

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 62**

Date: **2012 02 06**
Docket: Q. B. G. No. 1059 of 2008
Judicial Centre: Regina

BETWEEN:

THE SASKATCHEWAN FEDERATION OF LABOUR
(IN ITS OWN RIGHT AND ON BEHALF OF THE
UNIONS AND WORKERS IN THE PROVINCE
OF SASKATCHEWAN)

PLAINTIFFS

- and -

HER MAJESTY THE QUEEN, IN RIGHT OF THE
PROVINCE OF SASKATCHEWAN

DEFENDANT

- and -

SASKATCHEWAN UNION OF NURSES,
CANADIAN UNION OF PUBLIC EMPLOYEES,
SERVICE EMPLOYEES INTERNATIONAL
UNION (WEST), SASKATCHEWAN
GOVERNMENT AND GENERAL EMPLOYEES'
UNION

UNION INTERVENORS

- and -

REGINA QU'APPELLE REGIONAL HEALTH
AUTHORITY, CYPRESS HEALTH
AUTHORITY, FIVE HILLS REGIONAL
HEALTH AUTHORITY, SASKATOON
REGIONAL HEALTH AUTHORITY,
HEARTLAND REGIONAL HEALTH
AUTHORITY, SUNRISE REGIONAL HEALTH
AUTHORITY, PRINCE ALBERT PARKLAND
REGIONAL HEALTH AUTHORITY,
SASKATCHEWAN URBAN MUNICIPALITIES
ASSOCIATION, SASKATCHEWAN
ASSOCIATION OF RURAL MUNICIPALITIES,

CITY OF REGINA, CITY OF SASKATOON,
UNIVERSITY OF SASKATCHEWAN,
UNIVERSITY OF REGINA, SASKATCHEWAN
POWER CORPORATION, SASKENERGY
INCORPORATED

EMPLOYER INTERVENORS

Counsel:

Larry Kowalchuk and Craig Bavis	for the Saskatchewan Federation of Labour et al.
Juliana Saxberg	for the Saskatchewan Government and General Employees Union
Peter Barnacle	for the Canadian Union of Public Employees
Drew Plaxton and Adam Touet	for the Service Employees International Union (West)
Graeme G. Mitchell, Q.C., Barbara C. Mysko and Katherine M. Roy	for the Government of Saskatchewan (Attorney General)
Gary Bainbridge and Marcus Davies	for the Saskatchewan Union of Nurses
Leah Schatz, Shannon Whyley and Robert Frost-Hinz	for Cypress Regional Health Authority, Five Hills Regional Health Authority, Heartland Regional Health Authority, Prince Albert Parkland Regional Health Authority, Regina Qu'Appelle Regional Health Authority and Sunrise Regional Health Authority
Evert Van Olst	for the Saskatoon Regional Health Authority
Brian Kenny, Q.C. and Jana Linner	for SaskEnergy Incorporated and Saskatchewan Power Corporation
Michelle Ouellette, Q.C. and Dean Stanley Robert G. Kennedy, Q.C.	for the University of Saskatchewan for the City of Regina, the City of Saskatoon, Saskatchewan Urban Municipalities Association, Saskatchewan Association of Rural Municipalities
Erin Kleisinger	for the University of Regina

JUDGMENT
February 6, 2012

BALL J.

INTRODUCTION

[1] On November 7, 2007 a new Government was elected in Saskatchewan. Six weeks later, *The Public Service Essential Services Act*, S.S. 2008, c.P-42.2 (the “PSES Act”) and *The Trade Union Amendment Act 2008*, S.S. 2008, c. 26 and c. 27 (the “TUA Act”) were introduced. The legislation was proclaimed May 14, 2008.

[2] The Saskatchewan Federation of Labour (the “SFL”) and the intervenor unions challenge the constitutional validity of the PSES Act and the TUA Act on the basis that they infringe rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, (the “Charter”) in a manner that cannot be demonstrably justified under s. 1 of the *Charter*.

[3] The challenges to the validity of the legislation require the court to determine the extent to which the *Charter* protects collective action by employees, including the interdependent freedoms to organize, to bargain collectively and to strike, and to balance those protections with the need to ensure the effective delivery of essential services to the community by public sector employees.

[4] In Part I of this judgment I conclude that the PSES Act infringes upon the freedom of association of employees protected by s. 2(d) of the *Charter*, in a manner that cannot be justified under s. 1 of the *Charter*. Accordingly, the PSES Act is declared to be of no force or effect, with the declaration of invalidity suspended for a period of 12 months. In Part II of this judgment I conclude that the TUA Act does not infringe on the *Charter*, and dismiss the plaintiffs' claim for a declaration of invalidity.

OVERVIEW OF DECISION

[5] Although the PSES Act and the TUA Act were introduced and enacted by the legislature at the same time, they are discrete pieces of legislation and will be considered separately. Accordingly, in Part I of this decision I will focus on the constitutionality of the PSES Act. In doing so I will:

- (1) introduce and outline generally the provisions of the PSES Act;
- (2) summarize proceedings in other forums relevant to arguments advanced by the parties in this action. Those proceedings have included:
 - (i) mediated/arbitrated collective bargaining between the Government and the Saskatchewan Government and General Employees Union (“SGEU”);
 - (ii) a union complaint to the International Labour Organization with respect to the PSES Act;

- (iii) an effort by Canadian Union of Public Employees (“CUPE”) to access the limited dispute resolution process in the PSES Act; and
 - (iv) other judicial proceedings being pursued concurrently with this action;
- (3) consider relevant rights and freedoms protected by the *Charter* with particular emphasis on whether the right to strike is protected by s. 2(d) of the *Charter*. This will include consideration of, but will not be confined to, the role of the strike in collective bargaining, Canada’s international law commitments and their relevance to *Charter* interpretation, and the most recent Canadian jurisprudence concerning the scope of s. 2(d);
- (4) decide whether the PSES Act infringes upon the right to strike under s. 2(d) of the *Charter*; and
- (5) determine whether the infringements have been demonstrably justified by the defendant pursuant to s. 1 of the *Charter*. The determination will be based on the criteria enunciated in *R. v. Oakes*,¹ and will consider whether the PSES Act has a pressing and substantial objective, and whether it meets the requisite tests of proportionality.

[6] In Part II of this decision I will focus on the constitutionality of the TUA Act. By relying on various conclusions reached in Part I, my analysis in Part II will be relatively succinct.

¹ [1986] 1 S.C.R. 103

PART I: THE PUBLIC SERVICE ESSENTIAL SERVICES ACT

1. General Provisions

[7] The PSES Act legislates an essential services regime for employees of public employers in Saskatchewan. Understanding that regime requires recognition that there are three basic approaches to essential service dispute resolution in Canada. They have been identified as:

- (a) the no-strike model, which prohibits strikes entirely and usually provides for some form of compulsory arbitration as the mechanism to resolve disputes concerning wages and other terms and conditions of employment;
- (b) the unfettered strike model, under which there are no restrictions on strikes and lockouts other than the standard procedural requirements in the applicable labour relations statute; and
- (c) the designation or controlled strike model, a middle ground between the first two which seeks to leave the underlying collective bargaining dispute to be resolved through the interplay of power, but utilizes an independent adjudication process to determine which employees must remain at work during strikes and lockouts in order to maintain essential services.²

² See Adell, Grant and Ponak, *Strikes in Essential Services* (Kingston: IRC Press, Queen's University, 2001)

The PSES Act ostensibly adopts a “designation” or “controlled strike” model. It applies to all “public employers”, which by definition includes the Government of Saskatchewan, all Crown corporations, regional health authorities and affiliates, the Saskatchewan Cancer Agency, the Universities of Saskatchewan and Regina, all cities, towns, villages and other municipalities, all Boards that employ police officers, the Saskatchewan Institute of Applied Science and Technology (“SIAST”) and, with respect to the Government of Saskatchewan, all persons, agencies or bodies that the Government may prescribe by regulation.

[8] Section 2(c) of the PSES Act defines “essential services” as follows:

2 In this Act:

...

(c) "essential services" means:

(i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:

(A) danger to life, health or safety;

(B) the destruction or serious deterioration of machinery, equipment or premises;

(C) serious environmental damage; or

(D) disruption of any of the courts of Saskatchewan; and

(ii) with respect to services provided by the Government of Saskatchewan, services that:

(A) meet the criteria set out in subclause (i); and

(B) are prescribed;

...

[9] The *Public Services Essential Services Regulations*, R.R.S. c. P-42, Reg 1, O.C. 539/2009 (the “PSES Regs”) were enacted on July 10, 2009 pursuant to ss. 2(c)(ii) and s. 21(b) of the PSES Act. The PSES Regs list various services and programmes provided by the Government of Saskatchewan which are prescribed as essential.

[10] The PSES Act contemplates the negotiation of an essential services agreement between public sector employers and representative trade unions. Section 6 requires the parties to begin their negotiations at least 90 days before the expiry of their collective agreement. The contents of the agreement are set out in s. 7 which states:

7(1) An essential services agreement must include the following provisions:

- (a) in the case of an employer other than the Government of Saskatchewan, provisions that identify the essential services that are to be maintained;
- (b) provisions that set out the classifications of employees who must continue to work during the work stoppage to maintain essential services;
- (c) provisions that set out the number of employees in each classification who must work during the work stoppage to maintain essential services;
- (d) provisions that set out the names of employees within the classifications mentioned in clause (b) who must work during the work stoppage to maintain essential services;
- (e) any other prescribed provisions.

(2) For the purposes of clause (1)(c), the number of employees in each classification who must work during the work stoppage to maintain essential services is to be determined without regard to the availability of other persons to provide essential services.

[11] If an essential services agreement has not been concluded at least 30 days before the expiry of the collective agreement, the public employer can give notice to the union pursuant to s. 9 of the PSES Act. This means that the notice can be delivered 60 days after negotiations for an agreement must commence. The notice must set out the following:

- (a) the classifications of employees who must continue to work during the work stoppage to maintain essential services;
- (b) the number of employees in each classification who must work during the work stoppage to maintain essential services;
- (c) the names of employees within the classifications mentioned in clause (a) who must work during the work stoppage to maintain essential services;
- (d) in the case of a public employer other than the Government of Saskatchewan, the essential services that are to be maintained.

Section 9(3) of the PSES Act requires the public employer to notify each of the named employees that he or she must work during the work stoppage to maintain essential services. Section 9(4) empowers the public employers to at any time designate additional numbers of employees and the names of those employees "... who must work during all or any part of the work stoppage to maintain essential services".

[12] Section 10 of the PSES Act provides minimal authority to the Saskatchewan Labour Relations Board ("SLRB") to review the numbers of employees required to work

in each classification during a strike. However, the SLRB is not given authority to review the services designated by the employer or the specific persons who must work.

[13] The provisions of the PSES Act will be considered in more detail during the course of this decision.

2. Previous Proceedings in Other Forums

[14] In support of their various arguments the Unions rely in part on Canadian labour history, recent Canadian judicial authority, and Canada's international law obligations. In addition, the Unions advance two arguments based on three proceedings that have already occurred in other forums.

[15] One argument is that the PSES Act and PSES Regs unilaterally abrogated terms and conditions of employment contained in collective agreements negotiated between the Unions and the Government of Saskatchewan. For that reason, the Unions submit, the Government, in its capacity as employer, had a duty to consult with them before the PSES Act was proclaimed and/or the PSES Regs were promulgated. In support of this argument the Unions adduced evidence with respect to the manner in which the PSES Act and the PSES Regs invalidated negotiated (or arbitrated) provisions of a collective agreement between SGEU and the Government of Saskatchewan.

[16] A second argument advanced by the Unions is that the PSES Act deprives employees of a meaningful right to strike, thereby infringing s. 2(d) of the *Charter*. They

say that the infringement cannot be justified under s. 1 of the *Charter* unless the legislation provides access to independent dispute resolution processes with respect to:

- (1) the overall settlement of wages and other terms and conditions of employment; and/or;
- (2) whether public employer designations of essential service employees required to work during a strike are justified.

The Unions say that neither of those independent dispute resolution processes are available under the PSES Act.

[17] In support of their argument that access to these forms of independent dispute resolution process must be provided, the Unions rely in part on the results of a complaint to the Governing Body of the International Labour Organization (“ILO”) concerning the impugned legislation. In support of their argument that the PSES Act does not provide access to a meaningful dispute resolution process, the Unions rely on the provisions of the PSES Act and evidence of CUPE’s futile efforts to engage the limited jurisdiction of the SLRB under s. 10 of the legislation.

[18] These proceedings in other forums, and the manner in which they have influenced the scope and structure of this action, are summarized below.

(i) **Mediation/Arbitration Proceedings Between Government of Saskatchewan and SGEU**

[19] The intervenor SGEU represents approximately 11,000 employees who work for the Government of Saskatchewan and its agencies. Most of the employees are included in one certified bargaining unit.

[20] A Collective Bargaining Agreement between the Government and the SGEU expired on September 30, 2006. Negotiations between the parties took place, and members of the SGEU engaged in lawful strike action from December 21, 2006 through February 4, 2007.

[21] The strike was resolved with the assistance of a special mediator, Vince Ready. Mr. Ready was appointed by the Minister of Labour on January 11, 2007 pursuant to s. 23.1(1) of *The Trade Union Act*.³

[22] On January 24, 2007 Mr. Ready issued Recommendations for Settlement which stated:

Essential Services for 24-hour Institutions and Highway Employees

In today's complex society it is generally accepted that certain functions of government services are more essential than others. A recent telling example of this broad proposition is the severe winter storms which disrupted essential transportation routes.

The removal of highways crews during severe winter weather raises issues of public safety as does the displacement of RCMP from rural communities to staff correctional centres.

³ R.S.S. 1978, c. T-17, as am.

The Union left highways workers in place to maintain northern airports, air ambulance services and important testing facilities such as the Provincial Lab and the Prairie Diagnostic Centre. These are critical for maintaining public safety and this was recognized by the Union.

The difficulty is that, unlike most provinces in Canada, there is no legislative regime in Saskatchewan for the provision of essential services during a labour dispute and therefore no procedure or guidelines to assist the parties in working their way through this difficult area. It is of course available to the parties to negotiate the provision of essential services on an ad hoc basis during the labour dispute but this is often difficult to do when attention is focused on the issues in dispute and there is no mechanism or procedure for addressing the vital public policy aspect of essential services.

I therefore recommend:

1. That the parties insert into the Collective Agreement the language necessary to address the continuation of essential services during a labour dispute, particularly in the Highways Department during winter months, and any other services necessary to prevent a danger to the health and safety of the public.
2. That the parties negotiate an essential services agreement as part of the Collective Agreement within 180 days of the date of these recommendations.
3. That, in the event the parties fail to reach agreement, the issue be referred to Vince Ready or Colin Taylor, Q.C. for final and binding resolution.

[23] Those recommendations were embodied verbatim into a Memorandum of Agreement signed by the parties on February 14, 2007. A number of meetings to negotiate an Essential Services Agreement were held. No agreement was reached. In October of 2007, at the request of the parties, Mr. Ready agreed to intervene and mediate the ongoing negotiations.

[24] On November 7, 2007 the Saskatchewan Party was elected to form the new Government of Saskatchewan. On December 19, 2007 the proposed PSES Act and the

proposed TUA Act were introduced into the Legislature. Notwithstanding the enactment of the PSES Act, in May 2008 the mediation/arbitration process continued. In November of 2008 representatives of the Government and the SGEU met again with the special mediator, Mr. Ready. No agreement was reached.

[25] The agreement of February 14, 2007 had stated that if the parties failed to reach an Essential Services Agreement, the issue would be referred to Mr. Ready and/or Colin Taylor, Q.C. On March 3 and 4, 2009 the parties presented their respective positions to arbitrator/mediator Colin Taylor. On March 26, 2009 Mr. Taylor provided the parties with a “preliminary essential services designation” setting out various governmental programs required to prevent danger to life, health or safety – that is, those required to be provided pursuant to s. 2(c)(i) of the PSES Act. On April 30, 2009 the Government delivered directly to SGEU a list of additional services it proposed to consider essential for the purposes of the PSES Act.

[26] Arbitrator/mediator Taylor issued an award on July 2, 2009⁴ which finalized his “preliminary essential services designation” respecting programs and services. The result was that approximately 3200 SGEU members, or about 29% of the approximate 11,000 employees of the Government and its agencies could be prohibited from participating in strike action in the “danger to life, health or safety” category. Mr. Taylor noted that the Government intended to prescribe an additional 225 employees in the other three essential service categories, which would increase the overall proportion of employees prohibited from striking to about 31%. He described the SGEU bargaining

⁴ Arbitration Award of Colin Taylor, Q.C. *Re: Essential Services - Binding Interest Arbitration* filed as Exhibit R to the Affidavit of Barry Nowoselsky

unit as “a large and heterogeneous unit with a relatively low level of essentiality overall” and expressed the view that collective bargaining could continue to be maintained between the Government and the SGEU “on the footing of a ‘controlled strike’ by the non-essential majority”.

[27] Although Mr. Taylor decided that he did not have the jurisdiction to include an interest arbitration clause in the parties’ Essential Services Agreement, he stated that the Government’s power to prescribe services under s. 2(c)(ii) and the limited scope of the SLRB’s power of review under s. 10 could arguably “attenuate the SGEU’s right to strike to such a degree that interest arbitration will be necessary as a ‘compensatory guarantee’”. He then stated at para. 43 of his Award:

[43] The absence of such a mechanism becomes then, however, a failing of the legislation. As such, it is for the SGEU to pursue in its constitutional challenge to the *PSESA*.

[28] The PSES Regs were implemented on July 13, 2009 prescribing essential services provided by the Government of Saskatchewan pursuant to the PSES Act. The services included those identified by arbitrator/mediator Taylor in his July 2, 2009 award plus the additional services and programmes prescribed as essential by the Government.

[29] As previously mentioned, the SGEU contends that the Government had a duty to consult with its representatives before enacting provisions of the PSES Act and the PSES Regs. It argues that this duty existed because of the special relationship between the Government, *qua* employer, and the trade union representing its employees, and because the provisions of the PSES Act and the PSES Regs abrogated the

mediated/arbitrated agreement dated February 14, 2007. I will return to these arguments regarding the duty to consult during my assessment of whether the PSES Act satisfies the requirements of s. 1 of the *Charter*. That portion of the assessment will be found at paras. 152 to 169 of this decision.

(ii) **Complaint to The International Labour Organization (the “ILO”)**

[30] In June of 2008 the National Union of Public Employees (“NUPGE”), on behalf of the SFL, and the Canadian Labour Congress (“CLC”) complained to the ILO with respect to the provisions of the PSES Act and the TUA Act. The complaint alleged that the statutes:

... impede workers from exercising their fundamental right to freedom of association by making it more difficult for workers to join unions, engage in free collective bargaining and exercise their right to strike.⁵

[31] Canada is a member of the United Nations and the ILO. Canada has undertaken to uphold the right of employees to engage in collective bargaining, including the right of employees to strike, pursuant to a series of international treaties (or Conventions) and covenants. For the purposes of this action, the most significant are ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize (“Convention No. 87”)⁶ and two United Nations Covenants: the U.N.

⁵ CFA Committee Report GB. 307/7 Case No. 2654 Introduction
<http://www.ilo.org/wcmsp5/groups/public---ed_norm/---relconf/documents/meetingdocument/wcms_124972.pdf>

⁶ 68 U.N.T.S. 17

International Covenant on Economic, Social and Cultural Rights (the “ICESCR”)⁷ and the U.N. International Covenant on Civil and Political Rights (the “ICCPR”).⁸ Both of the United Nations Covenants make reference to Convention No. 87.

[32] Convention No. 87 was generated in 1948⁹ and formally ratified by Canada in 1972. Both the ICESCR and the ICCPR were acceded to by Canada on May 19, 1976, and both came into effect on August 19, 1976. Before accession, the Federal Government obtained the agreement of the provinces, all of whom undertook to take measures for implementation of the covenants in their respective jurisdictions.¹⁰ Nevertheless, it would appear that no implementing legislation has been enacted in Saskatchewan.

[33] As well, Canada has supported the Declaration of Fundamental Principles and Rights at Work, which was adopted by the ILO in 1998. The substance and relevance of these international instruments and decisions will be dealt with later. For now, it is enough to state that they provided the platform for the complaint filed with the ILO with respect to the PSES Act.

⁷ 993 U.N.T.S. 3

⁸ 999 U.N.T.S. 171

⁹ In 1949 the ILO generated Convention No. 98 concerning the Right to Organize and Collective Bargaining. Canada has not ratified Convention No. 98

¹⁰ See generally: Canada, *International Covenant on Economic, Social and Cultural Rights: Report of Canada on the Implementation of Articles 10-12 of the Covenant* (Ottawa: Department of the Secretary of State, 1982) at 1-8

[34] The complaint was considered by the ILO's Committee on Freedom of Association (the "CFA"). The Government of Saskatchewan attorned to the CFA's process and responded fully to the complaint.

[35] The CFA reviewed the provisions of the legislation and considered the Government of Saskatchewan's replies to the complaint. It then made a series of findings. With respect to the PSES Act, the CFA stated:

370. *At the outset, the Committee recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) 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) [see **Digest**, op. cit., para. 576].*

[36] After determining that certain essential services listed in the PSES Regs should not be unilaterally declared as "essential", the CFA Committee stated at para. 372:

372. *The Committee further recalls that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a full and frank exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services [see **Digest**, op. cit., para. 612]. The Committee considers that a requirement to negotiate an ESA is in conformity with the principle above.*

[37] The CFA Report dealt at length with the concern that pursuant to the PSES Act the essential services, the classifications, the number and the names of persons who must work during a work stoppage may be unilaterally determined by the public employer without review by an independent body with knowledge of the structure and functioning of the enterprises concerned and the real impact of the strike action. In addition, it expressed its concerns about the absence of any provision in the PSES Act to compensate public sector employees who lose their right to strike, stating in part at para. 376:

376. *... The Committee recalls that, where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned have confidence and can take part at every stage and in which the awards, once made, are fully and promptly implemented [see **Digest**, op. cit., paras 595 and 596]. The Committee requests the Government to take the necessary measures in order to ensure that such compensatory guarantees are made available to workers whose right to strike may be restricted or prohibited. It requests the Government to keep it informed in this respect.*

[38] The CFA Report concluded with the following recommendations related specifically to the PSES Act:

384. *In the light of its foregoing conclusions, the Committee invites the Government Body to approve the following recommendations:*

...

- (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 Service 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.*

[39] The Unions rely on the ILO Report in support of their argument that Canada is committed to uphold principles of international law which require compensatory guarantees to be made available where legislation restricts or prohibits the right to strike. They contend that the *Charter* should be interpreted in a manner that provides at least as much protection to employees as those contained in Canada's international law commitments. I will consider in due course the substance and relevance of those commitments, both as they relate to the scope of the freedom of association protected by s. 2(d) of the *Charter* and as they relate to whether the PSES Act infringements on that freedom can be justified under s. 1 of the *Charter*.

(iii) **Application by CUPE to the Saskatchewan Labour Relations Board (SLRB) Regarding Designation of Health Care Workers**

[40] The intervenors CUPE and Service Employees International Union (SEIU-West) represent virtually all of the healthcare workers in Saskatchewan except for nurses, who are represented by the intervenor SUN. CUPE is the largest union in Saskatchewan, with over 27,000 members working in healthcare facilities, libraries, municipalities, schools, universities, community based organizations and various administrative boards and agencies. There were 175 CUPE locals in Saskatchewan when the PSES Act and the TUA Act were introduced in the Legislature on December 19, 2007.

[41] Approximately 12,600 CUPE members are healthcare workers employed by five of the employer intervenors in this action: Regina Qu'Appelle Regional Health Authority; Prairie North Health Authority; Prince Albert Parkland Regional Authority; Sun Country Regional Health Authority; and Sunrise Regional Health Authority. All Regional Health Authorities in the province bargain collectively through their statutory representative, the Saskatchewan Association of Health Organizations ("SAHO").

[42] Healthcare workers represented by CUPE engaged in strike action in 1999 (for one day) and in 2001 (for six days). On both occasions, CUPE and SAHO developed essential services protocols for use during the strikes, with CUPE in a position to unilaterally decide who would (and who would not) work. Approximately 4% of the CUPE healthcare workers were designated to work during the 1999 and 2001 work stoppages.

[43] On June 9, 2009, SAHO delivered notices to CUPE pursuant to s. 9 of the PSES Act designating essential services levels at the Regional Health Authorities. The notices required the following percentages of CUPE healthcare workers to work during a work stoppage:

87% of CUPE members employed by Regina Qu'Appelle Regional Health Authority

75% of CUPE members employed by Prairie North Health Authority

72% of CUPE members employed by Prince Albert Parkland Regional Authority

85% of CUPE members employed by Sun Country Regional Health Authority

90% of CUPE members employed by Sunrise Regional Health Authority

[44] On November 3, 2009 CUPE filed an application with the SLRB asking the Board to exercise its authority under s. 10 of the PSES Act to vary the number of employees required to work in the event of a work stoppage. The dispute involved the designation of several hundred employees. In its application to the SLRB, CUPE also challenged the constitutional validity of the PSES Act, making essentially the same *Charter* arguments as it has advanced in this action.

[45] On November 9, 2009 the SLRB issued an order adjourning CUPE's application for 30 days and directing each party to "select not more than 3 classifications of positions that shall be deemed to be in dispute for the purposes of hearing evidence and argument on the said questions". For all other classifications, the application was

adjourned *sine die*. The parties duly agreed upon six positions within the Regina Qu'Appelle Regional Health Authority.

[46] The SLRB heard evidence and the submissions of the parties in mid December of 2009. On February 9, 2010 the SLRB issued its decision (*Canadian Union of Public Employees, Local 3967 (Applicant) v. Regina Qu'Appelle Health Region and The Attorney General for Saskatchewan (Respondents) LRB File No. 124-09*) (2010 CanLII 5199) in which it decided:

- “on the face of the legislation, the Board’s role (as suggested by the Attorney General) is to determine numbers”;
- the legislation does not indicate an intention to have the Board “adjudicate a broader range of questions of law, including questions of *Charter* compliance”;
- a plain reading of the legislation indicates that the scope of authority delegated to the Board is extremely narrow and, in the Board’s opinion, “the statute itself should be the primary consideration for determining legislative intent”;
- the Legislature has placed very short constraints on the adjudication of proceedings before the Board (i.e. matters must be determined within 14 days after an application is made);

For these reasons, the SLRB concluded at paras. 96 and 99 of its decision:

[96] Both the narrow scope of issue to be determined by the Board and the anticipated expediency of the Board in hearing and adjudicating

applications under the *PSES Act* would not be consistent with a legislative intent (sic) that this Board entertain complex questions of law, such as subjecting the legislation to *Charter* scrutiny. To the contrary, a plain reading of the statute leads to the conclusion that this Board would not be the appropriate forum for adjudicating such questions; or, in the alternative, to a legislative intent to exclude such questions from the scope of this Board's jurisdiction in deciding applications pursuant to s. 10 (or s. 11) of the *PSES Act*.

...

[99] For the foregoing reasons, we conclude that we do not have the requisite jurisdiction to answer the Constitutional questions raised by the Union in its Application (and in its Notice of Constitutional Questions). Specifically, we have concluded that we do not have jurisdiction to subject to (sic) the *PSES Act* to *Charter* scrutiny. To which end, this aspect of the Union's application must be dismissed. In the Board's opinion, the Union's Application must be determined based on a broad and purposive interpretation of the *PSES Act* in its present form; as drafted by the legislature.

[47] Although over four months had elapsed since CUPE's initial application, and although s. 10(4) of the *PSES Act* anticipates that the SLRB will make decisions within 14 days after the filing of an application, the SLRB did not decide whether the six positions the parties had identified in compliance with the SLRB's earlier order involved the provision of essential services. Instead, it ordered the parties to resume negotiations for an Essential Services Agreement.

[48] The Unions rely on CUPE's efforts to access the dispute resolution process in s. 10 of the *PSES Act* to support their argument that s. 10 does not provide the SLRB with any meaningful authority to review unilateral employer designations requiring employees to work during a strike. I will return to their argument during my assessment of whether the *PSES Act* satisfies the requirements of s. 1 of the *Charter*. That portion of the assessment will be found at paras. 208 to 218 of this decision.

(iv) **Previous Judicial Proceedings**

[49] Following the enactment of the PSES Act, five different proceedings were instituted in this Court, all challenging, in one or more respects, the constitutionality of the legislation. Two of the proceedings were actions commenced by statements of claim, while three were applications for judicial review. They may be summarized as follows:

- (i) This action was commenced by the Saskatchewan Federation of Labour (the “SFL”) and a number of trade unions by statement of claim filed July 30, 2008 and amended December 23, 2009 and June 25, 2010. The claim asserts that the PSES Act and certain of its provisions breach ss. 2(b), (c) and (d), 7 and 15 of the *Charter* and are not justified by s. 1. In addition the claim alleges that the PSES Act violates international law.
- (ii) Saskatchewan Union of Nurses (“SUN”) commenced an action by statement of claim filed April 14, 2009, alleging that the PSES Act breaches s. 2(d) of the *Charter*, and is not saved by s. 1 of the *Charter*.
- (iii) On November 18, 2009 SGEU applied for judicial review of arbitrator/mediator Colin Taylor’s award dated July 2, 2009. The application sought a declaration that the PSES Act breaches ss. 2(b) and (d) of the *Charter*, and is not saved by s. 1 of the *Charter*.

- (iv) On March 9, 2010 CUPE applied by way of judicial review for an order quashing the decision of the SLRB dated February 9, 2010. The application requested a declaration that the SLRB has jurisdiction to determine constitutional issues with respect to the PSES Act, and declarations that the PSES Act violates s. 2(d) of the *Charter* and is not saved by s. 1 of the *Charter*.
- (v) On December 18, 2009 Service Employees International Union (“SEIU”) brought applications against four different regional health authorities. The applications sought orders quashing notices issued by the health authorities designating various employees as essential pursuant to the PSES Act, on the basis that the designations went beyond what could reasonably be considered essential. The SEIU submitted that the PSES Act, in whole or in part, contravenes s. 2(d) of the *Charter* and is not saved by s. 1 of the *Charter*. They also submitted that the PSES Act violates a number of international covenants, conventions, decisions and principles of the ILO.

[50] In a fiat dated August 9, 2010,¹¹ Laing C.J. observed that:

¹¹ *Saskatchewan Federation of Labour v. Saskatchewan* 2010 SKQB 286, 365 Sask. R. 296

- (i) all of the proceedings raised the constitutionality of the PSES Act;
- (ii) one decision would resolve that question for all of the proceedings;
- (iii) a proper and complete factual record was required for the court to rule on that question;
- (iv) consolidation of the various actions and motions was not an option for technical reasons; and
- (v) having all of the matters heard consecutively by one judge would result in an unacceptable duplication of evidence.

[51] The Chief Justice (as he then was) concluded that the SFL action should be the lead case on the constitutionality of the PSES Act and that the trial would proceed on the basis of affidavit evidence. He granted intervenor status to all of the parties to the other existing proceedings, set out a process for determining whether other potential intervenors would receive similar standing, and stayed the other proceedings insofar as they related to the constitutionality of the PSES Act.

[52] Cross-examinations on affidavit evidence were conducted prior to the trial of this action so that a complete and substantial factual record was before the court. In addition, written and oral submissions were presented at trial by the plaintiffs, the defendant and all of the intervenors over a period of 12 hearing days.

3. ***The Public Service Essential Services Act and the Canadian Charter of Rights and Freedoms***

(i) **The Issue to be Determined**

[53] The SFL argues that the PSES Act infringes upon rights and freedoms guaranteed by ss. 2(b), 2(c), 2(d), 7 and 15 of the *Charter*. Section 2 of the *Charter* declares that everyone has fundamental freedoms that include freedom of expression (s. 2(b)), freedom of assembly (s. 2(c)) and freedom of association (s. 2(d)). Section 7 declares that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 15 declares that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.

[54] The SFL argues that the exercise of the right to strike by workers, and in particular the activity of picketing during a strike, are forms of expression, assembly and association protected by ss. 2(b), 2(c) and 2(d) of the *Charter*. It argues that by prohibiting workers from striking, the PSES Act infringes their rights under all of those provisions. It submits that the PSES Act also violates s. 7 of the *Charter* because it interferes with the ability of individual employees to make life choices, and negatively affects their personal autonomy, dignity and self respect. And it contends that the PSES Act violates equality rights under s. 15 of the *Charter*, primarily because the majority of public sector employees in Saskatchewan are women.

[55] Notwithstanding cogent arguments based on ss. 2(b), 2(c), 7 and 15 of the *Charter*,¹² the Supreme Court of Canada has treated associational activity by employees for the purpose of achieving collective bargaining goals (as distinct from political, social or other goals), including the rights to organize, to bargain collectively and to strike, as part of freedom of association guaranteed by s. 2(d) of the *Charter*.

[56] I will take the same approach in this judgment. I will do so for two reasons. First, since I have decided that the PSES Act infringes on freedom of association under s. 2(d) of the *Charter* in a manner that cannot be saved by s. 1, it will be unnecessary for me to address the other arguments advanced by the SFL. Second, it is my view that this case does not directly engage, either factually or legally, issues related to picketing or the right to assemble for the purpose of promoting political or social change or equality rights. Rather, it raises the issues of whether the right to strike, as an essential element of collective bargaining, is protected by the fundamental freedom of association declared by s. 2(d) of the *Charter* and if so, the extent to which that right can be limited under s. 1 of the *Charter* to ensure the delivery of essential services to the community. Expressed another way, if the right to strike is protected by s. 2(d) of the *Charter*, lawful strikes are not those that are permitted by legislation, but those that are not prohibited by legislation that can be justified under s. 1 of the *Charter*. This case will be decided on that basis.

¹² See for example, Brian A Langille, *The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It* [2009] 54 McGill LJ 177, in which the author advances the view that cases of exclusion of workers from statutory collective bargaining structures (such as occurred in *Health Services Support-Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27, [2007] 2 S.C.R. 391 (“*B.C. Health Services*”)) should be decided under s. 15 rather than 2(d) of the *Charter*.

(ii) The Meaning of the Term “Strike”

[57] For labour relations purposes, every Canadian jurisdiction defines “strike” somewhat differently. Some definitions include a purposive element. Others do not.¹³ However, from the perspective of *Charter* interpretation, it is important to recall that workers have not needed any particular statutory definition, nor any particular statutory “regime”, nor indeed any statute at all, to refuse to work in concert with one another in order to achieve collective goals.

[58] While different jurisdictions may utilize different statutory definitions of “strike” for labour relations purposes,¹⁴ there can only be one understanding of what

¹³ See the review and discussion in W. B. Rayner, *Canadian Collective Bargaining Law*, 2nd ed. (Markham, On: LexisNexis, 2007), at p. 46.

¹⁴ The term “strike” is not used in the PSES Act. Instead, the term “work stoppage” is utilized to include concepts of both “strike” and “lockout”. Section 2(k) of the PSES Act states:

2 In this Act:...

(k) “**work stoppage**” means a lock-out or strike within the meaning of *The Trade Union Act*.

Section 2(k.1) of *The Trade Union Act* defines “strike” as follows:

2 In this Act:...

(k.1) “**strike**” means any of the following actions taken by employees:

(i) a cessation of work or a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding; or

(ii) other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output or the effective delivery of services;

That definition of strike may be contrasted with the definition of “lockout” in s. 2(j.2) of *The Trade Union Act*, which states:

(j.2) “**lock-out**” means one or more of the following actions taken by an employer for the purpose of compelling employees to agree to terms and conditions of employment:

constitutes a strike for the purposes of collective action under s. 2(d) of the *Charter*. That is so because the *Charter* is applicable to Parliament and the legislatures of every jurisdiction in Canada, and because s. 2(d) of the *Charter* does not contemplate any particular labour relations model or structure.

[59] For the purposes of the *Charter* analysis in this judgment, the term “strike” will be taken to mean the refusal to work by employees, acting in concert with other employees, for the purpose of promoting their work related issues. The determination of whether a concerted refusal to work for some other purpose is protected by the *Charter* will have to await another case.

(iii) The Role of the Strike in Collective Bargaining

[60] The ability of employees to bargain collectively in a meaningful way requires three interdependent elements:

- (1) the right of employees to speak with one voice through a recognized bargaining representative;

(continued from footnote 14)

- (i) the closing of all or part of a place of employment;
- (ii) a suspension of work;
- (iii) a refusal to continue to employ employees;

The apparent difference between the definitions of “strike” and “lockout” under *The Trade Union Act* (although not in all Canadian jurisdictions) is that a “strike” may occur if employees act collectively to cease, restrict or limit output for any reason (which, as I have already noted, could be to engage in social or political protest) whereas the definition of “lockout” has a purposive element: it is only a lockout if it is for the purpose of compelling employees to agree to terms and conditions of employment.

- (2) the right of employees to bargain collectively with their employer through that representative; and
- (3) the right of employees to strike.¹⁵

[61] Rayner expresses the proposition concisely: “The ultimate truth of free collective bargaining is that it can only operate effectively, in market terms, if it is backed up by the threat of economic sanction”.¹⁶

[62] In the private sector a strike is intended to exert financial pressure on the employer to agree to improve terms and conditions of employment for employees. On the other hand, the effect of the strike on a public sector employer is not primarily financial. Public sector employers may actually spend less during strike action by their employees. The primary impact is on managers and administrators attempting to maintain basic levels of public services, and on the persons who rely on those services — most of whom are, not incidentally, eligible voters in the community. Thus, public sector strikes invariably have a substantial political dimension: the removal, or threat of removal, of public services causes voters to press Government to ensure there is no disruption.

¹⁵ Judicial and academic confirmation of this proposition is too extensive for any comprehensive list of authorities to be provided. For the purposes of this decision, I will cite only a few: Rayner: *Canadian Collective Bargaining Law*, 2nd ed., (Markham, On: LexisNexis, 2007) at pps. 2 and 46; *Alberta Reference*, *supra* per Dickson C.J. at paras. 94-98, quoted elsewhere in this judgment; Paul Weiler, *Reconcilable Differences - New Directions in Canadian Labour Law* (Toronto, On: Carswell, 1980) at p. 66; J. Fudge and E. Tucker, *The Freedom to Strike in Canada: A Brief Legal History* (2010), 15:2 *Canadian Labour and Employment Law Journal*, 333-53; *Crofter v. Handwoven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142 (H.L.) at pp. 158-159; Otto Kahn-Freund, *Labour and the Law* 3rd ed. (London: Stevens & Sons, 1983) at p. 292; *SEIU Local 204 v. Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231

¹⁶ *Supra* note 13 at 541

[63] Labour law practitioners understand the critical role played by a strike in the collective bargaining process. They know that it exerts pressures on *both* sides to resolve a dispute. A strike places pressure on the striking employees because they are not entitled to be paid for the work they do not do. The longer a strike lasts, the more difficult it becomes for them to make financial ends meet. Moreover, if an employee's sense of dignity and self-worth are connected to his or her work, as they undoubtedly are, the employee finds little of either while carrying a picket sign on the street. Employees who have professional obligations may feel even more conflicted.

[64] The ultimate mandate of the public service is to ensure that essential services are available to those who need them. If the role of the strike is to bring about the resolution of disputes through collective bargaining, then the role of the law must surely be to balance the wishes of the public employees with the needs of those who rely on them for the delivery of public services. As will be discussed in more detail, the historical purpose of labour legislation has been to regulate and limit strike activity in a manner that minimizes workplace instability and harm to third parties.

(iv) Freedom of Association under the Charter: the Jurisprudence

[65] I have stated that the strike is one of three interdependent elements of collective bargaining. All three elements entail collective action — that is, individual rights are subsumed by collective goals determined by the majority. At the same time, prohibitions on strike action during the term of a collective agreement give rise to new individual rights: in every Canadian jurisdiction, legislation provides employees with

access to independent third party adjudication of individual grievances and disputes, with a duty on the part of the union to fairly represent the employee in that process.¹⁷

[66] Because s. 2 of the *Charter* speaks to protecting only individual rights and freedoms, the judiciary debated for some time about whether the *Charter*, and particularly s. 2(d) of the *Charter*, guarantees collective action by employees. The Supreme Court of Canada has now put that debate to rest.

[67] The starting point for determining whether the guarantee of freedom of association under s. 2(d) of the *Charter* includes a right to strike must be the Supreme Court of Canada's decisions addressing the extent to which s. 2(d) protects the right to associate to achieve collective goals. The most significant of those are *Dunmore v. Ontario (Attorney General)* ("Dunmore"),¹⁸ *Health Services Support-Facilities Subsector Bargaining Assn. v. British Columbia* ("B.C. Health Services"),¹⁹ *Ontario (Attorney General) v. Fraser* ("Fraser"),²⁰ and the decisions on which they were based, most notably the dissenting judgment of Dickson C.J. in *Reference Re: Public Service Employee Relations Act (Alberta)*, ("Alberta Reference").²¹

[68] The majority of the *Charter* challenges leading up to those decisions were brought by public sector unions claiming that legislation prohibiting strikes and lockouts,

¹⁷ In Saskatchewan, see s. 25, 25.1 and 26 of *The Trade Union Act*, R.S.S. 1978, c. T-17.

¹⁸ 2001 SCC 94, [2001] 3 S.C.R. 1016

¹⁹ 2007 SCC 27, [2007] 2 S.C.R. 391

²⁰ 2011 SCC 20, [2011] 2 S.C.R. 3

²¹ [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161

either permanently or with respect to specific disputes, infringed freedom of association under s. 2(d) of the *Charter*. The *Alberta Reference* was one of three cases that became known as the “labour trilogy”. (The other two were, *Saskatchewan v. R.W.D.S.U., Locals 544, 496, 635 and 955*, (“*the Dairy Workers case*”)²² and *PSAC v. Canada*²³). Both the *Alberta Reference* and the *Dairy Workers* case dealt directly with legislation that prohibited strikes and mandated compulsory arbitration to resolve impasses in collective bargaining.

[69] The Supreme Court of Canada issued all three of its judgments in the labour trilogy at the same time, but the main reasons were delivered in the *Alberta Reference*. When the dust had settled, a very divided court had concluded that collective bargaining and the right to strike were not included within the ambit of s. 2(d) of the *Charter*. The majority accepted the proposition that the freedoms protected under s. 2 were individual, rather than collective, freedoms. Accordingly, it said, s. 2(d) protected an individual’s right to join a union (*i.e.* an association) but it did not protect the right to engage in the activities necessary to achieve the union’s goals.

[70] The dissenting judgments of Dickson C.J. in all three of the labour trilogy decisions presaged the Supreme Court of Canada’s acceptance, 14 years later in *Dunmore* and 20 years later in *B.C. Health Services*, that s. 2(d) of the *Charter* protects the freedom of individuals to engage in collective action to achieve workplace goals.

²² [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277

²³ [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249

[71] In *B.C. Health Services*, the Supreme Court unanimously overruled the majority decisions in the labour trilogy. In doing so, it relied heavily on the dissenting judgment of Dickson C.J. in *Alberta Reference*. It is therefore important to understand what Dickson C.J. had to say in his dissent.

[72] The *Alberta Reference* dealt with whether the provisions of *The Public Service Employee Relations Act*, *The Labour Relations Act* and *The Police Officers Collective Bargaining Act* of Alberta, which prohibited strikes and imposed compulsory arbitration to resolve impasses in collective bargaining, were consistent with the *Charter*. In his dissent, Dickson, C.J. expressed the view that all three statutes were unconstitutional. His basic premise was that s. 2(d) of the *Charter* will render legislation invalid if its purpose is to attempt to preclude a person who is free to act alone from acting with others in common pursuits and if it does so *because of* the concerted or associational nature of their endeavour. Referring specifically to the role of the strike in collective action, he stated:

89 ... There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

Dickson, C.J. recognized that an employee's sense of dignity and self worth is connected to his or her work. He then dealt with the importance of the right to strike as the engine that propels meaningful collective bargaining at paras. 94-96:

94 Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, *Collective Bargaining Law in Canada* (2nd ed. 1986), describes the requisites of an effective system of collective bargaining as follows at p. 4:

What are the requirements of an effective system of collective bargaining? From the point of view of employees, such a system requires that they be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining.

95 The Woods Task Force Report at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:

408. Strikes and lockouts are an indispensable part of the Canadian industrial relations system and are likely to remain so in our present socio-economic-political society.

96 At page 138 the Report continues:

431. Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.

At page 175 the Report notes that the acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike. And at p. 176, it is said, "The strike has become a part of the whole democratic system".

After citing a number of additional authorities for the proposition that the freedom to strike is essential to an effective system of collective bargaining, the Chief Justice concluded at para. 98:

98 I am satisfied, in sum, that whether or not freedom of association generally extends to protecting associational activity for the pursuit of exclusively pecuniary ends -- a question on which I express no opinion -- collective bargaining protects important employee interests which cannot

be characterized as merely pecuniary in nature. Under our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*.

[73] In both *PSAC v. Canada* and the *Dairy Workers* case Dickson C.J. repeated his view that the freedom to strike is a necessary incident of collective bargaining, without which employees are not in an effective position to bargain. In the *Dairy Workers* case, he agreed with the following statements of Cameron J.A. in the Court of Appeal judgment being appealed from:²⁴

[86] We were also referred to *United Federation of Postal Clerks v. Blount*, (1971), 325 F. Supp. 879, aff'd, 925 Ct. 80, a decision in the first instance of the United States District Court, District of Columbia, which was later affirmed by the Supreme Court, but without written reasons. This case seems to have held that in the United State public employees, at least, do not have a constitutionally protected "right to strike", even though they apparently enjoy a constitutionally protected right to bargain collectively. I am inclined to agree with this decision, to this extent: once it is established that employees, as such, enjoy constitutional freedom of association and are entitled, in exercise of that freedom to form trade unions for the purpose of bargaining collectively with their employers, then it does seem to me that a protected freedom to bargain collectively cannot be excluded. Otherwise, freedom of association — in the context of the workplace — would be largely devoid of practical value.

[87] But once the scope of the freedom in issue is taken to extend that far, can the "right to strike" be far behind? It is, after all, essential to collective bargaining, and without it there would be little if anything left of the freedom of employees to act as one in their dealings with their employer. ...

²⁴

39 Sask. R. 193, [1985] 5 W.W.R. 97

[74] After stating that a new approach to *Charter* interpretation was developing, Cameron J.A. further wrote, at para. 90:

[90] What all of this suggests then, is that while the decided cases weigh in favour of the exclusion of “the right, to strike” from the constitutional freedom of association, the emerging framework of principle governing *Charter* interpretation rather points to its inclusion, especially if we are to be faithful to the call to give these rights and freedoms a “generous interpretation ... suitable to give to individuals the full measure” of them.

[Emphasis in Original]

[75] The dissenting views of Dickson C.J. in the labour trilogy would be resurrected 14 years later in *Dunmore*. The decision in *Dunmore* dealt with the exclusion of Ontario agricultural workers from *The Labour Relations Act 1995*²⁵ – that is, they had been prevented from exercising the right to organize and to bargain collectively. The case did not deal with a right to strike. The agricultural workers claimed that Ontario had a positive obligation to extend the benefit of protective legislation to them — something more than the negative duty imposed on a state to refrain from enacting legislation that infringes on *Charter* protected freedoms.

[76] The majority of the Supreme Court decided that it would be impossible for the agricultural workers to exercise their right to organize without a protective statutory regime. It rejected the proposition that s. 2(d) of the *Charter* protects only activities capable of performance by individuals. Instead, it stated that whether collective activity is protected is to be determined contextually and by reference to the purpose of s. 2(d) of the *Charter*. Based on that approach, the Government of Ontario had a positive obligation

²⁵

S.O. 1995, c. 1, Sch. A.

to extend the statutory protections to agricultural workers that would enable them to meaningfully exercise their freedom to organize. The principle affirmed was clear: *Government measures that substantially interfere with the ability of individuals to associate for the purpose of promoting work related interests violate the guarantee of freedom of association under s. 2(d) of the Charter.*²⁶

[77] Having crossed that interpretational bridge, the stage was set for the Supreme Court of Canada to address the extent to which s. 2(d) of the *Charter* protects the capacity of union members to engage in “collective bargaining” on fundamental workplace issues. In *B.C. Health Services*, the court unambiguously decided that collective bargaining does indeed fall within the protections afforded by s. 2(d) of the *Charter*. McLachlin C.J. and LeBel J. agreed with the observation of Dickson C.J. in the *Alberta Reference* case that “...some collective activities may, by their very nature, be incapable of being performed by an individual”.²⁷ In making that observation Dickson C.J. was, of course, referring to strikes.²⁸

[78] The majority in *B.C. Health Services* extensively reviewed the history of collective bargaining in Canada (at paras. 40-68) and Canada’s international law obligations (paras. 69-79), before turning to the values that underlie the *Charter*. They agreed (at para. 82) with Dickson C.J.’s observations that the right to bargain collectively

²⁶ This was the conclusion in *Dunmore* as stated by McLachlin C.J. in *B.C. Health Services* at para. 35

²⁷ *B.C. Health Services* at para. 28

²⁸ *Alberta Reference* at para. 89. Dickson J.’s statement also appears at para 72 of this judgment

with an employer enhances the human dignity, liberty and autonomy of workers by giving them some control over a major aspect of their lives, namely their work. They then stated:

86 We conclude that the protection of collective bargaining under s. 2(d) of the *Charter* is consistent with and supportive of the values underlying the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.

[79] The court held that s. 2(d) of the *Charter* protects against “substantial interference” with associational activity in accordance with a test crafted in *Dunmore*:

90 Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against “substantial interference” with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether “excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association” (para. 23). Or to put it another way, does the state action target or affect the associational activity, “thereby discouraging the collective pursuit of common goals”? (*Dunmore*, at para. 16). Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees’ right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

[Emphasis in Original]

[80] And further at para. 92:

92 To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as “union breaking” clearly meet this requirement. But less dramatic interference with the collective process may also suffice. ... The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

[Emphasis in Original]

[81] Finally, the court dealt extensively with what it considered to be the essential elements of bargaining “in good faith”. It drew distinctions between what labour law practitioners have long understood to be the differences between “surface” and “hard” bargaining, and it went to some lengths to explain that the protected right does not mandate a particular statutory regime, nor a particular economic or substantive outcome.

[82] The decision in *B.C. Health Services* has not elicited universal acclaim. The eminent Canadian Constitutional Law Scholar, Prof. Peter W. Hogg, has criticized the decision on two grounds. First, he says that *B.C. Health Services* presumably requires all Canadian Legislatures to provide an “elaborate legislative superstructure to foster collective bargaining based on the American Wagner Act of 1935”. Second, he interprets *B.C. Health Services* as stating that government cannot invalidate existing collective agreements, thereby elevating the agreements themselves in constitutional status.²⁹ I will deal with the first concern in Part II of this decision at paras. 264 to 266. I will deal with

²⁹ Peter W. Hogg, *Constitutional Law of Canada*, Vol. 2, 5th ed. (Toronto: Carswell, 2007), at 44-8 to 44-10

the second concern in this Part I of my decision at paras. 167 to 172. In both cases I will provide reasons why I believe the concerns are not well founded.

[83] In *Fraser*, the Supreme Court of Canada returned to these concerns. Rothstein and Charron, JJ. elaborated on them in a detailed dissent. The majority structured their judgments as a response to their dissent.

[84] *Fraser* dealt with the validity of *The Agricultural Employees Protection Act, 2002*³⁰ which had been enacted in Ontario as a response to the decision in *Dunmore*. The court commented on its decision in *Dunmore* as follows:

[32] After *Dunmore*, there could be no doubt that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association, and that this right extends to realization of collective, as distinct from individual, goals. Nor could there be any doubt that legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally, there could be no doubt that the guarantee must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments.

[85] It also reviewed its decision in *B.C. Health Services* by stating:

[37] While *Health Services* concerned the actions of a government employer nullifying collective bargaining arrangements with unions representing its own employees, the Court rested its decision on a more general discussion of s. 2 of the *Charter*. Applying the principles of interpretation established in *Dunmore*, a majority of the Court held that s. 2(d) includes "a process of collective action to achieve workplace goals" (para. 19). This process requires the parties to meet and bargain in good

³⁰

S.O. 2002, c. 16

faith on issues of fundamental importance in the workplace (para. 90). By legislating to undo the existing collective bargaining arrangements and by hampering future collective bargaining on important workplace issues, the British Columbia government had “substantially interfered” with the s. 2(d) right of free association, and had failed to justify the resultant limitation on the exercise of the right under s. 1 of the *Charter* (paras. 129-61).

[38] The decision in *Health Services* follows directly from the principles enunciated in *Dunmore*. Section 2(d), interpreted purposively and in light of Canada’s values and commitments, protects associational collective activity in furtherance of workplace goals. The right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals. The claimants had a right to pursue workplace goals and collective bargaining activities related to those goals. The government employer passed legislation and took actions that rendered the meaningful pursuit of these goals impossible and effectively nullified the right to associate of its employees. This constituted a limit on the exercise of s. 2(d), and was thus unconstitutional unless justified under s. 1 of the *Charter*.

[86] The majority in *Fraser* then returned to its concerns about the nature of “good faith” in collective bargaining, and whether the *Charter* mandates any particular statutory regime or economic outcome. It reiterated that the right to collective bargaining is not a right to a particular type of collective bargaining model, such as the *U.S. Wagner Act* model which is dominant in Canada, stating at paras. 47 and 48:

[47] ... What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.

[48] The resolution of this appeal does not rest on stark reliance on a particular conception of collective bargaining. Rather, it requires us to return to the principles that underlie the majority rulings in *Dunmore* and *Health Services*. The question here, as it was in those cases, is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s.2(d) associational right.

[87] The Government of Saskatchewan submits in this case that *Fraser* represented a substantial retreat from the “high water” mark of *B.C. Health Services*. It argues that, “contrary to their earlier precedents”, the court in *Fraser* recognized only a limited right to collective bargaining – one that replaces the “bargaining” in “collective bargaining” with something akin to “listening”, or perhaps “consulting”. It contends that *Fraser* now requires applicants claiming that laws violate s. 2(d) of the *Charter* to show, on a balance of probabilities, that those laws render their ability to associate “substantially impossible” – something very different from the “substantial interference” standard established by *B. C. Health Services*. As well, the Government observes, employees are not entitled to insist upon the enactment of legislation based on any particular labour relations structure. Finally, it says, the Supreme Court has never explicitly recognized a constitutional right to strike. At the same time, the Government candidly acknowledges that the individual judgments in *Fraser* were so diverse that “a wider divergence of views would be hard to imagine”.

[88] Given the implications of the Government’s arguments regarding the decision in *Fraser*, all counsel in this case were invited to comment on whether legislation would violate s. 2(d) of the *Charter* if its purpose and effect was to:

1. rescind all previous orders of the SLRB certifying a trade union as the exclusive representative of a group of employees appropriate for the purpose of bargaining collectively. The employees would remain free to

organize and to join a trade union of their own choosing;

2. declare that all employers named in the rescinded SLRB orders would henceforth be at liberty to negotiate contracts of employment directly with one or more of their employees. At the same time, however, the employers would have to be prepared to consult with, or at least listen to (rather than actually bargain with) the previously certified trade unions; and
3. prohibit every employee from refusing to work in concert with one or more other employees for the purpose of improving his or her wages and other terms and conditions of employment. Breach of the prohibition would constitute just cause for termination of employment.

[89] Could it be that such legislation would not violate the *Charter*? The defendants only response was that, based on what the Supreme Court of Canada decided in *Fraser*, such hypothetical legislation would be valid, and this court is bound to follow *Fraser*.

[90] With respect, the Government of Saskatchewan's interpretation of what was decided in *Fraser* cannot be correct. It would mean that the court had said one thing in

B.C. Health Services and something entirely different in *Fraser*. It would mean that the s. 2(d) protections for collective action to achieve work place goals amount to nothing more than meaningless paper rights. And it would mean that the court's interpretation of s. 2(d) is at odds with Canada's labour history, values and labour relations realities.

[91] I do not accept that in *Fraser* the Supreme Court of Canada resiled from its position in *B. C. Health Services*, nor do I accept that the decision in *Fraser* is in any way incompatible with recognition of a right to strike as a fundamental freedom under s. 2(d) of the *Charter*. Rather, I accept at face value what the majority of the *Fraser* court stated at para. 97 in response to the dissent of Rothstein J.:

97 Notwithstanding the comprehensive reasons of our colleague, we conclude that *Health Services* is grounded in precedent, consistent with Canadian values, consistent with Canada's international commitments and consistent with this Court's purposive and generous interpretation of other *Charter* guarantees. In our view, it should not be overturned.

[92] It is true that the decisions in *B.C. Health Services* and *Fraser* did not recognize that the employee right to strike, counterbalanced at times by the employer right to lock out, are the primary drivers of the collective bargaining process. The decisions did not explicitly state that what motivates both parties to bring good faith to the bargaining table is the reality of a potential work stoppage. They did not explicitly identify the right to strike as a firmly established principle of international law, or acknowledge that it is an associational right that requires no particular labour relations structure for its efficacy. And it is true that neither decision explicitly recognized that, devoid of the right to strike, a constitutionalized right to bargain collectively is

meaningless. They did not acknowledge those realities, because in both decisions the court explicitly stated that it was not dealing with the issue of the right to strike.

(v) **A Rationale for Public Sector Bargaining**

[93] It has been argued that public sector employees should not have any right (much less a constitutionalized right) to strike. They note, as did Cameron J.A. in the *Dairy Workers* case (see para. 73 above) that public sector employees do not have a constitutional right to strike in the United States. They question why the right to bargain collectively was extended to public sector employees in the first place – as occurred across Canada a half century ago — because they believe those employees already enjoy wages, pension benefits and job security that exceed those of their private sector counterparts. They lament that politicians have “caved in” to the demands of the large public sector unions. For those of that view, a very brief rationale for public sector bargaining may be in order.³¹

[94] Governments provide services to the general public. They determine which services they will provide, and which services will be provided by private sector employers. When governments decide to directly provide services, they are in a position to (and most often do) make it difficult or impossible for private sector providers to compete. The result is that those who rely on government to provide services often have nowhere else to go.

³¹ This rationale for public sector bargaining is loosely based on the more fulsome and compelling views expressed by Weiler, Paul *Reconcilable differences: new directions in Canadian labour law* (Toronto: Carswell, 1980), at Chapter 7— *Making a Virtue Out of Necessity: Strikes by Essential Public Employees*

[95] Most of the cost of the services provided by government is related to the wages and benefits of the employees who deliver them. As with any labour intensive enterprise, the level of compensation determines the quality and quantity of the services, and the burden to be imposed on taxpayers. A significant portion of the services provided by government are essential to the health and safety of persons in the community. Clearly, the law should not permit those who provide essential services to extract unreasonably high compensation by jeopardizing the health and safety of the community.

[96] However, all of the services provided by public sector workers are not essential. It cannot be credibly argued, for example, that the services provided by every employee of every governmental ministry, Crown corporation and agency, every city, town and village, and every educational institution, are so essential that their discontinuance would jeopardize the health and safety of the community. Can it be said that the community would be at risk if employees at casinos and liquor stores in Saskatchewan decided to withdraw their services in support of higher wages?

[97] It must be recognized that the provision of essential services is not within the exclusive purview of the public sector. Private sector employers also supply essential services to the community: there are shareholder owned railways, telecommunications companies, suppliers of electrical and gas utilities, and corporations that supply oil and gas, coal, uranium and other critical resources. Almost all of those suppliers are unionized. Those who are must negotiate collective agreements with their employees.

[98] Governments purchase all kinds of goods and services from private sector suppliers – land, buildings, equipment, expert advice, infrastructure (e.g. roads, bridges,

power plants) and so on. In so doing, they negotiate the price with the supplier using taxpayer money. Governments negotiate incentives with large private sector corporations to encourage them to establish operations in the province, and to create (or maintain) jobs. In so doing, they use taxpayer money.

[99] There is no reason in principle, then, why governments should not be required to negotiate mutually acceptable wages and other terms and conditions of employment with their own employees. This is one explanation why the right to bargain collectively and the right to strike have been extended to all employees, including those in the public sector.

(vi) **Canada's International Law Obligations: the Right to Strike**

[100] During the hearing of this action both sides filed opinions prepared by international law experts along with detailed submissions relating to Canada's international law obligations. They did so in part because in the *Alberta Reference* and again in *B. C. Health Services*, the Supreme Court of Canada deemed Canada's international law obligations to be informative in its interpretation of s. 2(d) of the *Charter*. In *B.C. Health Services* the court stated:

79 In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection: *Alberta Reference*.

In reaching that conclusion the court referred to the same international conventions and instruments as were referred to by Dickson C.J. in *Alberta Reference*, *supra* and to which I have referred at paras. 31 and 32 above.

[101] The presumption of conformity with international law is a rule of legal interpretation whereby domestic law is read, wherever possible to be consistent with international law. It is a presumption that can be rebutted by legislation that “with irresistible clearness” is intended to violate international law obligations.³²

[102] The first question is whether, in its international law obligations, Canada has committed to recognizing the right of employees to bargain collectively, including the right of employees to strike in furtherance of the right to bargain collectively. An analysis of the scope and content of Canada’s international law obligations, and their significance to the interpretation of the *Charter*, was undertaken in this case by Professor Patrick Macklem³³ at the request of the Intervenor SUN. In his analysis Professor Macklem states:

54. At the heart of international human rights law is the Universal Declaration of Human Rights of 1948, a unanimous resolution of the UN General Assembly in December of the same year. In many respects, the Declaration is the blueprint of post-war international and domestic human rights protection — a contemporary approach that formulates rights and

³² See: Van Ert, *Gib Using International Law in Canadian Courts*, 2nd ed, (Toronto, On: Irwin Law, 2008) at p. 130; *R. v. Hape* 2007 SCC 26, [2007] 2 S.C.R. 292 per LeBel J. at para. 53

³³ Exhibit IP No. 4 - Affidavit of Patrick Macklem sworn December 21, 2010 Tab A. Professor Macklem is a Professor of Law at the University of Toronto with expertise in the areas of International Law, International Human Rights Law, Labour Law (Domestic and International) and Constitutional Law (Domestic and Comparative)

makes clear their limits, their relation to one another, and the duties they impose on others and the state. ...

55. Article 20(1) of the Universal Declaration affirms that “[e]veryone has the right to ... freedom of association,” and Article 23(4) affirms that “[e]veryone has the right to form and join trade unions for the protection of his interests.” Although Articles 20(1) and 23(4) do not expressly refer to a right to bargain collectively, many if not all of the rights enshrined in the Universal Declaration are rendered binding at international law through and by several treaties overseen and monitored by United Nations institutions. ...

[103] As I have stated, the most significant of those “several treaties” are ILO Convention No. 87, the ICESCR and the ICCPR, both of which refer to ILO Convention No. 87.³⁴ The ICESCR explicitly protects the right of workers to form and join trade unions for the promotion and protection of their economic and social interests. Article 8(1)(c) enshrines the right of trade unions to function freely. Article 8(1)(d) guarantees the right to strike. Article 8(2) authorizes “the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State”... .

[104] Unlike the ICESCR, Convention No. 87 does not refer to the right to strike. However, during the 24 years after its generation and before its ratification by Canada, Convention No. 87 was the subject of numerous interpretations by the CFA, as well as the ILO’s Committee of Experts and Commissions of Inquiry. These bodies consistently expressed the view that the right of employees to strike is an intrinsic corollary of the right to organize recognized by Convention No. 87.

³⁴ Sweptson, L. “*Human Rights Law and Freedom of Association: Development through ILO Supervision*” (1998), 137 *Int’l. Lab. Rev.* 169 at p. 172

[105] Finally, Canada has supported the ILO Declaration on Fundamental Principles and Rights at Work, which was adopted by the ILO in June of 1998. That Declaration establishes four core principles which ILO members are bound “to promote and realize”. In part, it declares:

... [All] Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

[106] To what extent are these international instruments relevant to *Charter* interpretation? Counsel for the Government of Saskatchewan submits that only the explicit “hard law” provisions of Convention No. 87 are relevant and important to *Charter* interpretation. Even then, he submits, courts should exercise caution in referring to Convention No. 87 because it has not been explicitly implemented in Saskatchewan. He submits that all of the other international instruments and Declarations which Canada has accepted and supported, including the ILO’s core principles and ILO generated jurisprudence (such as the decisions of the CFA and Committee of Experts) are “soft laws” which impose no international obligations on Canada, have not been explicitly implemented by Saskatchewan, and are therefore of little relevance.

[107] The Government’s submissions are inconsistent with many judicial authorities, some of which I will refer to in a moment, which treat international norms as highly important to *Charter* interpretation. They are also inconsistent with the terms of the various international covenants and Declarations themselves. And they are not

supported by the expert opinion given in this action, which is that Canada's responsibilities arising from its ILO membership and UN covenants include a commitment to respect the body of international law that has developed on collective bargaining.³⁵

[108] In his *Alberta Reference* dissent, Dickson C.J. referred to commentaries of the two ILO Committees on the implicit protection of the right to strike in Convention No. 87, stating at para. 68:

68 The general principle to emerge from interpretations of Convention No. 87 by these decision-making bodies is that freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits. A Commission of Inquiry, appointed to investigate a complaint against Greece, held that strike activity is implicitly protected by Convention No. 87: I.L.O. Official Bulletin: Special Supplement vol. LIV, No. 2, 1971. The Committee of Experts has reached the same conclusion in its deliberations, pointing out that prohibitions on the right to strike may, unless certain conditions are met, violate Convention No. 87:

214. In the opinion of the Committee, the principle whereby the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned in previous

³⁵ I note the contrary view expressed by Langille, Brian, "*Can We Rely on the ILO?*", 13 C.L.E.L.J. 363. Prof. Langille's criticism of the Supreme Court of Canada's consideration of international law to inform its interpretation of s. 2(d) of the *Charter* appears to misapprehend what the court actually said in *B.C. Health Services*. I accept the views expressed on the issue by Prof. Patrick Macklem (Exhibit IPSUN #4); Prof. Michael Link (opinion included in SLRB return to CUPE application for judicial review); Adams, Roy J., "*The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille*", 14 C.L.E.L.J. 317, England, Geoffrey, "*Evaluating the Merits of the 2008 Reforms to Collective Bargaining Law of Saskatchewan*", 71 Sask. L. Rev. 307 at 311; and Van Ert, Gib *supra* note 32, at 335

general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Moreover, if strikes are restricted or prohibited in the public service or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.

(Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4(B)), International Labour Conference, 69th Session, Geneva, International Labour Office, 1983, at p. 66.)

[109] The decision relating to Greece cited by Dickson J. in the above quotation was rendered in 1971. The date is relevant because it demonstrates that before ILO Convention No. 87 was ratified by Canada (in 1972) the CFA had stated its position that recognition of the right to strike was considered to be one of its included obligations. In fact, the CFA had expressed the same view on many occasions prior to 1971.

[110] A 1982 CFA report³⁶ dealt with the Ontario *Crown Employees' Collective Bargaining Act, 1972*.³⁷ The CFA stated:

³⁶ CFA Report 214, Case No. 1071 (Canada/Ontario) ILO Official Bulletin, Vol. LXV, Series B, No. 1, 1982

³⁷ S.O. 1972, c. 67

247. In the present case, the Committee notes the Government's statement that there is no customary international law to the effect that public servants have the right to strike and that timely dispute resolution procedures exist which compensate for the absence of that right. In this connection, the Committee must recall that the right to strike - generally recognized as deriving from Article 3 of Convention No. 87, ratified by Canada - could be restricted in the civil service or in essential services in the strict sense of the term, i.e. services whose interruption would endanger the existence or well-being of the whole or part of the population. ...

[111] At paras. 30 to 39 above, I summarized the Unions' complaint to the ILO concerning the PSES Act, and provided excerpts from the resulting CFA report. In their submissions to the CFA, Canada and Saskatchewan did not suggest that it lacked jurisdiction or authority to consider the complaint, or that their international law obligations did not include commitments to recognize and promote the right of employees to bargain collectively, including their right to strike. In part, Saskatchewan argued that the PSES Act "... balances the right of workers to strike and the need for essential services and protection of the public. The legislation does not outlaw the right of any worker or union to strike. Rather, it creates a process for the negotiation of essential service agreements".³⁸

[112] In other words, the positions taken by Canada and Saskatchewan in their submissions to the CFA were consistent with the conclusions reached by Dickson C.J. in *Alberta Reference* at para. 72:

(c) Summary of International Law

72 The most salient feature of the human rights documents discussed above in the context of this case is the close relationship in each of them between the concept of freedom of association and the organization and

³⁸ *Supra* note 5

activities of labour unions. As a party to these human rights documents, Canada is cognizant of the importance of freedom of association to trade unionism, and has undertaken as a binding international obligation to protect to some extent the associational freedoms of workers within Canada. Both of the U.N. human rights Covenants contain explicit protection of the formation and activities of trade unions subject to reasonable limits. Moreover, there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities -- that is of collective bargaining and the freedom to strike.

[113] Finally, in *Alberta Reference*, Dickson C.J. stated (at para. 48) that the body of international treaties (or conventions) and customary norms, including decisions of international tribunals, constitutes an international law of human rights that is a “relevant and persuasive source for interpretation of the *Charter*’s provisions”. In doing so, he was referring to the body of international law generally, and not only to explicit obligations in fundamental Conventions formally ratified by Canada. He went further in referring to ratified Conventions, stating at p. 349:

... The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of “the full benefit of the *Charter*’s protection”. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

(vii) Conclusion on International Law

[114] For the reasons set out above, I find that Canada is a party to international treaties and instruments that recognize and protect the freedom of workers to organize, to bargain collectively and to strike. Those instruments are relevant and persuasive sources for the interpretation of the *Charter*, which should generally be presumed to

provide protection at least as great as Canada has undertaken to provide internationally. Whether or not Canada's international obligations directly bind the Government of Saskatchewan, they are nonetheless highly important in assessing whether provincial labour relations legislation is *Charter* compliant.

(viii) Conclusion on the Right to Strike and s. 2(d) of the *Charter*

[115] 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*.

4. Do the Provisions of *The Public Service Essential Services Act* Infringe on the Freedom to Strike Protected by s. 2(d) of the *Charter*?

[116] Prior to the enactment of the PSES Act, unions representing employees in the Saskatchewan public sector had a virtually unfettered ability to unilaterally determine the nature and extent of services that would be provided during a strike. Although the PSES Act ostensibly contemplates the negotiation of an essential services agreement between each public employer and the union representing its employees, it also confers on public employers the unilateral authority to determine, in the words of s. 9(2) of the Act:

9(2) A notice served pursuant to subsection (1) must set out the following:

- (a) the classifications of employees who must continue to work during the work stoppage to maintain essential services;
- (b) the number of employees in each classification who must work during the work stoppage to maintain essential services;
- (c) the names of employees within the classifications mentioned in clause (a) who must work during the work stoppage to maintain essential services;
- (d) in the case of a public employer other than the Government of Saskatchewan, the essential services that are to be maintained.

[117] The Government has placed itself in a special position: pursuant to ss. 2(c)(ii), 6(2), 6(3), 7, 9(2)(d) and 21(b) of the PSES Act, it has exempted itself from the requirement to identify and inform the union of the services it considers essential. Instead, it is empowered to prescribe by regulation the services that must be maintained.

[118] The prohibitions and penalties for failing to adhere to employer designations and governmental regulations are set out in ss. 14 to 18 of the PSES Act as follows:

14 No essential services employee shall participate in a work stoppage against his or her public employer.

15(1) No trade union shall authorize, declare or cause a work stoppage of essential services employees.

(2) Neither the trade union nor any person acting on behalf of the trade union shall in any manner:

(a) discipline any essential services employee for the reason that the essential services employee complies with this Act; or

(b) direct, authorize or counsel another person to discipline any essential services employee for the reason that the essential services employee complies with this Act.

16 No person or trade union shall in any manner impede or prevent or attempt to impede or prevent any essential services employee from complying with this Act.

17 No person or trade union shall do or omit to do anything for the purpose of aiding, abetting or counselling any essential services employee not to comply with this Act.

18(1) If there is a work stoppage:

(a) every essential services employee shall continue or resume the duties of his or her employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement, if any;

...

(c) every person who is authorized on behalf of the trade union to bargain collectively with the public employer shall give notice to the essential services employees that they must continue or resume the duties of their employment in accordance with the terms and conditions of the last collective bargaining agreement, if any.

(2) If there is a work stoppage, no essential services employee shall, without lawful excuse, fail to continue or resume the duties of his or her employment with the public employer.

[119] Penalties for non-compliance with the prohibitions are set out in s. 20:

20(1) No person or trade union shall fail to comply with this Act, the regulations or an order of the board.

(2) Every person who or trade union that contravenes any provision of this Act is guilty of an offence and liable on summary conviction:

(a) in the case of an offence committed by a public employer or a trade union or by a person acting on behalf of a public employer or the trade union, to a fine of not more than \$50,000 and, in the case of a continuing offence, to a further fine of \$10,000 for each day or part of a day during which the offence continues; and

(b) in the case of an offence committed by any person, other than one described in clause (a), to a fine of not more than \$2,000 and, in the case of a continuing offence, to a further fine of \$400 for each day or part of a day during which the offence continues.

(3) In the case of default of payment of a fine imposed on a person pursuant to this section, the convicting court shall, on the request of the Attorney General, furnish the Attorney General with a certified copy of the order of conviction and fine imposed and, on its filing in the office of the local registrar of the Court of Queen's Bench, that order is enforceable as a judgment of that court.

[120] Whether or not the limitation on the employees right to strike can be demonstrably justified is a matter to be dealt with under s. 1 of the *Charter*. The issue at this point is whether the legislation violates s. 2(d) of the *Charter*.

[121] In *B.C. Health Services* the Supreme Court of Canada established a “substantial interference” test for determining whether governments must take positive steps to protect or promote the fundamental freedoms guaranteed by s. 2 of the *Charter* — for example, a positive duty to bargain collectively with a trade union, as in *B.C. Health Services*, or a positive duty to rectify underinclusive legislation, as in *Dunmore*. It is questionable whether the same “substantial interference” test is to be applied to the negative duty to refrain from infringing upon guaranteed freedoms — which is what we are dealing with here — specifically to refrain from enacting legislation that per se restricts the right to strike. What we do know is that in both *Dunmore* and the *Alberta Reference* dissent it was held that governments must justify all such legislative infringements under s. 1 of the *Charter*.

[122] I need not decide whether one standard of “substantial interference” applies to all claims, positive and negative, or whether a lower threshold applies to a negative claim like this one. Accepting the higher threshold, the PSES Act substantially interferes with the freedom of public sector employees in many workplaces to engage in meaningful

strike action. Accordingly, the government must demonstrate that the legislation can be justified under s. 1 of the *Charter*.

5. Do the PSES Act Limitations on the Freedom to Strike Satisfy s. 1 of the *Charter*?

(i) Introduction to Limitations on the Freedom to Strike Generally

[123] The historical summary contained in *B.C. Health Services* (at paras. 40-68), described how workers have achieved workplace goals by collectively refusing to work. Even though the law tried to limit workers' rights to unionize, strikes pressured employers to recognize a trade union as the representative of their employees, to agree to improve terms and conditions of employment and to resolve ongoing workplace disputes. The use of the strike weapon for those purposes was at best costly and disruptive; at worst, it led to violence, injury and death. As stated in *B.C. Health Services*:

54 While employers could refuse to recognize and bargain with unions, workers had recourse to an economic weapon: the powerful tool of calling a strike to force an employer to recognize a union and bargain collectively with it. The law gave both parties the ability to use economic weapons to attain their ends. Before the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the workers' desire to have an employer recognize a union and bargain collectively with it. ... The unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American *Wagner Act* model of legislation, discussed below.

[Authorities deleted]

[124] By necessity, labour laws have found ways to facilitate the collective goals of workers while restricting, if not entirely eliminating, their need to strike. Strikes for

the purpose of compelling employers to recognize an employee bargaining representative have been replaced with a process whereby a union may obtain and file evidence of employee support with a governmentally established tribunal. The tribunals' responsibilities are two-fold: (1) to define the group of employees (the "bargaining unit") for whom majority support must be shown; and (2) to determine whether the majority of employees in that group truly wish to be represented by that union. The crucial nature of the first function is often overlooked: the configuration of the bargaining unit defines the ongoing relationship between the parties, and has a direct effect on their relative bargaining strengths.

[125] The critical question is the extent to which the protected freedom to strike can be restricted. It is well established in Canadian and international law that, within certain parameters, the right to strike may be curtailed for employees engaged in the delivery of truly essential services to the community. In Canada, public sector labour legislation has attempted to balance the rights of employees to negotiate with their employer on the one hand, with the needs of the employer, the community and the larger economy, on the other. Expressed in more familiar terms, the purpose of labour law has been to recognize and promote the right of employees to bargain collectively through a trade union of their own choosing, subject to such reasonable limitations as may be demonstrably justified in a free and democratic society.

[126] The balance has not been easy to achieve. Public sector strikes can be an extremely powerful weapon. Governmental efforts to legislate them out of existence, at

times combined with statutorily imposed wage adjustments, have often failed.³⁹ Nevertheless, the principle that it is unacceptable to risk the health and safety of others as a means to resolve a public sector collective bargaining dispute is well established in Canada. Every labour relations jurisdiction has had its own approach to minimizing the risk of harm posed by a strike of public sector employees. Prior to the enactment of the PSES Act, every jurisdiction except Saskatchewan⁴⁰ had essential services legislation in place. At a minimum, all of those other jurisdictions prohibit strikes by police officers and firefighters. All except Nova Scotia also prohibit, or at least significantly curtail, the right of hospital workers to strike. Invariably, where essential services legislation has had the effect of precluding meaningful strike action for hospital workers in Canada, an alternative mechanism for establishing wages and other terms and conditions of employment for the employees is provided. I will refer to this again under the s. 1 proportionality analysis.

[127] International law also recognizes the necessity of limitations on the right to strike of essential service workers. Much material was submitted by all parties on this issue. The jurisprudence under ILO Convention No. 87, the ICSECR and the ICCPR has been consistent. As expressed by Prof. Patrick Macklem:⁴¹

...

³⁹ See Haiven, Larry and Haiven, Judy, *The Right to Strike and the Provision of Emergency Services in Canadian Health Care* (Ottawa, On: Canadian Centre for Policy Alternatives, 2002). See also Professor Geoffrey England, *supra* note 35 at 337, in which the author refers to the 1988 Alberta nurses strike, the 2001 B.C. teachers strike and the 1981 Ontario hospital strike by CUPE workers.

⁴⁰ Saskatchewan enacted *The Essential Services Emergency Act, 1966* and substantially expanded its scope in 1970 to include, inter alia, hospital workers. That legislation was repealed on August 12, 1971 following the election of a new government. Since then, Saskatchewan has enacted ad hoc back to work legislation on 10 occasions.

⁴¹ *Supra* note 33

Each of these instruments has been interpreted as enshrining the right to strike, and their respective supervisory bodies have insisted that the right to strike may be restricted or prohibited:

- (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.

[128] The following summary of decisions of the CFA Committee and the ILO Committee of Experts was also prepared by Professor Michael Lynk,⁴² which I accept as accurate and reliable:

The Right to Strike and Public Sector Essential Services

- 29. The two Committees have given essential services a specific meaning: those services where the withdrawal of labour would result in a clear and imminent threat to the life, personal safety or health of the whole or part of the population. As indicated above, the Committee of Freedom of Association has also said that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.
- 30. A government would be entitled to legislate restrictions or even prohibitions on the right to strike for public sector employees working in essential services. However, to be compliant with the ILO standards, a government would have to ensure the following:
 - (i) the public services that are targeted for the withdrawal of services genuinely meet the definition of essential services in its strict and proper sense;

⁴²

Prof. Michael Lynk: *Expert Opinion on Essential Services* included in SLRB Return filed pursuant to QB Rule 669 April 7, 2010

- (ii) the guiding test for the restriction or prohibition of the right to strike would be based on the minimal and proportional analysis;
- (iii) the first permissible exception to the broad and general right to strike that is to be explored would be a partial and restricted right to strike;
- (iv) the scope for a partial and restricted right to strike is to be drawn as purposively as possible in order to establish the minimum amount of services that can be offered during a strike that are sufficient to avoid endangering the life, personal safety or health of the whole or part of the population, while allowing for as comprehensive an exercise of the right as possible in the circumstances;
- (v) a partial and restricted right to strike that compels an unnecessarily broad number of employees to continue to work and leaves only a relatively small number of employees with the ability to strike would make the exercise of the right futile, and the right to collectively bargain a hollow guarantee;
- (vi) In determining the appropriate level of minimum services for a partial and restricted strike, provision is to be made for the meaningful involvement of the trade union(s) to establish the appropriate levels;
- (vii) that, if it is genuinely determined that even a partial and restricted strike would nevertheless endanger the life, personal safety or health of the whole or part of the population based on the minimal and proportional analysis, then the right to strike can be prohibited;
- (viii) where the right to strike in an essential service cannot be permitted, then the government must erect an “adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.” In such mediation and arbitration proceedings, it is essential that all the members of the bodies entrusted with such functions should be impartial and seen as such by both the employers and the workers concerned.

[129] Although the above summaries of the international law approach are consistent with the views expressed by Dickson C.J.'s dissent in *Dairy Workers*, the former Chief Justice also held that strikes (and lockouts) may be limited where they would be "especially injurious" to the economic interests of third parties. At p. 476 he stated:

In the *Alberta Labour Reference*, I accepted the "essential services" justification for the substitution of an adequate scheme of compulsory arbitration for the freedom to strike. The legislature is entitled to limit the freedom of employees to strike if the effect of a strike would be to deprive the public of essential services. The rationale for such a limitation is that members of the public who do not participate in a particular collective bargaining process ought not to be unduly harmed when the bargaining fails to produce a settlement. In my view, such a rationale also applies when the harm to third parties is economic in nature. Although, as I indicated in the *Alberta Labour Reference*, the right to bargain collectively and therefore the right to strike involve more than purely economic interests of workers, it cannot be doubted that economic concerns play an important role in a great many industrial disputes. It would be strange, indeed, if our society were to give constitutional protection for the freedom of employees to advance economic, as well as non-economic, interests by striking, while insisting that the state remain idle and indifferent to the infliction on others of serious economic harm. To require the legislature to be blind to the economic harm which may ensue from work stoppages would be to freeze into the constitution a particular system of industrial relations. Although, as yet, it would appear that Canadian legislatures have not discovered an alternative mode of industrial dispute resolution which is as sensitive to the associational interests of employees as the traditional strike/lockout mechanism, it is not inconceivable that, some day, a system with fewer injurious incident effects will be developed. In the meantime, in my view, legislatures are justified in abrogating the right to strike and substituting a fair arbitration scheme, in circumstances when a strike or lock-out would be especially injurious to the economic interests of third parties. ..

[130] In summary, Canadian and international law supports the restriction or prohibition of strikes by essential services employees provided that it is based on a

minimal and proportional analysis and, where strike action is substantially abrogated, accompanied by a fair and adequate dispute resolution scheme.

[131] I turn now to a consideration of whether the extent to which the PSES Act infringes on the freedom to strike can be justified under s. 1 of the *Charter*.

(ii) **Can the Limitations in the PSES Act be Justified under s. 1 of the Charter?**

[132] Section 1 of the *Charter* provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[133] The analytical framework in connection with s. 1 of the *Charter* was established by Dickson C.J. in *R. v. Oakes*.⁴³ Richards J.A., speaking for the majority of the Saskatchewan Court of Appeal in *Reference Re: Marriage Act*,⁴⁴ summarized the approach to be taken as follows:

68 The basic framework of analysis to be conducted in connection with s. 1 was set out by Dickson C.J.C. in *R. v. Oakes*, [1986] 1 S.C.R. 103 at pp. 138-39. The first requirement is that the objective of the impugned law be of sufficient importance to warrant overriding a Charter right or freedom. The second requirement involves the satisfaction of a form of "proportionality" test. Three factors are considered in determining if a law

⁴³ *Supra* note 1

⁴⁴ 2011 SKCA 3, 366 Sask. R. 48, 327 D.L.R. (4th) 669

is proportional in this sense: (a) the particulars of the law must be rationally connected to its objective, (b) the law must impair the right or freedom in question as minimally as possible, and (c) there must be an overall proportionality between the deleterious effects of the law and its object.

Is the Objective of the PSES Act pressing and substantial?

[134] The first requirement for determining whether a challenged law imposes a reasonable limit on a guaranteed right or freedom is whether its objective relates to concerns that are “pressing and substantial”. The objective of a law can be inferred from its effect, but cannot be determined solely by reference to its effect. Otherwise, any law that has the effect of infringing on a *Charter* right could be said to have the infringement as its objective. The effect of the challenged law is best considered at the fourth step of the *Oakes* analysis, which concerns the proportionality between the object of the law and its deleterious effects.⁴⁵

[135] In announcing the introduction of its labour legislation in December of 2007 Saskatchewan’s newly elected premier, Brad Wall, stated:

The goal of promoting growth requires my government to focus some attention on the current labour legislative environment. The rights of workers to bargain collectively and the rights of employers must be respected. However, the labour legislative environment must also be competitive with other Canadian jurisdictions, if the Saskatchewan economy is to realize its potential. My government will introduce legislation that achieves this competitive balance in labour laws.

Premier Brad Wall, Throne Speech, December 10, 2007, page 5.

⁴⁵ *Ibid.* at 72

[136] It is notable that the Premier referred to the need for “competitive balance” in the throne speech, rather than the need to ensure the uninterrupted delivery of essential services during public sector labour disputes. In doing so, however, the Premier did not appear to be referring specifically to the as yet to be introduced PSES Act.

[137] The PSES Act was introduced in the legislature on December 19, 2008. The first comments in the legislature with respect to its objective were made on March 11, 2008 when the legislation received second reading. At that time the Minister Responsible for Advanced Education, Employment and Labour, Honourable Mr. Norris stated:

Hon. Mr. Norris: — Mr. Speaker, I move that Bill 5, The Public Service Essential Services Act be read a second time.

Mr. Speaker, today I speak to the legislation that will ensure Saskatchewan people have access to essential services during labour disruptions. In two prominent labour disputes in 2007, the people of our province were put at unfortunate risk. Snowplow operators walked off the job as a result of the SGEU [Saskatchewan Government and General Employees' Union] public service strike last winter, and as many as 400 patients per day were being left without adequate medical care during the CUPE [Canadian Union of Public Employees] strike at Saskatchewan's two universities.

Our government will not sit by and allow the interruption of essential services as the result of these types of work stoppage. We are committed to ensuring the health and safety of the Saskatchewan people in event of strikes like these. This said, our government respects and will continue to respect the collective bargaining process. This legislation balances the rights of unions and workers with the need for essential services to ensure public safety, and it is similar to legislation passed in every other province in Canada except Nova Scotia, where the legislation like this has been tabled.

We know that any strike can affect the lives of Saskatchewan's people, but this legislation will ensure that lives are not jeopardized in the process. The legislation defines four categories of essential service. They are: danger to life, health, or safety; destruction of equipment or premises; serious environmental damage; or disruption to the courts. While the Act defines

categories of essential services, it is up to the employer to determine the number of employees required to deliver those services. That said, it also provides for an adjustment if that number changes due to circumstances. This legislation is about our commitment to the health and safety of the people of Saskatchewan, and to our communities.⁴⁶

[138] The affidavit evidence illustrates the factual disputes between the parties as to whether public sector unions have, or have not, provided essential services during past labour disputes (including those referred to by mediator Vince Ready in his report dated January 24, 2007 (see para. 22 above) and by Premier Wall in the throne speech (see para. 135 above) and whether there was, or was not, a “pressing and substantial need” for the PSES Act. All of the intervenor Unions take the same position: there has never been any “pressing and substantial” need for the Government of Saskatchewan to enact essential services legislation because their members have always voluntarily delivered those services during labour disputes.

[139] I am unable to reconcile the mass of conflicting affidavit evidence filed by the various parties with respect to what Union members did or did not do to provide essential services during labour disputes of the past. It is also unnecessary for me to do so. I need only consider the evidence concerning two labour disputes in which critical essential services were clearly withdrawn (although the Unions claim otherwise) under a labour relations regime that had no essential services legislation.

⁴⁶ Saskatchewan, Legislative Assembly, *Debates and Proceedings* 26th Leg, 1st Sess, N.S. Vol. 50, No. 10A (11 March 2008) at 267

The 1999 Nurses' Strike

[140] In April of 1999, 8400 nurses represented by SUN engaged in a province wide strike. In its submissions to the court in this case, SUN asserts that its members responsibly provided all of the essential services necessary to ensure the health and safety of the community during that dispute. In fact, the evidence is clear that many health care facilities throughout the province lost the capacity to provide critical care to patients.

[141] SUN served strike notice on April 5, 1999, declaring a strike effective April 8, 1999. The evidence is that SUN was reluctant to have pre-strike discussions regarding the level of essential services to be provided during the strike. The health care employers asked SUN to agree to provide nursing staff for planning and scheduling purposes. SUN refused. SUN took the position that essential services, as SUN defined it, would be provided by its members on a case by case, ward by ward, service by service basis.

[142] Some of the effects of the strike in Saskatoon were as follows:

- (a) the total acute care bed census went from approximately 890 to 289;
- (b) 1456 surgeries were cancelled, of which 77 were categorized as “urgent” and 91 were for cancer patients;
- (c) critically ill patients were airlifted out of the province, with 16 airlifted out of Saskatoon to facilities in Alberta and North Dakota;
- (d) only the emergency department at Royal University Hospital was kept open;

- (e) in Public Health, all clinic services and public health services involving nurses were discontinued.

Similar effects were experienced in other areas of the province.

[143] Six hours after the SUN strike began the Government enacted *The Resumption of Services (Nurses-SUN) Act*.⁴⁷ The Act directed SUN members to end the strike and return to work. SUN members ignored it.

[144] The health care employers, represented by SAHO, applied to the Court of Queen's Bench for injunctive relief. On April 11, 1999 an injunction was granted by Zarzeczny J.⁴⁸ who stated:

[31] If, as the materials filed attributing statements to the leadership of SUN are accepted, the 8,400 nurses that worked in Saskatchewan's acute and special care facilities are having difficulty coping with the stress and the work load in their facilities to the point where they felt while working that patient care and health is being compromised. The only sensible and reasonable conclusion to draw is that the continued withdrawal of the large majority of the services of these 8,400 nurses has and will continue to create a much worse situation and cause irreparable harm to the ability of these public institutions to provide safe, adequate and qualified health care to those Saskatchewan citizens who are patients or clients of these facilities. I have therefore concluded that the applicants have met the further requirement that they have and will continue to suffer irreparable damage or loss.

⁴⁷ S.S. 1999, c. R-22.001 as rep. by R.R.S. 1999, c. R-22.001 Reg. 1

⁴⁸ *Saskatchewan Health-Care Association et al. v. Saskatchewan Union of Nurses et al.*, 176 Sask. R. 179

SUN members ignored the injunction and continued their strike for another week. Although the strike ostensibly ended on April 18, 1999 SUN continued to publicly threaten job action in the form of resignations, refusal to work overtime, rotating strikes and other forms of withdrawals of service if its collective bargaining demands were not met.

[145] In a judgment dated July 8, 1999⁴⁹ Zarzeczny J. found SUN and its executive officers in criminal contempt of court, stating:

[11] All of the evidence which I received from the witnesses testifying at the hearing and additionally which I have reviewed as a consequence of the substantial affidavits and exhibits filed in this contempt motion satisfy me of the following facts and conclusions relevant to the question of the appropriate penalty to be imposed for the Union's contempt:

(a) That as initially found in the injunction judgment, the nurses' strike action did result in irreparable harm and a threat to the health and safety of Saskatchewan citizens who were either patients in or relied upon the employer health care institutions to provide necessary and appropriate care;

(b) That many essential services were not being provided by nurses to Saskatchewan citizens who needed those services and that the situation constituted a real and present danger to their health and well being;

(c) That the Union and Saskatchewan nurses did have in place essential service plans, however, those plans were developed and implemented without substantial and effective input from the representatives of the employing health care institutions including the doctors and administrators responsible for the operation of those facilities. As a result, during the nurses unlawful strike, the citizens of Saskatchewan and its health care institutions were without a published, responsible and consistently applied essential nursing services plan;

⁴⁹

Saskatchewan Health-Care Association et al. v. Saskatchewan Union of Nurses, et al., 177 D.L.R. (4th) 235; 182 Sask. R. 248

(d) That essential nursing services committees were in place and effectual, in some facilities, to relieve out-of-scope nurses and provide essential services and to deal with some, but not all, critical care requirements and emergencies;

(e) That the Union, through its leadership including its president, executive director and others continued to counsel nursing members by example, actions and statements made to and through the press and through Union communications including “hot line” and “talk mail” messages to continue the illegal strike until there was a basis for agreement that the Union could recommend to its members. That on April 17, 1999, the Union and its leadership, after signing a memorandum of agreement with SAHO and the Premier of Saskatchewan recommended to and instructed the membership to return to work which nurses did, on mass, on and after April 18, seven days after the injunction issued by this court.

...

[25] In all of these circumstances, and based upon the facts which I have found to exist in this case, I have concluded that the contempt of SUN acting through its president, and chief executive officer and other persons holding office in the Union did constitute a criminal contempt.

The 2001 Healthcare Workers’ Strike

[146] Strikes by Saskatchewan health care workers have not been confined to nurses. Employees represented by CUPE withdrew services in 1998, 1999 and 2001. Professionals and para-professionals represented by the Health Sciences Association of Saskatchewan (“HSAS”) engaged in strike action in 2002 and threatened strike action in 2007. I will briefly review the evidence only with respect to the 2001 strike by CUPE members.

[147] Pre-strike directives provided by CUPE in 2001 indicated that essential services would only be provided in life and death situations. The intervenor health

regions proposed minimum staffing, which CUPE refused. As the strike progressed, the impact on health care services became more serious. In the Regina area alone, elective procedures were cancelled, patients were transferred out of province to alternate provincial sites, and there were no admissions to permanent beds, convalescent beds, palliative beds or respite beds. Admissions to long term care facilities were halted. All day support programs and Meals on Wheels programs were cancelled. Eighty-eight beds at the Regina General Hospital were closed, which left it functioning at 75 percent, and 110 beds at the Pasqua Hospital were closed, leaving it functioning at only 54 percent of capacity. Operating room theatres were reduced from eight to one at the Regina General Hospital, and from seven to one at the Pasqua Hospital, being the only two operating hospitals in the city. The women's health centre was closed and five children's beds were closed in in-patient rehabilitation at Wascana Rehabilitation Centre, in addition to eight adult rehabilitation beds.

[148] These strikes in the health care field had common elements: the Unions decided when they would inform the employer about the essential services to be provided; what services would be provided, and who would provide them. While the Unions contend that there should be no limitation on their freedom to continue to do so, the evidence supports the conclusion that they have at times placed their own collective bargaining interests ahead of the interests of the community. That is hardly surprising: self interest motivates both sides in a labour dispute. Were it otherwise, Canadian and international law would have no need to recognize the propriety of limitations on the right to strike of essential services workers.

[149] That is the objective of the PSES Act: to ensure the continued delivery of essential services to the community during a labour dispute, which I find is a pressing and substantial objective satisfying the first of the *Oakes* requirements.

Does the PSES Act Satisfy the Requirement of Proportionality?

[150] The *Oakes* proportionality requirement entails consideration of three matters:

- (a) whether there is a rational connection between the objective of the law and the means by which it achieves that objective;
- (b) whether the objective of the law could be achieved by less restrictive alternatives; and
- (c) whether there is an overall proportionality between the objective of the law and its deleterious effects.

The evidence and arguments do not fit neatly into any one category.

(a) Rational Connection

[151] The first consideration is whether the law is “rationally connected” to its objective. It must be “carefully designed to achieve the objective in question” and not be “arbitrary, unfair, or based on irrational considerations”.⁵⁰ Expressed another way, the

⁵⁰ *R. v. Oakes*, *supra* note 1 at 139; *R. v. Edward Brooks and Art Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) at 770

Government must demonstrate that there is “a causal connection between the infringement and the desired benefits on the basis of reason or logic”.⁵¹

[152] The stated purpose of the PSES Act was to ensure the continuation of essential services during a labour dispute by requiring the employees who deliver the services to continue to work during a strike. The basic structure of the legislation, including the sanctions imposed on employees and their unions to ensure compliance with its provisions, is rationally connected to that objective.

(b) Minimal Impairment

[153] The second consideration under the *Oakes* proportionality inquiry is whether the law impairs rights and freedoms as little as reasonably possible in order to accomplish its objective. As stated by Richards J.A. in *Reference Re Marriage Commissioners*⁵² at para. 84:

84 The application of the minimal impairment feature of the *Oakes* test involves a certain measure of practical flexibility in the sense that the ultimate question is not whether the law in issue satisfies a bench mark of perfection but, rather, whether it falls within a range of reasonable alternatives. “Minimal impairment” is not an absolute standard and a law will not be found to be overbroad merely because it is possible to conceive of an alternative which might be less restrictive of the rights and freedoms in issue. See, for example: *R. v. Videoflicks Ltd.*, *supra*, at p. 782.

⁵¹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at 153

⁵² *Supra* note 54

[154] The Unions submit that the PSES Act fails to satisfy this “minimal impairment” test because:

- the Government, in its capacity as employer failed to satisfy what the Unions contend was its “duty to consult”;
- the PSES Act impairs the protected right to strike much more than is reasonably necessary;
- the deleterious effects of the PSES Act are more significant than the deleterious effects of other Canadian legislation having the same objective; and
- the PSES Act lacks independent processes for the resolution of disputes.

The Duty to Consult

[155] The Unions contend that in *BC Health Services*, the Supreme Court of Canada imposed a duty on governments to refrain from enacting legislation that is inconsistent with their duty as employers to engage in a “process of good faith consultation fundamental to collective bargaining”. They refer to para. 107 of the majority decision in *B.C. Health Services*, which stated:

107 In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should

be clearly supported on the record. Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.

[156] This “duty to consult” was referred to again in *B.C. Health Services* in its s. 1 analysis, and specifically in its consideration of whether the impugned legislation in that case minimally impaired the *Charter* rights of the Union members. The court stated at paras. 159 to 160:

159 The evidence establishes that there was no meaningful consultation prior to passing the Act on the part of either the government or the HEABC (as employer). The HEABC neither attempted to renegotiate provisions of the collective agreements in force prior to the adoption of Bill 29, nor considered any other way to address the concerns noted by the government relating to labour costs and the lack of flexibility in administrating the health care sector. The government also failed to engage in meaningful bargaining or consultation prior to the adoption of Bill 29 or to provide the unions with any other means of exerting meaningful influence over the outcome of the process (for example, a satisfactory system of labour conciliation or arbitration). Union representatives had repeatedly expressed a desire to consult with government regarding specific aspects of the Act, and had conveyed to the government that the matters to be dealt with under the Act were of particular significance to them. Indeed, the government had indicated willingness to consult on prior occasions. Yet, in this case, consultation never took place. The only evidence of consultation is a brief telephone conversation between a member of the government and a union representative within the half hour before the Act (then Bill 29) went to the legislature floor and limited to informing the union of the actions that the government intended to take.

160 This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government’s choices.

[157] At paras. 19 to 29 of this judgment I described the mediation/arbitration process between SGEU and the Government of Saskatchewan which resulted in a Memorandum of Agreement dated February 14, 2007 and an Arbitration Award on July 2, 2009. Eleven days after that Award was issued the Government designated as essential a wide range of governmental services and programmes in the PSES Regs.

[158] SGEU contends that the Government had a duty to consult with its representatives because of the Government's special relationship as employer and because the PSES Regs essentially abrogated the collectively bargained Memorandum of Agreement dated February 14, 2007.

[159] 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 the SGEU in any event.

[160] 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. Prior to the enactment of the PSES Regs, which refer to the Public Service/SGEU bargaining unit only, the Government did engage the SGEU in meaningful discussions, but only with respect to the "danger to life, health and safety" category of essential services.

[161] The lack of communication between the Unions and the newly elected Government appears to have been a product of their complete and utter mistrust of one another. Perhaps that should not have been entirely surprising. The role of public sector unions in Saskatchewan and elsewhere has not been confined to representing their employee members in collective bargaining: they have been major players in the political arena, enjoying a special relationship with, and contributing financially to, their political parties of choice.

[162] I take notice of the fact that, in Saskatchewan, that party of choice has generally been the NDP, the party in power for 47 of the previous 67 years. That was the public sector unions' party of choice in the months leading up to the defeat of the NDP by the Saskatchewan Party on November 7, 2007.

[163] 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 the employees would have no access to any alternative dispute resolution process.

[164] The Constitution does not prohibit legislation that rebalances the strength of the parties at the negotiating table. What is unacceptable is the creation of a structure that

infringes on basic freedoms protected by s. 2(d) of the *Charter* in a manner that cannot be justified under s. 1.

[165] It is trite to observe that governments generally try to stay in touch with the wishes of their electorate. Those that lose touch because they fail to consult may well be replaced by those who ought to have been consulted. More importantly, consultation is useful because it will usually lead to an improved statutory product. However, the Union's argument is not that Government should consult; it is that they have a constitutional duty to consult.

[166] The Unions acknowledge that their concept of a governmental duty to consult arises primarily from cases requiring a reconciliation of pre-existing aboriginal sovereignty with assumed Crown sovereignty⁵³ under s. 35 of the *Constitution Act*. Section 35 of the *Constitution Act* is not part of the *Charter* per se, and is not subject to a s. 1 analysis. Nevertheless, the Unions contend that the same type of duty to consult should be imposed in cases such as this — that is, where Government uses its legislative power to abrogate its own obligations under a collective agreement. They say that if Government fails to consult, legislation abrogating collectively bargained agreements should be declared unconstitutional.

[167] This leads back to the concerns expressed by some by Rothstein and Charron JJ. in *Fraser* and Prof. Peter W. Hogg (as set out at para. 82 of this decision) that the decision in *B.C. Health Sciences* elevated collective agreements to constitutional status. Their concerns arise because in *B.C. Health Services*, the government of British

⁵³ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 S.C.R. 511 at 20

Columbia was not entitled to enact legislation that abrogated its own collective bargained obligations, in part because it did not consult with the union.

[168] With the utmost respect. I do not agree that *B.C. Health Services* elevated collective agreements to constitutional status. *B.C. Health Services* did not suggest:

- (i) that governments may not enact legislation that alters a collective agreement; or
- (ii) that governments, *qua* employer, have a duty to “consult collectively” with the unions that represent governmental employees, rather than the same duty as all other employers to “bargain collectively” with those unions; or
- (iii) that a governmental failure to consult can invalidate otherwise constitutional legislation; or
- (iv) that consultation by government can validate otherwise unconstitutional legislation.

[169] The decision in *B.C. Health Services* was summarized at para. 108:

108 Even where a s. 2(d) violation is established, that is not the end of the matter; limitations of s. 2(d) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

[170] At para. 157:

157 Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.

[171] And at para. 161:

161 We conclude that the government has not shown that the Act minimally impaired the employees' s. 2(d) right of collective bargaining. It is unnecessary to consider the proportionality between the pressing and substantial government objectives and the means adopted by the law to achieve these objectives. We find that the offending provisions of the Act (ss. 6(2), 6(4) and 9) cannot be justified as reasonable limits under s. 1 of the *Charter* and are therefore unconstitutional.

[172] Nothing in those comments elevated a collective agreement, including one negotiated by the government *qua* employer, to constitutional status, thereby immunizing the agreement from legislation. In my view, the rationale for the above comments was simply this: governments cannot use their sovereign power to legislate in a manner that eliminates their own obligations as employers to respect protected employee rights under s. 2(d) of the *Charter*, unless the legislation can be justified under s. 1. This means that governments cannot eliminate their own duty to recognize the right of their own employees to bargain collectively and to strike by enacting unjustified legislation. Whether or not a government has consulted with a union before enacting labour legislation is relevant only to the court's proportionality analysis under s. 1. In *B.C. Health Services*, the court chose to take the failure to consult into account in assessing the *Oakes* requirement of minimal impairment.

[173] For these reasons, I find that the Government of Saskatchewan did not have a duty to consult with the Unions before enacting the PSES Act. Its failure to do so, however, must be considered in assessing whether the PSES Act minimally impairs the right of its employees to strike.

The Degree of Impairment

[174] The PSES Act empowers a broad spectrum of public employers to require employees providing essential services to work during a strike. It also empowers them to unilaterally decide whether the services provided by those employees are “essential”. It is helpful to repeat the definition of essential services in s. 2(c) of the Act:

- 2** In this Act:
- ...
- (c) “**essential services**” means:
- (i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:
- (A) danger to life, health or safety;
 - (B) the destruction or serious deterioration of machinery, equipment or premises;
 - (C) serious environmental damage; or
 - (D) disruption of any of the courts of Saskatchewan; and
- (ii) with respect to services provided by the Government of Saskatchewan, services that:
- (A) meet the criteria set out in subclause (i); and
 - (B) are prescribed;

[175] All of the definitions of essential services require basic judgments to be made. When is life, health or safety “endangered”? When does the deterioration of machinery, equipment or premises become “serious”? (Note that the definition encompasses any and all machinery, equipment or premises, large or small, whether used in the delivery of essential services or not). How is the line to be drawn between environmental damage that is “serious” and environmental damage that is “not serious”? At what point do the operations of the courts become “disrupted”? There are no answers to be found in the PSES Act.

[176] Rather, the PSES Act directs that, in the absence of an agreement with the Union, all these questions will be unilaterally answered by the public employers: the Government of Saskatchewan by regulation; all other public employers by designation under s. 9 of the Act.

[177] Given their past experiences with labour related work stoppages, one might think that the meaning of the words “danger to life, health or safety” in s. 2(c)(i)(A) of the PSES Act could be agreed upon by the parties, at least as it applies to health care. The evidence was otherwise.

[178] Before the enactment of the PSES Act, SAHO had prepared an “Essential Services Designation Handbook” to provide its members with an “overview of the guiding principles related to the development of essential services designation”. The 2005 Handbook stated at p. I-1:

Essential Services are Services [that] are Necessary or Essential to Prevent Immediate and Serious Danger to the Health, Safety or Welfare of the Residents of Saskatchewan.

[179] That view was closely aligned with various decisions of the CFA, which as we have seen, treat “essential services” as: “the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population”.⁵⁴

[180] To supplement the basic SAHO definition, as it then was, Regional Health Authorities prepared detailed descriptions of the specific services they considered to be essential in each area of health care. One example in evidence was a June 2007 outline of specific duties considered essential prepared by Saskatoon Regional Health Authority in anticipation of the HSAS strike.

[181] The view taken by SAHO and the Regional Health Authorities changed dramatically following the enactment of the PSES Act. In February of 2009 the President of SAHO, Susan Antosh, noted at a press conference that the PSES Act does not define the word “health”, and stated that health care employers henceforth intended to use the World Health Organization definition in determining the services, classifications and numbers they would designate as essential. The World Health Organization defines “health” as:

A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

⁵⁴ *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. 5th (revised) ed., 2006 at 581

[182] That is the only evidence in this case of any definition of “life, health or safety” developed by SAHO for the purposes of essential services agreements contemplated by the PSES Act. The Regional Health Authorities, represented by SAHO, took the position that they had no obligation under s. 9(2) of the PSES Act to identify specific services as essential. They simply relied on their power to unilaterally identify the classifications they deemed essential, the number of employees in each classification, and the names of the employees who must work during a work stoppage. Their position was consistent with the PSES Act.

[183] Just as the definition of “essential services” is very broad, so too is the definition of “public employer”. Section 2(i) defines the term as follows:

- 2 In this Act:
- ...
- (i) “**public employer**” means:
- (i) the Government of Saskatchewan;
 - (ii) a Crown corporation as defined in *The Crown Corporations Act, 1993*;
 - (iii) a regional health authority as defined in *The Regional Health Services Act*;
 - (iv) an affiliate as defined in *The Regional Health Services Act*;
 - (v) the Saskatchewan Cancer Agency continued pursuant to *The Cancer Agency Act*;
 - (vi) the University of Regina;
 - (vii) the University of Saskatchewan;
 - (viii) the Saskatchewan Institute of Applied Science and Technology;
 - (ix) a municipality;

- (x) a board as defined in *The Police Act, 1990*;
- (xi) any other person, agency or body, or class of persons, agencies or bodies, that:
 - (A) provides an essential service to the public; and
 - (B) is prescribed;

[184] Some of the public employers listed in s. 2(i) of the PSES Act employ a high percentage of essential service workers. Examples include Boards of Police Commissioners, Regional Health Authorities and affiliates, and the Saskatchewan Cancer Agency. Some of the public employers, such as municipalities, have proportionately fewer employees delivering essential services. There is no evidence that some of the public employers employ any employees who are engaged in the delivery of essential services. Examples include SIAST and Saskatchewan Gaming Corporation, a Crown corporation that owns and operates Casinos in Regina and Moose Jaw.⁵⁵

[185] Nevertheless, all of the public employers, from Boards of Police Commissioners acting under *The Police Act 1990*,⁵⁶ to resort villages as defined in *The Municipalities Act*,⁵⁷ have the powers set out under s. 9. of the PSES Act. Section 9, ss. (1) to (6) state:

⁵⁵ The lines between public employers and the essential services they provide are not always clear cut. For example, the Royal University Hospital is located on the campus of the University of Saskatchewan in Saskatoon. It is dependent on the University for its utilities. Essential services are therefore provided by the University, not because it is engaged in the delivery of secondary education, but because it provides utilities critical to the functioning of the healthcare facility.

⁵⁶ S.S. 1990-91, c. P-15.01

⁵⁷ S.S. 2005, c.M-36.1

9(1) A public employer shall serve a notice on the trade union in accordance with this section if:

- (a) there is a work stoppage or a potential work stoppage; and
- (b) there is no essential services agreement concluded between the public employer and the trade union.

(2) A notice served pursuant to subsection (1) must set out the following:

- (a) the classifications of employees who must continue to work during the work stoppage to maintain essential services;
- (b) the number of employees in each classification who must work during the work stoppage to maintain essential services;
- (c) the names of employees within the classifications mentioned in clause (a) who must work during the work stoppage to maintain essential services;
- (d) in the case of a public employer other than the Government of Saskatchewan, the essential services that are to be maintained.

(3) The public employer shall notify each of the employees named in a notice served pursuant to subsection (1) that he or she must work during the work stoppage to maintain essential services.

(4) If at any time the public employer determines that more employees in one or more classifications set out in the notice served pursuant to subsection (1) are required to maintain essential services and there is no essential services agreement concluded between the public employer and the trade union, the public employer may serve a further notice on the trade union setting out:

- (a) the additional number of employees in those classifications who must work during all or any part of the work stoppage to maintain essential services; and
- (b) the names of the employees within those classifications who must work.

(5) The public employer shall notify each of the employees named in a notice served pursuant to subsection (4) that he or she must work during the work stoppage to maintain essential services.

(6) Every employee who is named in a notice pursuant to this section, other than a further notice served pursuant to subsection (7), is deemed to be an essential services employee.

[186] The unilateral power of public employers to make designations under s. 9 of the PSES Act permeated health care sector negotiations for the essential services agreements required by s. 7 of the Act. Given its authority to designate under s. 9, SAHO took the position that the essential services agreements would be completed region by region, profession by profession and facility by facility within about four to eight weeks. HSAS informed SAHO that it would not be possible for its representatives to engage in meaningful negotiations within that time frame. HSAS represents 27 different health care professions employed by 12 Regional Health Authorities in hundreds of facilities.

[187] SEIU as representative of employees of four Regional Health Authorities, also informed SAHO that it lacked resources and personnel to engage in such a process. It asked that negotiations take place on a Regional Health Authority by Regional Health Authority basis. SAHO advised SEIU that negotiations with all four of the Regional Health Authorities must take place “coincidentally”.

[188] Essential services agreements in health care were either entered into on the basis of the employers’ initial designations, or because the employers proceeded to finalize their designations under s. 9(1) of the PSES Act. In the event of a work stoppage, named employees were required to carry out all of the duties of their classification whether or not all of those duties were identified as “essential”. Many employees were named as essential and then placed on “standby”.

[189] Most of the evidence in this case focused on the PSES Act on the health care sector. Not all public employers exercised their powers under the PSES Act in the manner of SAHO and the Regional Health Authorities. The evidence indicated that urban

municipalities engaged in meaningful negotiations leading to essential services agreements with local unions representing their employees. They did so by drawing on their experiences during previous work stoppages. Both sides were often able to agree to levels of truly essential services that left non-essential employees in a position to engage in meaningful action. The Universities of Regina and Saskatchewan engaged in similarly meaningful negotiations.

[190] Even so, it would be naive to assume that both parties in all public sectors will simply deal with one another “in good faith”. Good faith negotiation is not possible when one side has the capacity to simply impose an agreement on the other. Decisions based on the genuine needs of the community were not always made when the unions held the unilateral power to impose essential service protocols on public employers, and they will not always be made when the situation is reversed. It would be equally naive to think that the party with power will not eventually exercise it — in the public employers’ case, if only because running a large and complex institution during a strike is a massive inconvenience to their managers and administrators.

[191] The point is that the PSES Act effectively enables some public employers to eliminate the capacity of their employees to strike in any meaningful way (and, as a necessary corollary, to engage in meaningful collective bargaining) by requiring any employees they deem “essential” to work. By exercising their powers under the legislation, they are able to ensure that their operations can continue on what is at least close to a “business as usual” basis.

[192] In my view the provisions of the PSES Act go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike. For example, the provisions of s. 7(2) of the PSES Act are not required to ensure the delivery of essential services to the community during a strike. As a reminder, s. 7(2) states that “... the number of employees in each classification who must work during the work stoppage to maintain essential services is to be determined without regard to the availability of other persons to provide essential services”. The apparent purpose of s. 7(2) is to enable managers and non-union administrators to avoid the inconvenience and pressure that would ordinarily be brought to bear by a work stoppage. Yet if qualified personnel are available to deliver requisite services, it should not matter if they are managers or administrators. If anything s. 7(2) works at cross purposes to ensuring the uninterrupted delivery of essential services during a work stoppage.

[193] As well, an unnecessary imbalance is created by giving public employers unilateral power under s. 9(2) of the PSES Act — a power that invites decisions to be made during a labour dispute based on their perception of which employees are most important to their union, or which ones are most opposed to collective action. The Government offered no response to the proposition that unions should have input into the naming of the employees and no explanation for why the public is better protected by conferring that power on the employers.

Deleterious Effects of the PSES Act and Other Essential Services Legislation in Canada

[194] The “minimal impairment” analysis invites consideration of other essential services regimes in Canada. That does not mean that if essential services legislation in

other jurisdictions is less intrusive, only the legislation most favourable to unions is constitutionally acceptable. Within the limitations of the Constitution, it is for the Legislative Branch to determine the appropriate balance between public employers, organized labour, and the needs of the community.

[195] Every province in Canada has some legislation that compels the provision of essential services during a strike. Nova Scotia's is confined to police⁵⁸ and firefighters.⁵⁹ Other provinces such as British Columbia⁶⁰ and New Brunswick⁶¹ have adopted "controlled strike" models that contemplate voluntary essential service agreements between unions and employers in the first instance. If they cannot agree, a third party such as a Labour Relations Board or independent arbitrator decides which duties are essential. Employees are only required to perform essential job duties; the union schedules individuals to work to meet established levels of service; and managers and administrators are expected to work during a work stoppage.

[196] A number of jurisdictions explicitly recognize that there is a threshold of essential services designation beyond which a "controlled strike" is ineffective, requiring compensatory measures. Under federal jurisdiction s. 87.4 of the *Canada Labour Code*⁶² provides for the negotiation of essential services agreements between the trade union and

⁵⁸ *Trade Union Act Amendment* S.N.S. 2004 c.47

⁵⁹ *Trade Union Act Amendment* S.N.S. 2006 c.48

⁶⁰ *Labour Relations Code* R.S.B.C. 1996, c. 244 s.72

⁶¹ *Public Service Labour Relations Act*, R.S.N.B. 1973, c.P-25, s. 43.1

⁶² R.S.C. 1985, c.L-2

the employer. Section 87.4(4) allows either party to apply to the Canada Labour Relations Board for orders determining the services that must be supplied and the manner and extent to which they must continue. Subsection 87.4(8) provides:

Binding settlement

(8) Where the Board is satisfied that the level of activity to be continued in compliance with subsection (1) renders ineffective the exercise of the right to strike or lockout, the Board may, on application by the employer or the trade union, direct a binding method of resolving the issues in dispute between the parties for the purpose of ensuring settlement of a dispute.

[197] Ontario has enacted separate essential services legislation for ambulance workers,⁶³ Crown employees⁶⁴ and hospital employees.⁶⁵ The statute for hospital employees prohibits strikes but provides compensatory access to binding arbitration. The legislation for Crown employees requires the parties to negotiate an essential services agreement determining which services will be provided, with either side entitled to request the appointment of a conciliation officer⁶⁶ and failing agreement, to apply to the Ontario Labour Relations Board for the resolution of all remaining matters.⁶⁷

[198] The Ontario legislation for ambulance workers is another example of how legislation can trigger access to compensatory arbitration where essential service

⁶³ *Ambulance Services Collective Bargaining Act 2001*, S.O. 2001, c.10

⁶⁴ *Crown Employees Collective Bargaining Act*, 1993 S.O. 1993, c. 38

⁶⁵ *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H-14

⁶⁶ *Supra* note 64, s. 35(1)

⁶⁷ *Supra* note 64, s. 36(1)

designations eliminate an ability to engage in meaningful strike action. It allows a party to an essential service agreement to apply to the Labour Relations Board for a declaration that the agreement has the effect of depriving ambulance workers of a meaningful right to strike. An essentiality threshold of 25% of the employees must be met before the Board can make an order, but there is no set percentage above that at which the meaningful right to strike is deemed to have been lost.

[199] In Newfoundland and Labrador, *The Public Service Collective Bargaining Act*⁶⁸ allows a union to opt for interest arbitration if more than 50% of the employees in a bargaining unit are determined to be “essential employees” prohibited from striking.

[200] The Government asserts that the PSES Act was modelled after Manitoba legislation requiring the provision of essential services during public sector strikes. That legislation was *The Essential Services Act*.⁶⁹ It was repealed on July 16, 2011 and replaced by two essential statutes: *The Essential Services Act (Government and Child and Family Services)*⁷⁰ and *The Essential Services (Health Care) Act*.⁷¹

[201] There are similarities between the earlier, now repealed, Manitoba statute and the PSES Act. Both contain a similar definition of “essential services” although nothing in the Manitoba legislation permits the Government to prescribe them by Regulation. Both provide for an employer designation of classifications of employees, the number of

⁶⁸ R.S.N.L. 1990 c.P-42

⁶⁹ C.C.S.M. c. E-145

⁷⁰ C.C.S.M., c. E-145

⁷¹ C.C.S.M., c.E-146

employees in each classification, and the names of the employees within those classifications. Both limit the jurisdiction of their respective Labour Relations Boards to addressing the number of employees required to work in each classification.

[202] However, there are very significant differences. One is that the “model” Manitoba statute never applied to police officers, universities, technical institutes, cities and towns, Crown corporations or the broad range of other public sector employers encompassed by the PSES Act who employ either a very high percentage of essential service workers (e.g. police officers) or those who employ only a relatively small percentage (e.g. most of the rest). Another is that the Manitoba statute did not contain a provision similar to s. 7(2) of the PSS Act, which prohibits consideration of the availability of other persons to provide essential services in designating who must work during a strike.

[203] The Manitoba legislation on which the PSES Act is said to have been modelled has now been bifurcated into two statutes. One applies only to employees of the Government of Manitoba and agencies and authorities under *The Child and Family Services Act*.⁷² That is, it applies generally to what in Saskatchewan is the Public Service/SGEU bargaining unit. The other applies only to health care workers. There is still no Manitoba legislation (or, for that matter, any essential services legislation in Canada) that applies to the broad range of public service employers encompassed by the PSES Act.

⁷²

C.C.S.M., c. C-80

[204] The *Essential Services (Health Care) Act* in Manitoba applies to employers who own or operate a hospital or personal care home, Regional Health Authorities, and three named health care providers. It requires the negotiation of essential services agreements which identify work functions, and it provides prompt access to conciliation and consensual arbitration boards in respect of the establishment of those agreements⁷³ and the manner in which they are implemented and applied.⁷⁴ As with the earlier Manitoba legislation, there is no provision similar to s. 7(2) of the PSES Act. The statute permits managers to be fully utilized and unions to set out staffing schedules. The evidence is that this is done by protocol between the parties.

[205] No further comparative analysis is required. 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*.

⁷³ *Supra* note 71, s. 7(1) and (2)

⁷⁴ *Ibid.* s. 10(1) and (4)

Access to a Dispute Resolution Process

[206] At para. 7 of this judgment I referred to the three basic approaches to essential services dispute resolution in Canada, and stated that the PSES Act ostensibly adopts a “designation” or “controlled strike” model. I used the word “ostensibly” because where a “designation” model results in such a high level of essentiality that the capacity to engage in meaningful strike action is abrogated, it in essence becomes a “no strike” model.

[207] Throughout this judgment I have referred to two types of dispute resolution mechanisms. The first relates to a process whereby unilateral employer designations of employees who must work during a strike can be independently reviewed. The second relates to an overall dispute resolution process, which becomes necessary when employer designations of essential service workers serve to abrogate the ability of employees to engage in meaningful strike action.

[208] Of the unilateral designations made by public employers under s. 9(2) only one, that of the number of employees required to work, is subject to review by the SLRB. Sections 10(1) to (4) state:

10(1) If the trade union believes that the essential services can be maintained using fewer employees than the number set out in a notice pursuant to section 9, the trade union may apply to the board for an order to vary the number of essential services employees in each classification who must work during the work stoppage to maintain essential services.

...

(4) Within 14 days after receiving an application pursuant to subsection (1) or any longer period that the board considers necessary, the

board shall issue an order confirming or varying the number of essential services employees in each classification who must work during the work stoppage to maintain essential services.

[209] It is apparent from the plain language of these provisions, as confirmed by the SLRB in its decision referred to at paras. 45 and 46 of this judgment, that the authority conferred on the SLRB by s. 10 of the PSES Act is extremely limited. It does not enable the SLRB to decide whether any particular service is truly essential, or whether any classification prescribed by Government and designated by other public employers involves the delivery of truly essential services. It does not confer authority on the SLRB to determine if specific employees named by employers to work during a strike have been named for reasons connected to the objectives of the Act. In any event, whether the SLRB has the resources, experience and knowledge to deal with those questions with respect to the myriad of work places within the scope of the PSES Act is a very open question.

[210] As a general rule, compulsory arbitration as a mechanism to resolve overall disputes concerning wages and other terms and conditions of employment has no place in a “designation” or “controlled strike” model. If a collective bargaining dispute is to be resolved by arbitration, a “controlled” strike by the non-essential workers serves no purpose.

[211] Access to a dispute resolution process in a “designation” or “controlled strike” model is only required where the level of designated essentiality is so high that the capacity of the remaining non-essential employees to engage in strike action is

substantially removed. In those cases, what is ostensibly a “controlled strike” model operates as a “no strike” model.

[212] The CFA principle that prohibitions of strikes in essential services should be accompanied by access to binding dispute resolution procedures is intended for situations in which meaningful strike action is prohibited.⁷⁵ At para.128 above I referred to Professor Michael Lynks summary of international law. As a reminder, the last paragraph in that summary stated:

30. (viii) where the right to strike in an essential service cannot be permitted, then the government must erect an “adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.” In such mediation and arbitration proceedings, it is essential that all the members of the bodies entrusted with such functions should be impartial and seen as such by both the employers and the workers concerned.

I refer also to the statements of Dickson, C.J. in *Alberta Reference* at para. 68 (as set out at para. 108 of this decision). Although the three statutes being considered in *Alberta Reference* all contained an arbitration process, Dickson, C.J. expressed the view that because the processes were not fair and impartial it was fatal to their validity.

[213] Canadian legislation prohibiting strikes by firefighters and police officers, where the level of essentiality is very high, invariably provides compensatory access to arbitration to resolve collective bargaining disputes. The same is true for legislation

⁷⁵

Supra note 54

prohibiting strikes by hospital workers. Although that legislation contains a variety of approaches for determining when and how access should be provided, the point is that it is invariably provided.

[214] There is a pragmatic reason why “no strike” legislation almost always provides for access to independent, effective dispute resolution processes: mechanisms of that kind can operate as a safety valve against an explosive buildup of unresolved labour relations tensions.

[215] In Saskatchewan alone, the implications for the rule of law arising from strike action by police officers (such as occurred in Regina in 1989⁷⁶ and again in 1993⁷⁷) or health care workers (as outlined in paras. 140 to 149 above) illustrate what Prof. Paul Weiler had to say following his five years as Chairperson of the British Columbia Labour Relations Board in the 1970's:

“If there is any lesson I have learned from five years in the fray, it is how fragile the legitimacy of the law is in labour relations, how tenuous a purchase the legal system has on collective employee action”.⁷⁸

[216] Since 1976, the Government of Saskatchewan has enacted ad hoc back to work legislation to resolve individual disputes on 10 occasions. Four statutes did not

⁷⁶ See *Regina Police Services (Continuation of Services) Act* S.S. 1988-89, c. 4 (Repealed)

⁷⁷ See *Regina Police Association v. Regina Board of Police Commissioners*, 23 C.L.R.B.R. (2d) 200

⁷⁸ *Supra* note 31

contain a mandated dispute resolution process.⁷⁹ Of those four, the first,⁸⁰ suspended CUPE strike action in the health care sector for 30 days until after a provincial election. The second,⁸¹ which ended an SGEU strike by imposing a collective agreement, invoked the “notwithstanding” clause in s. 33 of the *Charter*. The third⁸² ended a labour dispute at Saskatchewan Power Corporation by imposing a three year collective agreement with no access to arbitration. That Act was found by the CFA to have violated Canada’s international law obligations.⁸³ And the fourth, which prohibited strike action without compensatory access to a dispute resolution process,⁸⁴ was enacted on the day that SUN members commenced their province wide strike in 1999. As we have seen, the legislation was ignored by the nurses.

Conclusion on Minimal Impairment

[217] In summary, I find that the PSES Act transfers all of the power previously held by the unions to the public employers, who are backed by the considerable additional powers of the Legislature. Considered in its entirety, its provisions do not satisfy the minimal impairment requirement of s. 1 of the *Charter*.

⁷⁹ One that did contain such a process was the *Dairy Workers (Maintenance of Operations Act, 1983-84, c.D-1.20*. That was the legislation Dickson, C.J. in dissent, held to be unconstitutional in the *Dairy Workers* case because the procedure was not fair and impartial.

⁸⁰ *The Labour Management Dispute (Temporary Provisions) Act, S.S. 1981-82, c.L-0.1*

⁸¹ *The SGEU Dispute Settlement Act, S.S. 1984-85-86, c. 111*

⁸² *The Maintenance of Saskatchewan Power Corporation’s Operations Act, 1998, (expired), S.S. 1998 c.M-1.2*

⁸³ CFA Report 318, Case No. 1999, ILO Official Bulletin, Vol. LXXXII, Series B, No. 3, 1999

⁸⁴ *The Resumption of Services (Nurses-SUN) Act, supra note 47*

[218] In my view, the PSES Act would be substantially less impairing of the right to strike protected by s. 2(d) of the *Charter* if in every case it made provision for an effective, independent dispute resolution process to address the propriety of public employer designations of employees required to work during a work stoppage. In addition, the PSES Act would be substantially less impairing if it provided compensatory access to adequate, impartial and effective overall dispute resolution proceedings in those cases where employer designations effectively abrogate the right of employees to engage in meaningful strike action. The latter process may not be an issue for many of the public employers within the scope of the PSES Act, but it is a fundamental issue for many others, most notably police officers and health care workers. Every work place is different, and every work place must be dealt with according to its own set of circumstances.

(c) Proportionality Between Deleterious Effects and Objective

[219] In *Reference Re: Marriage Act*, Richards J.A. stated:

[90] The third and final aspect of the proportionality inquiry involves consideration of whether the deleterious effects of the impugned law are, overall, proportionate to the public benefit conferred by the law. This involves a broad assessment of whether the positive effects of the law warrant its negative impact on guaranteed rights or freedoms. In *Thompson Newspapers Co. et al. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; 226 N.R. 1; 109 O.A.C. 201, recently quoted with approval in *Alberta v. Hutterian Brethren of Wilson Colony*, *supra*, at para. 77, Bastarache J. explained as follows:

[77] ...

The third stage of the proportionality analysis performs a fundamentally distinct role ... The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the

ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. *The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter.* (Italics added.)

[91] Historically, this aspect of the *Oakes* test has been the subject of some academic criticism and has not featured prominently in the jurisprudence. But, in *Alberta v. Hutterian Brethren of Wilson Colony*, supra at paras. 72-78, the Supreme Court recently reconfirmed this aspect of the proportionality inquiry and clearly endorsed its ongoing application.

[220] As an overall assessment, I have accepted that the previous labour relations structure in Saskatchewan gave public sector Unions unrestricted power to unilaterally decide what essential services, if any, would be provided during a strike. I have accepted that the Government's objective in enacting the PSES Act was to ensure the continuation of essential services to the community during a strike — an objective that is pressing and substantial. However, in the preceding two stages of the proportionality analysis I have explained why, in my view, the deleterious effects of the PSES Act substantially outweigh the public benefits it confers. Quite simply, I do not accept that the manner in which the PSES Act transfers all of the Union's former powers to the employers is minimally impairing of protected s. 2(d) rights.

[221] A number of options are available to reduce these concerns. Some are:

- in every case, provide an impartial and effective dispute resolution process by which a union may challenge public employer designations under s. 9(2) of the PSES Act;

- in cases where public employer designations under the PSES Act remove a meaningful right to strike by the employees, provide an adequate, impartial and effective dispute resolution process;
- enable public service unions to have meaningful input into determining which employees will work during a strike;
- require public employers to consider the availability of other qualified persons to provide essential services during a strike.

[222] In summary, I conclude that the provisions of the PSES Act go well beyond what is reasonably necessary to achieve the Legislature's stated objective.

PART II: THE TRADE UNION AMENDMENT ACT 2008

1. Overview of Provisions

[223] The TUA Act revised *The Trade Union Act* in two significant ways. First, it altered the manner in which a trade union receives and loses its status as the exclusive bargaining representative of employees. Second, it amended a provision dealing with communications by employers with their employees.

(i) **Changes to the Process for Certification**⁸⁵

[224] In every Canadian labour law jurisdiction, a trade union seeking certification as the bargaining representative of employees must demonstrate, first, that the group of employees it seeks to represent constitutes a unit of employees appropriate for the purpose of bargaining collectively; and second, that the majority of the employees in that unit support the union as their bargaining representative. Apart from those two basic requirements, statutory “certification” processes vary from jurisdiction to jurisdiction.

[225] In Saskatchewan, the initial evidence of employee support consists of cards signed by the employees. Prior to the TUA Act, a trade union seeking certification was required to file support cards signed by at least 25% of the employees within six months of the application. If the support level was between 25% and 50%, the SLRB conducted a vote of the employees. If more than 50% of the employees signed support cards, the union was entitled to be automatically certified without a vote.

[226] The TUA Act alters the requirements for union certification by increasing the minimum level of support that must be shown from 25% to 45% of the employees in the proposed bargaining unit, by requiring support cards to be signed within three months of the application rather than six months, and by eliminating automatic certification based on support cards. Majority support on all applications for certification must now be demonstrated by way of a secret ballot vote of the employees conducted by the SLRB.

⁸⁵ The term “certification” in this judgment refers to the process leading up to an SLRB order, and to the order itself, that requires an employer to bargain collectively with a trade union. Although the term is not used in *The Trade Union Act*, it is used by practitioners and it is found in most other labour relations legislation.

(ii) **Changes to the Process for Decertification**⁸⁶

[227] Every Canadian labour law jurisdiction provides a process by which employees may apply to have the union's certification order rescinded, either because the employees in the bargaining unit no longer wish to be represented by any union, or because they wish to be represented by a different union.

[228] Prior to the TUA Act, employees who no longer wished to be represented by a union were required to file threshold evidence of majority employee support (i.e. 50% plus one) signed by employees within six months of the application. Unlike certification, evidence of majority employee support for decertification did not result in automatic decertification, but in a vote of the employees conducted by the SLRB.

[229] The TUA Act alters the requirements for decertification by decreasing the minimum level of employee support from 50% plus one to 45%;⁸⁷ and requiring the support cards to be signed within three months of the application rather than six months. A secret ballot vote conducted by the SLRB is retained for all decertification applications.

[230] Prior to the TUA Act, the SLRB could refuse to hold a vote of employees where a union applying for certification filed evidence of support of 25% to 50% of the employees, but an incumbent union represented a "clear majority of the employees". The

⁸⁶ The term "decertification" is not used in *The Trade Union Act*, but is used by practitioners. In this decision, it refers to the process leading up to an SLRB order rescinding a certification order, and to the rescinding order itself. Where one union replaces another in the work place, the incumbent union is "decertified", and the replacement union is "certified".

⁸⁷ If the SLRB finds that the applicant employees would have obtained 45% support but for an unfair labour practice or violation of the Act, it must order a vote of the employees.

existence of a certification order was considered evidence of majority support. In practice, this provision meant that a union seeking to replace an incumbent union was required to file support cards signed by a majority of employees in the bargaining unit. The effect was to protect an incumbent union from replacement by a “raiding” union. The TUA Act repealed that provision, thereby eliminating the SLRB’s discretion to refuse a vote in those circumstances.

(iii) Change to Employer Communication with Employees

[231] Every labour law jurisdiction in Canada statutorily prohibits unacceptable conduct by employers, trade unions, employees and other persons. The statutory prohibitions are referred to generally as “unfair labour practices”, “unfair practices” or “prohibited practices”.

[232] Prohibitions against unfair labour practices have been part of *The Trade Union Act* since it was originally enacted in Saskatchewan in 1944.⁸⁸ At that time, Section 8(1)(a) stated:

8.—(1) It shall be an unfair labour practice for any employer or employer’s agent:

- (a) to interfere with, restrain or coerce any employee in the exercise of any right conferred by this Act;

⁸⁸

S.S. 1944 (2nd Session) c. 69

[233] The above provision moved from s. 8(1)(a) to s. 11(1)(a) over the years, but it remained intact until the proclamation of the *Charter* in 1981. In 1983 clause 11(1)(a) was repealed and the following was substituted:⁸⁹

(a) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees.

[234] In 1994 clause 11(1)(a) was again repealed and the following substituted:⁹⁰

(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;

[235] And in 2008 the TUA Act repealed clause (a) and substituted the following:

(a) to interfere with, restrain, intimate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees.

2. Stated Purpose of the Legislation

[236] The TUA Act received second reading in the Legislature on March 11, 2008. Its purpose was explained by Honourable Rob Norris, the Minister Responsible for Advanced Education, Employment and Labour as follows:⁹¹

Hon. Mr. Norris: — Mr. Speaker, it's my pleasure to move second reading of Bill 6, The Trade Union Amendment Act, 2007. Through these

⁸⁹ *The Trade Union Amendment Act*, S.S. 1983 c. 81 s. 6(1)

⁹⁰ *The Trade Union Amendment Act*, S.S. 1994 c. 47, s. 8(1)(a)

⁹¹ *Supra* note 46

amendments to our legislation, we're keeping our promise to foster a fair and balanced labour environment in Saskatchewan. These amendments aim to promote co-operative, productive, and healthy work environments for employers and employees while ensuring that Saskatchewan is competitive with other Canadian jurisdictions.

[237] After outlining the proposed changes to the certification process, and comparing the end result to other labour legislation in Canada the Minister stated:

Mr. Speaker, Saskatchewan can only maximize its great promise and potential if we are competitive with other Canadian jurisdictions. We are experiencing growth in this province right now, and we want to sustain this economic expansion by ensuring that we are moving forward with moderate, progressive legislation.

[238] He then explained the purpose of the proposed change to s. 11(1)(a) of *The Trade Union Act* as follows:

Mr. Speaker, the next change to The Trade Union Act we are proposing concerns section 11(1) of the Act. We clarify the right of employers to communicate with their employees at all times, including during union organizing drive. Fundamentally this is about responsible communication. This communication will still not allow for interference, for restraint, to intimidate, threaten, or coerce an employee.

It's an unfair labour practice anywhere in Canada for an employer to interfere with, restrain, intimidate, threaten, coerce an employee in the exercise of an employee's right. Similar prohibitions exist for unions. This amendment makes it clear that an employer has the freedom and responsibility to lawfully communicate facts and opinions to his or her employees.

Let me be clear. Our government will defend the right of employers to engage in responsible communication. We believe that open, two-way communication can help to ensure both workers and employers are able to make informed decisions.

3. Previous Proceedings in Other Forums:

[239] Part I of this decision summarized proceedings in other forums relevant to arguments being advanced in this action. One such proceeding resulted from a complaint by the NUPGE, on behalf of the SFL, to the ILO. The complaint, as it related to the TUA Act, was essentially that the amendments to *The Trade Union Act* violate Canada's international law obligations because they make it more difficult for workers to join trade unions, thereby impeding the exercise of their freedom of association.

[240] Part I of this decision also reviewed Canada's international law obligations, and concluded that Canada has undertaken to recognize the right of workers to form and join trade unions and to bargain collectively in the promotion and protection of their economic interests.

[241] In response to the complaint the CFA stated in part:

378. *The Committee recalls that a system of collective bargaining with exclusive rights for the most representative trade union is compatible with the principle of freedom of association. Furthermore, the determination to ascertain or verify the representative character of trade unions can best be ensured when strong guarantees of secrecy and impartiality are offered. Thus, verification of the representative character of a union should a priori be carried out by an independent and impartial body [see **Digest**, op. cit., para. 351]. While representativity may be determined by the number of members or by a secret ballot, the Committee considers that a secret ballot supervised by the LRB may be consistent with the principles of freedom of association as long as it has the confidence of the parties.*

379. *However, the Committee is of the opinion that, in the particular circumstances of the case, the law stipulating that a trade union must receive the support of 45 per cent of employees before the*

procedure for recognition as a collective bargaining agent may well be excessively difficult to achieve. ...

These comments resulted in the following recommendation:

- (d) *The Committee requests 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.*

[242] The Union's rely on the CFA Report in support of their argument that the TUA Act infringes on the ability of employees to bargain collectively through a trade union of their own choosing, thereby infringing on their freedom of association under s. 2(d) of the *Charter*. Their argument will be analyzed below.

4. *The Trade Union Amendment Act and the Charter*

(i) The Submissions of the Parties

[243] The STF, supported by the intervenor Unions, submit that the TUA Act infringes on associational freedoms guaranteed by s. 2(d) of the *Charter* because it is legislation that “swings the labour relations pendulum” towards employer interests at the expense of unions and workers. They argue that the TUA Act and the PSES Act, taken together, “create a new climate of discouraging citizens to see the value of unions in our society”. They take particular exception to what they regard as the misguided ideology on which the legislation was based, which is that the more difficult it is for unions to

become certified to represent employees in the work place, the better it is for the Saskatchewan economy. They argue that the new requirements for certification introduced by the TUA Act are so onerous that they infringe on workers' freedom to organize and, as a consequence, to bargain collectively. And they contend that the amendment to s. 11(1)(a) of *The Trade Union Act*, which states that an employer may communicate "facts and its opinions" to employees, provides employers with dispensation to coerce and intimidate employees in their efforts to organize and bargain collectively.

[244] The Government responds that the TUA Act, when considered in the context of the decisions in *Dunmore*, *B.C. Health Services* and *Fraser*, does not infringe on protected freedoms under s. 2(d) of the *Charter*. The Government also says that the changes introduced by the TUA Act create a labour relations regime in Saskatchewan that is similar to the regime in other Canadian jurisdictions.

(ii) The Issue to be Determined

[245] As with the PSES Act, the SFL argued that TUA Act infringes upon rights and freedoms guaranteed by ss. 2(b), 2(c), 2(d), 7 and 15 of the *Charter*. In Part I of this decision, my analysis of the constitutionality of the PSES Act was confined to s. 2(d) of the *Charter*. My analysis of the TUA Act will be similarly confined. One reason is that virtually all of the arguments concerning the constitutionality of the TUA Act were based on s. 2(d) alone. Another is that in my view the changes to the certification process introduced by the TUA Act directly engage the rights of workers to organize and bargain

collectively through a trade union of their own choosing — that is, rights protected by s. 2(d).

[246] The SFL argued that the act of associating by employees is a form of expression protected by s. 2(b) of the *Charter*. However, that same argument could be made in the abstract with respect to almost any action for any purpose. The connection, in my view, was too tenuous to require a s. 2(b) analysis. By the same token, the evidence and arguments relating to s. 2(c), s. 7 and s. 15 were insufficient to support an inquiry into whether those provisions are violated by the TUA Act.

[247] The amendment to the unfair labour practice provisions of s. 11(1)(a) of *The Trade Union Act* does engage issues of freedom of expression, but they relate primarily to the employer's protected right to express facts and opinion, rather than the employees' right to express thoughts, beliefs and opinions. It may have been implicit in some of their submissions, but the Unions did not argue that Legislatures are constitutionally required to abrogate all freedom of expression by employers under s. 2(b) of the *Charter* in order to protect employees from coercion and interference in exercising their rights under s. 2(d).

[248] I will touch on this issue again in the analysis which follows. Generally, however, my analysis will focus on whether the TUA Act infringes on the right of employees to organize and speak with one voice, and to bargain collectively with their employer — rights protected by s. 2(d) of the *Charter*.

(iii) Analysis

[249] In Part I of this decision I reviewed various judicial decisions dealing with the scope and substance of freedom of association protected by s. 2(d) of the *Charter*. I also considered Canada's international treaties and conventions, labour history and labour relations realities. I concluded that s. 2(d) protects the right of employees to organize, to bargain collectively, and to strike.

[250] Judicial decisions considered in Part I included the decisions of the Supreme Court of Canada in *Dunmore*, *B.C. Health Services* and *Fraser*. One principle enunciated in all three decisions is that s. 2(d) of the *Charter* does not mandate any particular result, nor access to any particular legislative scheme. In *Fraser*, the Supreme Court held that although labour relations legislation in Canada is based on a *Wagner Act* model, the *Charter* does not give employees a right to that model in the exercise of their rights under s. 2(d) of the *Charter*.

[251] In speaking to the TUA Act in the legislature Minister Rob Norris stated that its purpose was to make Saskatchewan "competitive with other Canadian jurisdictions". The Unions take serious exception to the validity of the Government's assumption, or "ideology", that the presence of a union in the workplace makes an employer less competitive, or that the absence of a union is good for the economy.

[252] It is not my role to assess the validity of the Government's assumptions in enacting the PSES Act. My task is to determine whether its provisions are constitutional. So long as legislative initiatives remain within the limiting framework of the constitution,

I must defer to the economic, political and social policy choices of the Legislative Branch. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*⁹² Iacobucci and Arbour JJ. stated at paras. 35 and 36:

35 In addition, it is unsurprising, given how the *Charter* changed the nature of our constitutional structure by requiring that all laws and government action conform to the *Charter*, that concerns about the limits of the judicial role have animated much of the *Charter* jurisprudence and commentary surrounding it (see, for example, K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001); C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1993); F.L. Morton and R. Knopff, *The Charter Revolution and the Court party* (2000); A. Petter, “The Politics of the Charter” (1986), 8 *Supreme Court L.R.* 473). Thus, in *Vriend, supra*, this Court stated, at para. 136:

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts.

36 Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.

Determining the boundaries of the courts’ proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.

⁹²

2003 SCC 62, [2003] 3 S.C.R. 3

[253] The Unions rely on affidavit evidence and expert opinion to support their argument that the provisions of the TUA Act have had the effect of reducing the success rate of unions in their applications for certification by the SLRB. The Government relies on other affidavit evidence and expert opinion to support its contrary contention that the amendments have made no difference to the success rate of such applications.

[254] I find that the changes to the certification process introduced by the TUA Act have reduced, and will continue to reduce, the success rate of union applications for certification. However, that does not in itself resolve the issue to be determined. To explain, I must digress for a moment.

[255] Many parties participated in this action. All of them were either employers or Unions. Understandably, all of them delivered their submissions from their own perspectives. The Unions delivered their submissions from the perspective that their interests and the interests of the employees are synonymous. That perspective led them to the conclusion that in order to protect the associational freedoms of employees, s. 2(d) of the *Charter* must also protect the Unions' own organizational and institutional interests.

[256] The reality, however, is that the institutional interests of a union are not always completely aligned with the interests of its rank and file membership. That is why Canadian labour legislation invariably imposes a duty on the union to fairly represent employees in grievances and disputes; prohibits unfair labour practices by unions, and provides for the decertification of unions that lose the confidence and support of employees.

[257] On occasion, employees may find themselves in the divide between their union and their employer, unable as individuals to confront the power of either organization. A simple example is when a union loses the confidence and support of the majority of employees in a bargaining unit. Those employees will choose to exercise their right not to associate — a right recognized in *Lavigne v. Ontario Public Service Employees Union*⁹³ and *R. v. Advance Cutting & Coring Ltd.*⁹⁴ They exercise that negative right by applying for an order decertifying the union.

[258] All of the Unions declared that the 45% level of support introduced by the TUA Act for certification applications is an excessively difficult threshold for them to achieve. None of them expressed any similar concern about the ability of employees to achieve the same threshold level of support for decertification applications.

[259] From the Union's perspective, there is a principled reason for that. Their view is that unionization is a social good to be promoted by labour legislation that facilitates certification, ensures the security of the union and discourages decertification as much as possible. They argue that Canada is bound by international law to promote (not just protect) unionization and that s. 2(d) of the *Charter* should be interpreted accordingly. Because their perspective is that unionization is beneficial for employees and, by extension, for society, freedom of association under s. 2(d) of the *Charter* must be interpreted in a manner that will promote the institutional interests of the unions themselves.

⁹³ [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545

⁹⁴ 2001 SCC 70, [2001] 3 S.C.R. 209

[260] The other perspective, equally principled, is that employees should be free to organize and to join, form or assist trade unions without coercion or interference by any person. That view, a more neutral one, focuses on protection of the freedom of every individual to choose to associate, or not to associate, for the purpose of pursuing work place goals. That protection extends to the independent, democratic, operation of the union. It does not extend to the promotion of the Unions' own institutional interests.

[261] In my view, s. 2(d) of the *Charter* embraces the latter concept as a minimum level of protection, leaving it open to Legislatures to fortify that protection as they see fit. Thus, where the interests of the union and the interests of the employees diverge, s. 2(d) of the *Charter* serves to protect the interests of the employees.

[262] This leads me back to the concerns expressed by Rothstein and Charron JJ. in *Fraser*, and by Prof. Peter W. Hogg (as referenced at para. 82 of this decision) that the majority decision in *B.C. Health Services* requires Legislatures to enact an "elaborate legislative superstructure to foster collective bargaining based on the American *Wagner Act* of 1935".

[263] In my view, an "elaborate legislative superstructure" is not required to protect the basic freedom of individual employees to associate to achieve workplace goals. What is required is a rudimentary structure that protects the essential components of collective bargaining. Although it is well beyond the scope of this decision to definitely determine those basic elements they likely include:

- (1) the identification of a group of employees;

- (2) the assessment of the freely expressed wishes of the majority concerning a bargaining representative; and
- (3) a requirement that the employer bargain exclusively with that representative.

These are not necessarily elements derived from a *Wagner Act* model. Any system that does not operate by Government decree (that is, any system with constitutional protections for freedom of association) will have those rudiments in place. As I have determined in Part I of this decision, they are given meaning and substance by the freedom to strike, which does not require enabling legislation for its existence.

[264] All of the remaining “complicated superstructure”, (unfair labour practices, union security provisions, processes related to collective bargaining, the substantive provisions of collective agreements, individual access to grievance and arbitration proceedings and the like), is left to the Legislatures to determine, subject only to s. 1 of the *Charter*. Those choices may include leaving it to employees to strike to resolve day to day issues surrounding the interpretation and application of collective agreements, or precluding strikes during the term of the agreement in return for providing employees with access to independent third party arbitration. All jurisdictions in Canada have chosen the latter.

[265] All of this is a somewhat circuitous way of saying that the issue to be decided with respect to the constitutionality of the TUA Act is not whether the Unions will be less successful in their application for certification by the SLRB. That is the issue from the Unions’ perspective. The issue from a *Charter* perspective — that is, from the

perspective of protecting individual employee freedom of association under s. 2(d) — is whether, by introducing a different method for determining the wishes of the employees, the TUA Act interferes with their freedom to organize and to bargain collectively through the trade union of their own choosing. Protecting fundamental freedoms of employees does not require the enactment of legislation that ensures trade unions succeed easily in their efforts to be certified; it precludes the enactment of legislation that interferes with the freely expressed wishes of employees in the exercise of their s. 2(d) rights, unless the legislation can be justified under s. 1.

[266] As a reminder, the changes to the certification process introduced by the TUA Act increase the initial threshold for demonstrating employee support to 45%, substitute secret ballot votes for automatic certification based on support cards, and reduce the validity of support cards to three months. The Government submits that these changes bring the Saskatchewan certification process into line with the processes in place in other Canadian jurisdictions.

[267] Comparing one statutory provision to another demands extreme caution: Isolating superficially similar provisions from their respective statutory environments for the purposes of comparison can be less than helpful. With that caveat, it is useful to compare the criteria for certification introduced by the TUA Act with other Canadian labour legislation.

[268] The increase in the threshold for demonstrating employee support to 45% introduces the same minimum level of support as is required in British Columbia.⁹⁵ That

⁹⁵ Supra note 95, Labour Relations Code, R.S.B.C. 1996, c. 244, s. 29(1), 33(2)

initial threshold is not substantially higher than the 40% threshold required in Ontario,⁹⁶ Manitoba,⁹⁷ Alberta,⁹⁸ New Brunswick,⁹⁹ and Newfoundland.¹⁰⁰ The minimum level of employee support that must be shown in the federal jurisdiction is set at 35%.¹⁰¹ The 90 day period for which support cards remain valid corresponds to the 90 day period in place in Alberta.¹⁰²

[269] Perhaps most significantly, the requirement that evidence of employee support must be demonstrated by way of a secret ballot vote is consistent with no less than four other jurisdictions in Canada: Nova Scotia, Ontario, British Columbia and Alberta. However, three of those jurisdictions have statutory provisions mandating quick votes to minimize the window of opportunity for employers to coerce or intimidate employees. In Nova Scotia, the maximum period is five days;¹⁰³ in Ontario, it is five days,¹⁰⁴ and in British Columbia,¹⁰⁵ it is 10 days. Although no specific time frame for

⁹⁶ *Labour Relations Act* 1995, *supra* note 25, s. 8(2)

⁹⁷ The Labour Relations Act, C.C.S.M., c. L-10, s. 40(1)

⁹⁸ *Labour Relations Code*, R.S.A. 2000, c.L-1, ss. 33(a), 33(b)

⁹⁹ *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 14(2), 14(3)

¹⁰⁰ *Labour Relations Act*, R.S.N.L. 1990, c.L-1, s. 47(1)

¹⁰¹ *Canada Labour Code*, R.S.C. 1985, c.L-2

¹⁰² *Supra* note 98, s. 33(a)(ii)

¹⁰³ *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 25(3)

¹⁰⁴ *Supra* note 96, s. 8(5)

¹⁰⁵ *Labour Relations Code*, *supra* note 95, s. 24(2)

conducting votes is statutorily mandated in Alberta, the evidence is that votes are nevertheless conducted promptly.

[270] Pursuant to s. 18(v) of the TUA Act, the SLRB has an unfettered discretion to order that a vote be conducted at any time:

18 The board has, for any matter before it, the power:

...

(v) to order, at any time before the proceeding has been finally disposed of by the board, that:

(i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere; and

(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;

...

This empowers the SLRB to ensure that votes are conducted quickly.

[271] The changes to the certification process must be considered in the context of the amendment to s. 11(1)(a) of *The Trade Union Act*, which permits employer communication of “fact and its opinions to its employees”. The Unions contend that this amendment provides employers with a license to communicate with employees in a manner that was previously not permitted. They submit that employer communications with employees on union matters are invariably intimidating and coercive to the employees, and as such invariably interfere with their freedom of association under s.

2(d) of the *Charter*. Implicit in that argument is the somewhat self-serving proposition that unions, and only unions, are fair, objective, impartial and non-coercive in their dealings with employees, who must be protected from hearing differing facts or opinions.

[272] Section 2(b) of the *Charter* protects the fundamental freedom of fact, belief, opinion and expression. Freedom of expression under s. 2(b) protects not only the freedom of everyone to express their thoughts, beliefs and opinions, but of everyone to receive the thoughts, beliefs and opinions of others.¹⁰⁶ Limitations on an employer's right to communicate opinions to his or her employees must be demonstrably justified under s. 1 of the *Charter*. Although the Unions did not say so explicitly, they implicitly argued that the state has an obligation to abrogate the freedom of expression of employers under s. 2(b) of the *Charter* in order to protect the freedom of association of employees under s. 2(d) of the *Charter*.

[273] That argument may not be particularly nuanced, but it is grounded in bitter experience. Labour legislation in Canada invariably imposes limitations on employer communications with employees about union matters. It does so in recognition of the reality that employees are vulnerable to the influences of their employer, direct and indirect, which interfere with free exercise of their associational rights. As a former chairperson of the SLRB, I take notice of the fact that even a reasonably courageous employee can be cowed by employer statements that directly or impliedly threaten negative consequences if the wishes of the employer are opposed.

¹⁰⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 and *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra* note 51

[274] For that reason all labour legislation in Canada prohibits employer communications if they are likely to restrain, inhibit, threaten, coerce or interfere with employees in the exercise of their rights. These limitations remain in s. 11(1)(a) of *The Trade Union Act*. A lengthy list of other employer unfair labour practices are set out in ss. 11(1)(b) to (p), which remain unchanged.

[275] Section 11(1)(a) has been in place in *The Trade Union Act* in one form or another for over 65 years. During that time, the extent to which employers have been precluded from communicating with employees has depended as much on the facts of each case and the views of the SLRB, as constituted from time to time, as it has on the legislation. As a practical matter it has turned on the extent to which the SLRB has decided such communications have violated the restrictions in s. 11(1)(a) or the other unfair labour practice provisions of the Act.

[276] The statement in the amended s. 11(1)(a) that an employer is not precluded from stating facts and its opinions is consistent with freedom of expression under s. 2(b) of the *Charter*. It is also consistent with statements that explicitly recognize the right of employers to communicate with employees found in the federal jurisdiction¹⁰⁷ and provincial jurisdictions such as, for example, Ontario,¹⁰⁸ Manitoba,¹⁰⁹ Alberta¹¹⁰ and

¹⁰⁷ *Canada Labour Code*, *supra* note 101, s. 94(2)(c)

¹⁰⁸ *Labour Relations Act 1995*, *supra* note 96, s. 70

¹⁰⁹ *The Labour Relations Act*, *supra* note 97, s. 6(3)(f)

¹¹⁰ *Labour Relations Code*, *supra* note 98, s. 148 (2)(c)

British Columbia.¹¹¹ The provision in British Columbia applies to every “person” rather than specifically to employers, and states:

8 Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

[277] I find that the purpose and effect of the amendment to s. 11(1)(a) of *The Trade Union Act* is to declare that employers may communicate with employees in a manner that does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes. That interpretation is compatible with the underlying purpose of *The Trade Union Act* and with the explanation given by Minister Norris in the Legislature.

[278] Clearly the SLRB’s interpretation and application of the amended s. 11(1)(a) of the Act will be critical to maintaining an appropriate balance in the work place. Time frames will presumably be established and enforced to minimize the opportunity for employers to interfere with employee freedoms in a manner that cannot be effectively remedied under other provisions of *The Trade Union Act*. If the SLRB is to carry out its responsibilities in an effective manner, it must have the necessary resources and the capacity to function independently from the Legislative Branch of Government.¹¹²

¹¹¹ *Labour Relations Code*, *supra* note 95, s. 8

¹¹² See: *Saskatchewan Federation of Labour v. Saskatchewan (Attorney General)*, Department of Advanced Education, Employment and Labour 2010 SKCA 27, 346 Sask. R. 252

[279] In summary, I find that the provisions of the TUA Act do not infringe on the freedom of employees to organize in and bargain collectively through a trade union of their own choosing, nor do they enable employers to interfere with those protected freedoms by exercising their own freedom of expression under s. 2(b) of the *Charter*. Since I find no infringement, it will be unnecessary to engage in an assessment of the legislation under s. 1 of the *Charter*.

CONCLUSION: PART I

[280] I have determined that the rights to bargain collectively and to strike are protected by s. 2(d) of the *Charter*. *The Public Service Essential Services Act* infringes on those rights by empowering all public sector employers to make non-reviewable decisions that can effectively preclude the capacity of their employees to engage in meaningful strike action, and thus to engage in meaningful collective bargaining.

[281] The infringements cannot be demonstrably justified under s. 1 of the *Charter*. *The Public Service Essential Services Act* does not contain a dispute resolution process enabling employees to address the propriety of unilateral employer essential services designations. It does not provide compensatory access to an impartial and effective dispute resolution process for those employees whose capacity to engage in meaningful strike action is effectively abrogated. And it contains provisions that are incompatible with the “controlled strike” model on which the legislation is based and which do not facilitate the continued delivery of essential services to the community during a labour dispute. These are serious flaws. Although the benefits that accrue from the statutory

limitations on the rights to bargain collectively and to strike are significant, they are clearly outweighed by their deleterious effects on the employees affected.

[282] For these reasons, I find that *The Public Service Essential Services Act* is unconstitutional because it infringes on rights and freedoms protected by s. 2(d) of the *Charter* to such an extent that it cannot be saved under s. 1.

[283] At the commencement of this hearing the parties agreed that the only issue to be addressed by the court would be the constitutional validity of the impugned legislation, with the plaintiffs' claim for damages to be bifurcated and dealt with at a later date. At the conclusion of the hearing the parties also agreed that if the legislation was found to be unconstitutional, the declaration of invalidity should be suspended for a minimum of 12 months.

[284] Accordingly, *The Public Service Essential Services Act* is declared to be of no force or effect by reason of s. 52 of the *Constitution Act, 1982*. The effect of the declaration of invalidity is suspended for a period of 12 months. The manner in which the legislation should be adjusted to meet the requirements of the *Charter* is left to the Legislative Branch.

CONCLUSION: PART II

[285] I have determined that the provisions of *The Trade Union Amendment Act 2008* do not infringe on the rights of employees to organize, to bargain collectively and to strike, all of which are protected by s. 2(d) of the *Charter*. Accordingly, the plaintiffs'

claim for a declaration that some or all of the provisions of *The Trade Union Amendment Act, 2008* are constitutionally invalid is dismissed.

[286] In accordance with the agreement of the parties I will hear representations with respect to remedy in due course.

 J.

D. P. BALL