process.” To suggest that collective bargaining is inherently adversarial is misguided and an extremely poor representation of a system that has brought about some of the most significant social progress in our nation’s history. Nearly anyone that has ever participated in the process, in good faith, will have seen ample opportunity for cooperation and for the parties to pursue mutual interest. Collective bargaining often facilitates success for businesses, the effective administration of programs, and the profitable delivery of products and services. Furthermore, good working relationships between working people and management, which are often established at the bargaining table, are essential to establishing labour peace:

Improving union-management relationships in a more concerted and strategic fashion is the overriding objective of the primary options upon which there was a general degree of consensus among stakeholders. This goal is premised upon the widely-held view that better labour-management relationships reduce the risk, frequency and duration of work stoppages.Indeed, in order to facilitate greater peace and efficiency within worker-management relations, more collective bargaining should transpire, not less. It should also be noted, contrary to comments Government MLAs have made in recent history, as Statistics Canada notes, “the proportion of estimated working time lost due to strikes and lockouts decreased to 0.01% in 2011 from 0.03% in 2010.” Given the evidence, it is troubling that the descriptor the government has chosen to ascribe to the process of collective bargaining is “adversarial.”

To mischaracterize collective bargaining as combative is one thing, to interfere in the collective bargaining process by means of legislation quite another, the latter having implications for

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Charter rights. A labour relations law must provide, at a minimum, to adequately protect freedom of association, “the statutory freedom to organize … along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.”37

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Striking

On the topic of striking, it is important not to allow the Government to draw a false equivalency between the strike and the lockout. Preventing employers from calling a lockout prior to an impasse is simply not the same thing as preventing a strike. The employer, under such a rule, could continue to operate at full capacity and, indeed, better prepare for a strike should the matter come to impasse. As Paul Weiler explains:

If the law were just to ban strikes by employees, that would effectively end collective bargaining. It would deprive the union of the ultimate lever it has to extract concessions from recalcitrant employer. In the eyes of trade unionists, it would leave the employees with no more than the right of collective begging. Nor could one disguise the one-sided nature of any such “reform” by prohibiting employer lockouts at the same time. A lockout is not the employer equivalent of a strike...the reciprocal employer lever is really the management prerogative to maintain or to change the terms and conditions which the employer will pay its employees who want to work in its operations...38

Though there would initially appear to be some symmetry to limiting strikes and lockouts alike, the far greater impact would fall upon working people. Because there exists a natural power imbalance between employer and employee, even measures that seem equally affective for both parties can have unequal consequences. As a result, legislation intended to affect access to strike and lockout should take the possibility of unequal impact into account.

There is perhaps little that can be added to the words of Justice Dennis Ball in any attempt to impart the importance of the right to strike. Justice Ball describes the right to strike as the third leg of a stool that also includes the right to organize and the right to bargain collectively. The three legs are interdependent and protected by the Charter:

I am satisfied that the right to strike is a fundamental freedom protected by s. 2(d) of the Charter along with the interdependent rights to organize and to bargain collectively. That conclusion is grounded in Canada’s labour history, recent Supreme Court of Canada jurisprudence and labour relations realities. It is also supported by international instruments

which Canada has undertaken to uphold. Governments may enact laws that restrict or prohibit essential service workers from striking, but those prohibitions must be justified under s. 1 of the *Charter*.\(^{39}\)

Justice Ball goes on to describe the impact of the Government’s attempt to limit people’s right to strike, as represented in Bill 5:

> Quite apart from the political environment of the time, it may also be that the Government did not consult with the Unions because the PSES Act was intended to have not one, but two, objectives: the first, being to ensure the continuation of essential services during a labour dispute; the second, being to alter the balance of power at the collective bargaining table. The most obvious way to alter the balance of power would be to empower every public employer to prohibit any meaningful strike activity by employees while ensuring that he employees would have no access to any alternative dispute resolution process.\(^{40}\)

The government used legislation to take a *Charter*-protected right from thousands of people in the province, and the law was stricken down in its entirety.

As if Justice Ball’s decision was not sufficient evidence of the fact that striking is a fundamental right, the Government of Canada has also recognized it. In 1966 Canada ratified the International Covenant on Economic, Social and Cultural rights, which obligates members to “ensure” “[t]he right to strike, provided that it is exercised in conformity with the laws of the particular country.”\(^{41}\)

The ILO has noted that in order to limit the fundamental rights of working people to strike, they must be provided access to some conciliation mechanism, though a specific kind of conciliation mechanism. In regard to prerequisites to a strike, the ILO has stated that voluntary conciliation and arbitration in industrial disputes prior to a strike being called is acceptable, but it suggests that recourse to arbitration that is compulsory and that does, in practice, prevent the calling of a strike is unacceptable. The ILO Freedom of Association Committee has also stated that the

\(^{39}\) *Saskatchewan Federation of Labour v. Saskatchewan*, 2012 SKQB 62. 58.
\(^{40}\) Ibid. 82.
requirement for negotiation, conciliation, or arbitration must be accompanied by “adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage.” A mechanism, therefore, that cannot claim to be “adequate, impartial, and speedy” will not be acceptable. Justice Ball affirms the necessity of a dispute resolution mechanism as a part of any attempt to limit the right of working people to strike:

It is enough to say that no other essential services legislation in Canada comes close to prohibiting the right to strike as broadly, and as significantly, as the PSES Act. No other essential services legislation is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential service workers and, where those designations have the effect of prohibiting meaningful strike action, an independent, efficient, overall dispute mechanism. While the purpose of all other essential services legislation is the same as the PSES Act, none have such significantly deleterious effects on protected rights under s. 2(d) of the Charter.

Of course, others question the value of arbitration as an alternative to recourse to strike action altogether:

I am unconvinced by those who advocate arbitration as an alternative to strike or lockout action. Despite my long career as an interest arbitrator, I am of the opinion that the process is too inflexible and too prone to posturing by the parties.

Picketing

If the strike is the economic pressure exerted by working people, then picketing is an important part of the persuasive pressure. Protected under the Charter as free expression, picketing is one of the means by which people access their right to strike. In a landmark decision of 2002, the Supreme Court explains that “the imbalance between the employer’s economic power and the

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relative vulnerability of the individual worker informs virtually all aspects of the employment relationship,” and that “free expression in the labour context thus plays a significant role in redressing or alleviating this imbalance.” The Supreme Court goes on to explain the important interrelationship between, picketing, free expression, self-actualization and democracy:

Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(b) of the Charter. This Court’s jurisprudence establishes that both primary and secondary picketing are forms of expression, even when associated with tortious acts: *Dolphin Delivery*, supra. The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society (see *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452). The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one’s circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one’s life and perhaps the wider social, political, and economic environment.

Free expression is particularly critical in the labour context. As Cory J. observed for the Court in *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, “[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations” (para. 25). The values associated with free expression relate directly to one’s work. A person’s employment, and the conditions of their workplace, inform one’s identity, emotional health, and sense of self-worth: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *KMart*, supra. So fundamental is free expression to fulfilling a role as a person, as a citizen, and to participating in democracy, that the Court concludes “free expression in the labour context benefits not only

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46 Ibid. 19-20.
individual workers and unions, but also society as a whole.” 47 Given the lengthy jurisprudential record on freedom of expression, and the relationship between picketing and free expression, it seems incredibly unlikely that any limitations imposed upon picketing could be consistent with the Charter.

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47 Ibid. 21.
The Rand Formula

For decades, the Rand Formula has governed the way in which union dues are remitted to unions in organized workplaces. The rational was simple:

Justic Rand commented in his award that he considered it “entirely equitable …that all employees should be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract; that they must take the burden along with the benefit.”

As Walkom explains, “the rationale here was simple: If a union provides services to all workers in a bargaining unit then everyone in that unit – whether fans of organized labour or not – must chip in to pay the costs.” So fundamental is the equitability described in Justice Rand’s decision, that the Alberta Labour Relations Board has determined that “the Rand formula itself forms part of the freedom of association that is protected by s. 2(d) and can no longer be considered an issue capable of being the subject of collective bargaining.”

Though fringe segments of society continue to clamour for abandoning the Rand Formula, and though our Premier has publically mused about the possibility of allowing people of a certain age to “opt out” of paying dues, it remains a Charter-protected right and a common sense approach to labour relations:

The personal beliefs of anti-union workers are stepped on when monthly dues are deducted from their paychecks, even though they don’t belong to a union. In right-to-work states, the same workers wouldn’t have to pay dues but would benefit from the higher wages a union might negotiate on their behalf. The unions have a word for that: free-loading.

Instead of reducing the integration of certain union and management operations, by removing the requirement for a mandatory dues “check off,” for example, a more effective policy for maintaining labour peace might be to foster greater integration. A bloomber.com article suggests, for example, that “the answer isn’t right-to-work but better labor-management cooperation. Both sides might learn a lesson from Germany, where union members often sit on corporate boards and vote on management pay (helping to keep in check excessive, U.S.-style compensation).” \(^{52}\)

Unions are, for the most part, “voluntary associations” under the law. Union members have recourse within their constitutions and, ultimately, through the Courts or through a duty of fair representation application if they believe that the union is not following its own constitution. Battles over dues remittance is not something with which the Labour Relations Board should be further burdened.

Allowing further grounds to “opt out” of union membership is not appropriate. Whether someone is a student or a minor, they gain the benefits of representation under the collective agreement and to allow them to opt out of union membership allows them to reap the benefits of collective bargaining without sharing the cost. In terms of administration, an analogy may be drawn to the requirement to pay income tax. The Courts have universally rejected attempts to allow individuals to refuse to pay a portion of their income tax because of an objection to one or another aspect of public spending – often either healthcare expenditures on abortion, or military expenditures. If taxes are the cost for a civilized society, it could be said that union dues are the cost for a civilized workplace.

It should also be noted that those with a religious objection to joining a trade union are already exempt from joining the union under The Trade Union Act, and they have a right to have their dues remitted to a charity of their choice. Again, to have a statutory requirement that individuals be allowed to opt out of given types of spending is not required; individuals may alter the course of a union’s spending through participation in existing democratic processes upon which all unions are founded (though, of course, there is no guarantee that the majority of members will agree with them).

\(^{52}\) Ibid.
The premise of Canadian labour relations is to avoid the “free rider” situation; any attempt to promote more “free riders” should be resisted. A union, fundamentally, is a democratic institution, and within democratic institutions unanimous consent is not necessary. Instead, they rely on the principal of majority rule to decide upon appropriate policies. Once the majority has come to a decision, the decision is binding for everyone, including those who may have voted against it. Collective bargaining is a public good where workers share the costs and the benefits, and it should not be constrained or fragmented any further.

It should also be noted that any attempt to institute a regime where employees may simply choose whether or not to join the union, but the union is still required to represent them, is entirely unacceptable and strikes at the very heart of Canadian labour relations. Though such arrangements are relatively common in the United States, they are the most extreme example of the “free rider” problem. It is, in fact the problem with “free riders” that the Alberta Labour Relations Board has ruled that imposing the Rand Formula model is an important part of the Canadian labour relations system and, indeed, a constitutional right.

The Saskatchewan Federation of Labour supports a mandatory dues check off system, as well as mandatory dues remittance.
Discriminatory Accounting Rules for Unions

The Government has clearly indicated an intention to require unions to provide annual audited financial statements not just to its members, but also to the Government itself and to the general public. This would also, incidentally, be a means by which governments could track union involvement not only in the political process, but also with interest groups, international aid organizations, think tanks, and other organizations. Under such a system, an employer or the Government (which could also, of course, be an employer) access to information such as how much the union has budgeted for legal proceedings (grievances, ULPs, etc.) not to mention job action (strikes etc.). Of course, depending on the information sought, public disclosure could also potentially violate the privacy rights of union members. Public disclosure thereby raises the possibility for employers or Governments to generate “black lists” of union members.

What the Government seems to continually overlook, is the fact that unions are already democratic institutions accountable to their members. In fact, even the act of organizing requires participation in democratic processes. Members are entitled to access financial information in their unions, and many union constitutions require that statements be provided on a recurring basis. Once again, the problem that the Government is intent on addressing is unclear. As Jim Stanford says of Federal Bill C-377:

The actual issue contemplated by the bill (requiring unions to publicize their financial statements) is an invented non-problem. The CAW, like other unions, discloses its audited financial statements regularly to its elected board of directors, to all union locals, and to delegates to its conventions. Annual audited statements must be filed with government labour boards, both provincially and federally. Individual members can request the statements from their local, from the national union, or (if they are “frightened” by the big bad union bosses) directly from the labour boards.53

To suggest that unions are somehow lacking in financial disclosure policies is simply false. In fact, other organizations in Saskatchewan would do well to emulate a union’s disclosure regime.

Another obvious problem with the innuendo by which the Government has communicated its intentions to legislate greater transparency from unions is that singling out unions with legislation is flagrantly discriminatory. Why for example should one organization be required to abide by special accounting rules? Again, as Jim Stanford explains:

It is interesting to compare what unions disclose through their internal democratic processes, reinforced by the requirements of the labour boards, with what corporations must disclose. Publicly-traded companies, of course, are required to disclose financial statements (some of them audited, not all), executive compensation (top 5 execs), and other details to their own shareholders (and potential shareholders), by virtue of securities regulations (not tax law). Private companies, however, don’t have to disclose a thing. This includes most Canadian subsidiaries of foreign firms — which are some of the most important businesses operating in Canada. A ruthless multinational like U.S. Steel, for example, in the process of trying to starve out its workers in Hamilton, doesn’t have to divulge one line of its Canadian financial statements to the Canadians who depend on its activity and presence. Why focus the demand for transparency against unions, who are clearly the David in these conflicts with uber- secretive Goliaths?

Unions are not alone in that they receive funds from members that can then be allocated or disbursed according to the prerogative of elected, representative boards. Other associations with mandatory membership have been exempt from the discussion to date. The Law Society of Saskatchewan, the Saskatchewan Medical Association, the Association of Saskatchewan Realtors, the Saskatchewan Association of Architects, and the Saskatchewan Dental Hygienists Association, just to name a few, are all organizations that collect “dues,” in some form, from members and act on their behalf. It is unclear why unions should be singled out as requiring more stringent disclosure practices, while a number of other organizations in the province with similar or even identical structures do not. As David Climenhaga suggests:

…the same logic being applied to unions by this alliance of far-right "think tanks," online and journalistic bloviators, neo-Con Members of Parliament, anti-union private corporations and business combines, and AstroTurf "taxpayer" and "small business" federations applies to most of their activities as well.
So maybe the bright light of a freshly charged forensic accountant’s flashlight would be just the thing to shine on the books of private corporations who benefit from tax breaks and subsidies. This goes double for "think tanks" like the Fraser Institute and the Frontier Centre (neither of which are anything more than market-fundamentalist PR agencies) and AstroTurf groups like the Canadian Taxpayers Federation (which does not represent the interests of taxpayers) and the Canadian Federation of Independent Business (which does not represent the interests of independent businesses).\(^5\)

Construction Associations, Chambers of Commerce, the Canadian Taxpayers Federation, the Canadian Federation of Independent Business, and other organizations all collect fees from members and then allocate or disperse funds on behalf of the members. It is extremely difficult to see any way not to interpret Bill C-377-styled laws as anything other than ideological, discriminatory attacks on democratic organizations of working people.

The SFL Executive Council

Submitted without prejudice, as it relates to any ongoing or future legal action and/or proceeding that relates to, or is derived under, any labour-related legislation, on behalf of the SFL Executive Council.

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