Q.B. No. 1059 of 2008

CANADA)
PROVINCE OF SASKATCHEWAN)

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF REGINA

BETWEEN:

THE SASKATCHEWAN FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE UNIONS AND WORKERS IN THE PROVINCE OF SASKATCHEWAN); ADVANCED EMPLOYEES' ASSOCIATION AND ITS LOCALS 101 AND 102; AMALGAMATED TRANSIT UNION, LOCAL 588; CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 397; COMMUNICATIONS, ENERGY, AND PAPERWORKERS' UNION, LOCAL 180; GRAIN SERVICES UNION; HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN; INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF U.S., ITS TERRITORIES AND CANADA AND ITS LOCALS 295, 300 AND 669; INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 771; INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS, LOCAL 119; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 2038, 2067 AND 529; SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION; SASKATCHEWAN JOINT BOARD RETAIL, WHOLESALE AND DEPARTMENT STORE UNION; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985; UNITED MINEWORKERS OF AMERICA, LOCAL 7606; UNITED STEEL, PAPER, FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND ITS LOCALS; UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES/HOTEL EMPLOYEES, RESTAURANT EMPLOYEES' UNION LOCAL 41; UNIVERSITY OF REGINA FACULTY ASSOCIATION; LARRY HUBICH; BOB BYMOEN; GARRY HAMBLIN; TREVOR HOLLOWAY; SASKATCHEWAN PROVINCIAL BUILDING & CONSTRUCTION TRADES COUNCIL; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179; CANADIAN UNION OF PUBLIC EMPLOYEES, LOCALS 7 AND 4828 AND TEAMSTERS, LOCAL 395

PLAINTIFFS

AND

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

DEFENDANT

AND

SASKATCHEWAN UNION OF NURSES (SUN),
CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE),
SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU),
SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION (SGEU),
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 (SUMA),
SASKATCHEWAN ASSOCIATION OF RURAL MUNICIPALITIES (SARM),
CITY OF REGINA,
CITY OF SASKATOON,
UNIVERSITY OF SASKATCHEWAN,
UNIVERSITY OF REGINA,
SASKATCHEWAN POWER CORPORATION,
SASKENERGY INCORPORATED

INTERVENOR

BRIEF OF LAW ON BEHALF OF THE INTERVENOR CUPE
CANADIAN UNION OF PUBLIC EMPLOYEES

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I. INTRODUCTION

(a) *The Public Service Essential Services Act* (Bill 5)

1. This Brief of Law is filed on behalf of the Intervenor CUPE, the Canadian Union of Public Employees, in support of their position that *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 or parts and provisions thereof (the "*PSESA"*) violates *The Canadian Charter of Rights and Freedoms* (the "*Charter"*), s. 2(d), and is not saved by s. 1 of the *Charter*, on the following grounds:

   (a) The *PSESA* infringes the freedom of association guaranteed by s. 2(d) of the *Charter* by, *inter alia*, unreasonably, indefensibly and unduly restricting, abrogating or substantially interfering with the rights and ability of the Intervenor CUPE and its members to engage in meaningful collective bargaining through the ability to exert meaningful influence and pressure by the prospect of, or the engagement in, a stoppage of work, picketing and other lawful strike-related activities;

   (b) The *PSESA* provides no final and binding alternative dispute resolution process to offset this impact on the collective bargaining process;

   (c) The *PSESA* is in violation of international law and Canada's obligations under such law and inconsistent with the developing common international understanding with respect to the interpretation of freedom of association;

   (d) The *PSESA* is not reasonably necessary in a free and democratic society, and the breaches identified are not saved by s. 1 of the Charter.

(b) *The Trade Union Amendment Act* (Bill 6)

2. This Brief of Law is further filed in support of the position that *The Trade Union Amendment Act*, S.S. 2008, c. 26 or parts and provisions thereof (the "*TUAA")* violates the *Charter*, s. 2(d), of and is not saved by s. 1 of the *Charter*, on the following grounds:

   (a) The *TUAA* infringes the freedom of association guaranteed by s. 2(d) of the *Charter* by, *inter alia*, unreasonably, indefensibly and unduly restricting, abrogating or substantially interfering in the ability of workers in Saskatchewan to exercise their right of association and, further, their right to negotiate the terms and conditions of their employment through meaningful collective bargaining;

   (b) The *TUAA* is in violation of international law and Canada's obligations under such law and inconsistent with the developing common international understanding with respect to the interpretation of freedom of association; and

   (c) The *TUAA*, or portions thereof, is not reasonably necessary in a free and democratic society, and the breaches identified are not saved by s. 1 of the *Charter*.

3. The obligation to justify any violation of s. 2(d) in respect to the *PSESA* and the *TUAA* rests with the Attorney General and the Intervenor CUPE accordingly reserves its submissions to any s. 1 argument in reply.

II. FACTS

4. The Intervenor CUPE notes the evidence in the following areas:

   (a) Evidence establishing the impact of the *PSESA* on freedom of association with respect to collective bargaining, which necessarily includes the right to strike; and

(b) Evidence establishing the impact of the *TUAA* on freedom of association with respect to ability of workers to associate and to act in association through meaningful collective bargaining.

(a) Evidence establishing the impact of the *PSESA* on freedom of association with respect to collective bargaining, which necessarily includes the right to strike

5. The evidence regarding the impact of the *PSESA* on freedom of association includes the following:

(i) evidence with respect to the provision of essential services prior to the introduction of the *PSESA*; and

(ii) evidence with respect to the provision of essential services post-implementation of the *PSESA* establishing substantial interference in collective bargaining, which it is submitted necessarily includes the right to strike.

(i) Evidence with respect to the provision of essential services prior to the introduction of the *PSESA*.

6. Evidence was presented by the Intervenor CUPE and by intervenor employer parties related to the Intervenor CUPE regarding the provision of essential services during work stoppages in various sectors of public service prior to the introduction of the *PSESA*, namely:

a. University of Saskatchewan;
b. University of Regina;
c. City of Regina;
d. City of Saskatoon;
e. CUPE Regional Health Authorities:
   - Prairie North Regional Health Authority
   - Prince Albert Parkland Regional Health Authority

- Regina Qu'Appelle Regional Health Authority
- Sun Country Regional Health Authority
- Sunrise Regional Health Authority

a. University of Saskatchewan

7. The evidence established that, during the CUPE strike in 2007 (prior to the introduction of the *PSESA*), essential services were maintained at the University and there is no evidence of any serious incidences or dangers to health and safety of the public. Although certain non-essential services may have been abandoned, the Intervenor CUPE presented evidence that the Intervenor CUPE's local, CUPE Local 1975, provided coverage in situations considered critical and that the University also maintained essential services in critical areas by re-deploying out-of-scope employees, managers and volunteers.

8. A summary of the evidence presented with respect to the University of Saskatchewan is attached as Appendix "A" to this Brief of Law.

b. University of Regina

9. The Intervenor CUPE presented evidence that, during the CUPE strike in 2007 (prior to the introduction of the *PSESA*), the Intervenor CUPE's local, CUPE Local 1975-01, organized an essential services committee to ensure that essential services would be maintained at the University during the strike action. Following a request from the University for an employee to return to work, the essential services committee would, in conjunction with that particular employee, review the request, determine the legitimacy of the request and make a decision as to whether it was necessary for the employee to work to maintain essential services.

10. The Intervenor CUPE further presented evidence that, during the strike, duties were performed by outside contractors and out-of-scope personnel, some of whom had been

purposefully moved out-of-scope so that they would be available in the event of a strike. No evidence was presented of any actual harm or damage caused during the 2007 strike.

11. A summary of the evidence presented with respect to the University of Regina is attached as Appendix “B” to this Brief of Law.

c. City of Regina

12. The Intervenor CUPE presented evidence that, prior to the CUPE Local 7 and CUPE Local 21 strikes in 2005, the CUPE locals made a conscious decision to postpone strike action until after the Summer Games had concluded to avoid any negative impact or harm on the success of the games. The CUPE locals communicated to the City of Regina that they had every intention of providing any essential service required during the course of the strike, however, essential services were maintained by the out-of-scope managers and third party contractors with no request for assistance from CUPE. There was no evidence presented of any actual harm that resulted during the course of the 2005 strike.

13. A summary of the evidence presented with respect to the City of Regina is attached as Appendix “C” to this Brief of Law.

d. City of Saskatoon

14. The Intervenor CUPE presented evidence that, in 1994, there was a lockout of all CUPE members who were employed by the City of Saskatoon (CUPE Local 47, CUPE Local 59 and CUPE Local 859). During the course of the lockout, CUPE offered to provide essential services that were required, however, the City of Saskatoon maintained essential services through the use of out-of-scope mangers. The City did not request assistance from CUPE during the course of the lockout. There was no evidence presented of any actual harm that resulted during the course of the 1994 lockout.

15. A summary of the evidence presented with respect to the City of Saskatoon is attached as Appendix “D” to this Brief of Law.

e. CUPE Regional Health Authorities

16. The evidence established that there was a strike with respect to the "CUPE" Regional Health Authorities – i.e. those regional heath authorities for which health care provider workers are represented by CUPE - comprising what is now Prairie North Regional Heath Authority, Prince Albert Parkland Regional Health Authority, Regina Qu'Appelle Regional Health Authority, and Sunrise Regional Health Authority, in both 1999 (one day) and 2001(six days).

17. On both of these occasions, the Intervenor CUPE and the Employer met in order to discuss and negotiate the provision of essential services during the respective strikes. Approximately four percent of members were identified as being required to provide essential services.

18. The Intervenor CUPE presented further evidence that prior to the 2001 strike, the parties created a document that was provided to the CUPE Locals and the facilities so that those who were designated as providing an essential service would have a clear understanding of the protocol and the services that were to be provided for the duration of the strike. The parties established a process whereby if an emergency arose, the Intervenor CUPE contact person would address the issue and if the circumstances warranted it, the Intervenor CUPE would provide the appropriate essential service.

19. There was evidence provided by the Regional Health Authorities that there was impact on services as a result of the strike. There was no evidence presented of any actual harm to an individual that arose as a result of the 1999 or the 2001 strikes and in fact, the Intervenor CUPE was provided with a letter of thanks from the Employer for reacting quickly and preventing the loss of two lives during the 2001 strike due to the timely provision of essential services.

20. A summary of the evidence presented with respect to the CUPE Regional Health Authorities is attached as Appendix "E" to this Brief of Law.

(ii) Evidence with respect to the provision of essential services post-implementation of the *PSESA* establishing substantial interference in collective bargaining, which it is submitted necessarily includes the right to strike.

21. Evidence was presented with respect to the impact of the *PSESA* on the rights and abilities of the Intervenor CUPE and its members to engage in meaningful collective bargaining and to exert meaningful influence and pressure on employers during labour disputes through the prospect of, or engagement in, strike activity. This evidence was with respect to:

a. City of Regina;
b. City of Saskatoon;
c. CUPE Regional Health Authorities; and
d. Ministry of Social Services.

a. City of Regina

22. Evidence was presented that the essential services negotiations between locals of the Intervenor CUPE and the Intervenor City of Regina were concluded within a short time frame and were not contentious. The Intervenor CUPE presented evidence that there was no dispute by the union with respect to classifications and essential services negotiations were concluded in a short time frame because the CUPE locals recognized that there was little that could be done to challenge any designated classifications in any event.

23. A summary of the evidence presented with respect to the City of Regina is attached as Appendix "D" to this Brief of Law.

b. City of Saskatoon

24. Evidence was presented that the essential services negotiations between the Intervenor CUPE and the Intervenor City of Saskatoon were concluded within a short time frame and were not contentious. Similar to the City of Regina, the Intervenor presented evidence that the reason that the negotiations were concluded in a short time frame was that the CUPE locals did not dispute the classifications included in the essential services agreement as they recognized that there was little that could be done to challenge any designated classifications.

25. A summary of the evidence presented with respect to the City of Saskatoon is attached as Appendix "D" to this Brief of Law.

c. CUPE Regional Health Authorities

26. The Intervenor CUPE presented evidence with respect to the manner in which the essential services discussion commenced. The parties were unable to reach agreement in terms of the information that was to be provided in the essential service designations creating a great deal of discord between the parties even before the substantive bargaining began. This set the stage for a long arduous bargaining process.

27. The evidence established that the Employer's essential services designation levels were as follows:

- 75% of CUPE members in Prairie North Regional Health Authority;
- 72% of CUPE members in Prince Albert Parkland Regional Health Authority;
- 87% of CUPE members in Regina Qu'Appelle Regional Health Authority;
- 85% of CUPE members in Sun Country Regional Health Authority;
- 90% of CUPE members in Sunrise Regional Health Authority.

28. The Intervenor CUPE presented evidence that the high level of essential service designations meant that there would be few members who would have been able to participate in strike activity as a means to influence and apply pressure on the Employer at the bargaining table. With such a high designation level, the prospect of a strike was of little consequence to the employers and a strike itself would be rendered entirely ineffective.

29. There is no effective ability to challenge these high designation levels under the *PSESA* given the inability under the Act to dispute the nature of services deemed essential by the employers. Nonetheless, the Intervenor CUPE requested intervention from the Saskatchewan Labour Relations Board through a test case to address services that the Intervenor Regina Qu'Appelle Regional Heath Authority had deemed essential through filing of its s. 9 Notice on the union on June 5, 2009. That application was a challenge to the constitutionality of the *PSESA*, but the parties also led evidence on various classifications that had been unilaterally deemed essential by the employer and the subsequent designations of employees to provide those services which comprised some 87% of the CUPE workforce in the region.

30. The record of the subsequent proceeding before the Board, including transcript of the evidence, and the Board decision itself is part of the record before this Honourable Court pursuant to the *Fiat* of the Chief Justice dated August 1, 2010, in which, *inter alia*, a stay was ordered on the application for judicial review of the Board's decision by the Intervenor CUPE.

31. The Intervenor CUPE also presented evidence to the Board that the bargaining which occurred after the introduction of the *PSESA* was considerably different than bargaining that took place before the *PSESA* was introduced. The employer bargaining representative, the Saskatchewan Association of Health Organizations (SAHO), took a far more rigid and inflexible approach to bargaining than it had ever done in the past and there was an absence of any real or meaningful exchanges taking place between the parties in the current round of collective bargaining to that point in time.

32. The Intervenor CUPE relies upon the record of the Labour Relations Board proceeding in this matter, and in addition a summary of evidence presented with respect to the CUPE Regional Health Authorities is also attached as Appendix "E" to this Brief of Law.

d. Ministry of Social Services

33. *The Public Service Essential Services Regulations* (hereafter, the "*Regulations*") list specific services, and related programs, performed by employees of the Government of Saskatchewan which are prescribed as essential services for the purposes of s. 2 of the *PSESA*. In the Community Living Division – Valley View Centre in the Ministry of Social Services, where employees are represented by a local of the Intervenor CUPE, CUPE Local 600. The services prescribed as essential services include such services and programs as laundry, food services, housekeeping, dental clinic and medical equipment repair.

34. The Intervenor CUPE presented evidence that, as a result of the introduction of the *Regulations*, the CUPE local was effectively left without the ability to negotiate which classifications of employees should be designated as essential. Although the CUPE local believed that many of the services prescribed as essential services in the *Regulations* were not in fact essential services, the designation of the services as essential in the *Regulations* removed their ability to challenge the services. Furthermore, the introduction of the *Regulations* also effectively meant that the classifications of employees that maintained these prescribed services were also essential.

35. A summary of the evidence presented with respect to Valley View Centre is attached as Appendix "F" to this Brief of Law.

(b) Evidence establishing the impact of the *TUAA* on freedom of association with respect to ability of workers to associate and participate in collective bargaining.

36. The Intervenor CUPE presented evidence with respect to the impact of the *TUAA* on freedom of association in reducing the ability of Saskatchewan workers to associate for the purposes of collective bargaining through the expert report of Dr. Chris Riddell, who at the time was an Assistant Professor in the School of Policy Studies, Master`s of Industrial Relations Program and Queen`s University.

37. Further, the Intervenor CUPE presented evidence from Bill Robb, a National Representative of the Intervenor CUPE, with respect to impact on organizing in the Province's education sector.

38. Finally, the Intervenor CUPE notes here the evidence of the Attorney General which supports the conclusion that the Government introduced the *TUAA* with the policy intention of reducing the level of unionization in the Province for the purpose of promoting the "competitive" position of Saskatchewan.

(i) Dr. Chris Riddell, Assistant Professor in the School of Policy Studies

39. Dr. Riddell attested that studies on the impact of mandatory votes (or "compulsory election" laws in the United States") establish a reduction in union certification success over the alternate method of card check. Dr. Riddell's study established that such research is consistent with what has now occurred in Saskatchewan in that the implementation of a mandatory vote regime has resulted in a decline in union certification success in the private sector of some 20 per cent (19.6%). The decline is higher if controls on the statistical analysis are applied, i.e. up to 25.8% decline.

40. Dr. Riddell further attested that the mandatory vote system brought in for Saskatchewan in May 2008 is unique in Canada in that there is no time limit for when election would take place. This makes Saskatchewan the only province that operates under a similar system as in the United States. Dr. Riddell attested that, although the impact of time

delay in Saskatchewan on the holding of votes has yet to be determined, in the absence of a statutory requirement it is likely that the delay will be greater than in other Canadian jurisdictions and as such, the experience in the United States will become more relevant where increases in delay result in greater negative impact on certification success rates.

41. Dr. Riddell further attested that, extrapolating from these two bodies of evidence, i.e. (1) the findings from the switch from card check to mandatory votes, and (2) findings on the direct effects of vote delay, the introduction in Saskatchewan of compulsory mandatory votes without time limits suggests there will be a reduction in union certification success rates by an even greater magnitude that seen in other jurisdictions in Canada, again consistent with the experience in the United States.

42. The Attorney General sought to challenge the evidence of Dr. Riddell through cross-examination and the filing of an expert report from Dr. Marc Van Audenrode which, contrary to established and accepted research, maintains that the decline in union certification in the private sector after the implementation of the *TUAA* can be explained by economic factors. The Intervenor CUPE notes that Dr. Van Audenrode's position was also undermined by a second expert report filed by the Attorney General from Dr. Marcel Boyer.

43. In his report Dr. Boyer accepted the research view that it is established that the imposition of mandatory votes reduces certification success rates :

> The fact that Dr. Riddell finds that the certification regime only has an impact on certification success in the private sector as opposed to public institutions is not surprising as competitive sector firms and employees are the ones most concerned with productivity and performance because they tend to be less protected from disruptive forces coming from competition in national and international markets.
>
> *Union Certification Systems and Their Impact on Competitiveness*, Exhibit "A" to the *Affidavit of Marcel Boyer*, March 4, 2011, at para. 31. See also the discussion at para. 19 – 22 of the report.

44. Dr. Boyer confirmed his agreement on the impact of mandatory votes in cross-examination on his affidavit and also elaborated hat this a reduction in unionization is something to be desired to promote the Province's competitive position.

> *Transcript, Cross-Examination of Dr. Marcel Boyer*, May 4, 2011, at questions 217 – 219.

45. Finally, as summarized below, the Attorney General chose to lead evidence of studies supporting labour legislative initiatives to reduce unionization as public policy to enhance the Province's competitiveness, leading to the reasonable conclusion that a negative impact on certification success was intended.

46. A summary of the evidence presented by Dr. Riddell is attached as Appendix "G" to this Brief of Law.

(ii) Bill Robb, National Representative of the Intervenor CUPE

47. Mr. Robb has been involved in numerous union organizing drives in the Province of Saskatchewan on behalf of the Intervenor CUPE, both prior to the introduction of the *TUAA* and subsequent to its enactment. Mr. Robb attested that, although not all organizing drives were successful prior to the introduction of the *TUAA*, the Intervenor CUPE did receive certification in approximately sixty (60%) percent of workplaces. Mr. Robb further attested that, of the approximately twelve organizing drives that he was been involved in subsequent to the enactment of the *TUAA*, none have been successful.

> *Affidavit of Bill Robb* – Paragraphs 3, 5 and 6

48. The Defendant did not present any evidence to contradict or dispute the evidence presented through Mr. Robb.

(iii) Evidence on Government Policy to Reduce Unionization in Saskatchewan

49. As noted above (at paragraph 46), the Attorney General presented evidence in the form of studies supporting labour policy initiatives to enhance competitiveness based on limiting unionization. These studies are all authored by the Fraser Institute. Indeed, another study from that agency was relied upon by Dr. Boyer for his report conclusion that:

> 30. The association between the overall performance of the economy and the level of unionization can also be examined through the flexibility of labour markets. Flexibility is essential to high-performing economies. Efficient labour market leads to growth, strong job creation, short duration of unemployment, and a highly productive workforce.
>
> *Union Certification Systems and Their Impact on Competitiveness*, *supra*, at para. 30, citing in support a 2008 study of the Fraser Institute as Footnote 15 to the above statement.

50. As will be seen, the relationship between "the overall performance of the economy" and "the level of unionization" is seen by the Fraser Institute as a negative correlation: better performance results from lower unionization as labour markets become more flexible.

51. Such evidence was the basis of the research of the Government apparently relied upon in deciding to introduce the impugned labour legislation in 2007. We say "apparently" because although the witnesses for the Attorney General do not make such an express statement, Fraser Institute reports advocating, *inter alia*, reduced unionization were the only reports submitted by the Government as its research prior to introduction of the labour amendments.

52. Thus, we have the affidavit testimony of Patricia Parenteau, at the material time a Senior Policy Analyst with the Ministry of Advanced Education, Employment and Labour, Government of Saskatchewan. Ms Parenteau states that she was assigned the task to review "secondary literature relating to essential services legislation and trade union statutes in other provinces of Canada and in the United States". Further:

> The purpose of this literature review was to identify what various commentators considered to be the effect of changes to labour law regimes in those jurisdictions.
>
> *Affidavit of Patricia Parenteau (No. 2)*, December 24, 2010, at para. 3 and quotations at para. 4

53. Ms Parenteau goes on to note that in the course of her literature review, she "accessed" articles and papers published at three universities, but any such articles or papers from those institutions are not named or their content summarized. However, Ms Parenteau further attests that she also reviewed "various non-governmental public policy organizations such as the Fraser Institute" (Affidavit, paragraph 6) and four publications and one press release from the Fraser Institute are attached as exhibits to her Affidavit (see paragraph 7 – 11).

54. A review of the documents reviewed by the Government and attached to Ms Parenteau's affidavit reflects the Fraser Institute link Dr. Boyer identified in his report noted above between labour market flexibility and a high performing economies. The studies also link such flexibility and performance to reduced rates of unionization and the Fraser Institute encourages Canadian governments to adjust public policy with respect to labour legislation accordingly.

55. Thus, Exhibit "A", the first exhibit to Ms Parenteau's affidavit is a copy of the "Canadian Provincial Investment Climate: 2007 Edition" and we note the Fraser Institute states that the 2007 Edition is the third instalment in an ongoing research to assess "the performance of labour markets and explain why results differ among jurisdictions" (page 3). By that, the focus is to measure labour markets in Canada and the United States and the 50 states and 10 Canadian provinces are ranked as a single group with respect to two specific areas of study: labour market performance and labour market characteristics and regulation.

56. Labour market performance considers performance measurements for the Canadian provinces and American states based on five "indicators" reflecting data from 2002.

Saskatchewan is held to come out at No. 10 in respect to the 60 jurisdictions considered in the 2007 study.

> See description of study at page 3 and *Executive Summary Table 1: Summary of Provincial and State Rankings, Labour Market Performance,* Column 1, page 4.

57. The Fraser Institute study states that "the second section of the study identifies and measures key characteristics and regulations that affect labour market performance in each of the 60 jurisdictions".

58. The third of the four considerations with the second part is unionization. The Fraser Institute states unionization acts to "impede labour market flexibility, a key factor of performance" (page 29). Further:

> …unions tend to reduce employment growth, profitability, and investment. There is growing consensus that unions in general practice reduce labour market flexibility, productivity, and adversely affect the overall efficiency of labour markets. (page 8)

59. Given this perspective, it is no surprise that the Fraser Institute gives No. 1 position to North Carolina, given it has the lowest ratio of unionized workers to total employment of some 3.9%, while Saskatchewan is ranked at 57th with 35.6% union density. The impact of legislation amendments that have been established as leading to reduced levels of unionization must be considered in light of this assumption that reduced unionization is good for the economy. It completes the Fraser Institute chain of logic: low unionization equals labour market flexibility which therefore leads to high-performing economies.

> *Executive Summary Table 2: Summary of Provincial and State Rankings, Labour Market Regulation and Characteristics*, Column 7 and 8, page 10 and page 11.

60. The fourth characteristic in the labour market regulation and characteristics section of the Fraser Institute study is also of particular interest in that labour market performance is also said to be influenced by labour legislation. As one would anticipate, the more

regulation and restriction on employers and government, the lower the score in the Fraser Institutes analysis. The Fraser Institute looks at the following:

- certification and decertification;
- union security; and
- regulation of unionized firms which in turn includes a review of successor rights, technological change provisions, arbitration of disputes, the ability to use replacement workers and third party picketing restrictions.

61. In all categories, the greater the employer freedom the higher the ranking. Based on this analysis of key characteristics that affect labour market performance, Alabama is No. 1 and Saskatchewan is ranked as 58.

> See descriptions of the Labour Relations Laws criteria at pages 39 – 45 and *Executive Summary Table 2: Summary of Provincial and State Rankings, Labour Market Regulation and Characteristics*, Column 9 and 10, page 10.

62. Exhibit "B" to the *Affidavit of Patricia Parenteau (No. 2)* is the "Canadian Provincial Climate Report: 2007 Edition". This report is stated to be based on a survey of "Canada's leading money managers on a host of issues, including provincial investment climates and policies that contributed to positive and negative climates". The basis for the study is that investment capital is increasingly acknowledged as "a leading contributor to a jurisdiction's economic success or failure". The Provincial Investment Climate Index is comprised of seven components, including labour market regulation.

63. While Saskatchewan comes in at number three behind Alberta and British Columbia, in the overall ranking, Saskatchewan was considered to be at the bottom of the labour market regulation index amongst Canadian provinces.

> *Canadian Provincial Climate Report: 2007 Edition*, *supra*, at page 5.

64. In words that are echoed by subsequent statements of this Government, the Fraser Institute concludes Exhibit "B" by stating:

> Overall, the results indicate that all provinces have, to varying degrees, room to improve their public policies in order to attract investors to their jurisdictions. Public policies that contribute to positive investment climates are those that encourage productive economic activities: competitive tax rates (personal and business), adequate and effective transportation infrastructure, prudent fiscal policies on the part of government, **labour laws that promote flexibility and balance**, and, as appropriate, cost-effective regulations.
>
> *Canadian Provincial Climate Report: 2007 Edition*, *supra*, at page 35.

65. The third exhibit to the *Affidavit of Patricia Parenteau (No. 2)* is the "Measuring Labour Markets in Canada and the United States: 2010", the sixth instalment of its ongoing research and thus a follow up to the 2007 study, which is Exhibit "A" to Ms Parenteau's affidavit. While it is a study dated some three years after the introduction of the bills, we note that it is conducted with the same methodology as the 2007 study and, with respect to labour market performance index, on the Fraser Institute rankings Saskatchewan has moved up from No. 10 to No. 3 out of the 60 jurisdictions. No explanation is provided for Saskatchewan's improvement.

> *Exsum table 1: Summary of provincial and state rankings (out of 60), labour market performance*, Colum 1 and 2 at page 8.

66. Exhibit "D", the fourth exhibit is a Fraser Institute press release dated September 2, 2010 announcing the publication of the above-noted 2010 report (Exhibit "C"). The Fraser Institutes notes that Saskatchewan recorded the second best performing labour market in Canada and third overall in North America an improvement from its 8th ranking in the 2009 report (which is not an exhibit to this affidavit). The press release makes no mention of legislative change in its discussion of Saskatchewan's "improvement".

Best labour markets found in the west, led by Alberta and Saskatchewan; Ontario and Quebec struggle, p1.

67. Nonetheless, making clear its prescription for Government, the Fraser Institute goes on to conclude in the press release that:

> The high rate of unionization among Canadian provinces is the result of relatively biased labour relations laws. These laws inhibit the proper and efficient function of the labour market, because they favour one group over another, prevent innovation and flexibility, and are overly prescriptive.
>
> *Best labour markets found in the west, led by Alberta and Saskatchewan; Ontario and Quebec struggle*, p2.

68. The final exhibit to the *Affidavit of Patricia Parenteau (No. 2)* is the *Canadian Provincial Investment Climate, 2010 Report*, again a follow up to the 2007 Edition which is Exhibit "B" to Ms Parenteau's affidavit. Once again, the study is three years after the introduction of the legislation and could not have been considered in 2007. Nonetheless, perhaps, as with the 2010 follow up report that is Exhibit "C", the intention is to demonstrate Fraser Institute approval of the new Saskatchewan labour relations policy.

69. Thus, Saskatchewan now moves up one position to be number two in the Canadian Provincial Investment Climate Index, 2010. Indeed, in the labour market regulation component of the index Saskatchewan goes from No. 10, in 2007 to No. 4 in 2010, although the Fraser Institute does not say why.

> *Canadian Provincial Investment Climate, 2010 Report*, page 1 and page 4.

70. The conclusions to the study nonetheless state that all provinces have "room to improve their public policies to attract their investors to their jurisdictions. That conclusion also states that labour laws are required that "promote flexibility and balance"".

> *Canadian Provincial Investment Climate, 2010 Report*, page 5.

71. The presentation of the Fraser Institute studies by the Attorney General as the only literature reviewed by the Government invites the conclusion not just of ideological compatibility between the views of that institution and the Government of Saskatchewan, but supports the conclusion that the introduction of the *TUAA* (and as noted, the PSESA

by impairing the ability to have meaningful collective bargaining for those workers in the public sector) was intended to do exactly what the research suggests would occur: reduce the rate of unionization in the province. This is an impact supported by the expert report of Dr. Riddell in this proceeding.

72. The position of the Fraser Institute invites a debate, but not just simply a debate on whether the evidence it claims indeed supports the argument it makes. Rather, it invites an initial debate as to whether freedom of association protected by our *Charter* and consistent with international law and the obligations on Canada thereunder is subject to limitation on the basis of economic interests in the name of competitiveness. The Fraser Institute materials do not make any mention of a need to balance the policy changes it recommends with Canadian human rights or *Charter* considerations, let alone reflect Canadian international obligations. That is, in the end the position taken by the Fraser Institute that appears to be adopted by the Government in this case is subject to constitutional limitations.

III. ISSUES

73. The Intervenor CUPE respectfully submits that this action raises the following issues for determination by this Honourable Court, namely:

(a) Does the *PSESA* (or parts and provisions thereof) violate s. 2(d) of the *Charter*;

(b) If the *PSESA* (or parts and provisions thereof) is found to violate s. 2(d) of the *Charter*, is the *PSESA* (or the impugned parts and provisions thereof) saved by s. 1 of the *Charter*;

(c) Does the *TUAA* (or parts and provisions thereof) violate s. 2(d) of the *Charter*; and

(d) If the *TUAA* (or parts and provisions thereof) is found to violate s. 2(d) of the *Charter*, is the *TUAA* (or the impugned parts and provisions thereof) saved by s. 1 of the *Charter*.

IV. ARGUMENT

(a) Does the *PSESA* (or parts and provisions thereof) violate s. 2(d) of the *Charter*

74. The Intervenor CUPE respectfully submits that the *PSESA* infringes on the freedom of association guaranteed by s. 2(d) of the *Charter* by substantially interfering with the rights and ability of the Intervenor CUPE and its members to engage in meaningful collective bargaining through its impact on the Intervenor CUPE's ability to exert effective influence and pressure in the collective bargaining process pursuant to the following provisions of the *PSESA*.

(a) s. 2, the definition of essential services, is overbroad as it overreaches an acceptable definition of essential service consistent with Canada's international law obligations and thus provides for disproportionate designation of employees compared to the services that can be considered essential and, in fact, does not provide for provision of essential service during a labour dispute but rather, in effect, for maintenance of full services, including those not essential;

(b) s. 7(2) provides 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, thus ignoring the ability of the employer to cover essential services with managers and other out-of-scope employees, along with contractors and replacement workers;

(c) s. 9 provides for overbroad powers of an employer to designate employees not essential, require work that is not essential, require those who have the right to

decline work to perform work and otherwise require employees to carry out work in a manner inconsistent with their ability to engage in meaningful collective bargaining and exercise the right to strike; and

(d) s. 10 prevents the Board from determining whether a service is actually essential, who is required to perform a service and it what manner, and thus provides no effective review or appeal of unilateral employer designations or the basis on which they are determined or provided by designated employees.

75. The Intervenor CUPE submits that the ability of its members to conduct meaningful collective bargaining has been significantly impaired, indeed fatally impaired, given the right of employees to associate in a process of collective action to achieve workplace goals is effectively removed by the impugned provisions and application of the *PSESA*.

76. The Intervenor CUPE submits that the impact of the impairment of the ability to put pressure on the employer is well supported by authors and courts as set out below and a conclusion also supported by the evidence in this case. As such, the *PSESA* is inconsistent with the *Charter* s. 2(d) freedom of association as that freedom has been interpreted by the courts.

77. Further, the Intervenor CUPE submits that the right to strike is in stark contrast to the regimes established under essential services legislation in other provinces and such is relevant in considering the scope and impact of the legislation in determining its impact on collective bargaining as protected under s. 2(d) of the *Charter*. The decisions of other Canadian tribunals charged with the task of interpreting and applying essential services legislation are relevant in striking the balance between collective bargaining, including the right to strike, and the public interest in maintaining essential services in a potential labour dispute.

78. The Intervenor CUPE further submits that the regime established under the *PSESA* is inconsistent with international law principles with respect to both the right of collective bargaining, a consideration of great weight in the interpretation of *Charter* provisions.

79. We elaborate on these arguments below.

<u>Charter of Rights and Freedoms</u>

a. Freedom of Association, s. 2(d)

80. The Intervenor SEIU-West has set out an analysis of the caselaw with respect s. 2(d) in its Brief of Law in this proceeding which the Intervenor CUPE adopts in addition to the following submissions.

81. The evolution of s. 2(d) freedom of association jurisprudence to its current state arises from the adoption of the dissent of then Chief Justice Dickson in the *Alberta Reference* (1987) by the Supreme Court of Canada in *B.C. Health Services*, as well as *Dunmore* (2001), *B.C. Health Services* (2007) itself and cases subsequent. The role of freedom of association in labour relations is aptly summarized by Chief Justice Dickson at paragraph 23 of the *Alberta Reference* and adopted the majority in *BC Health Services* (at paragraph 84 of that decision):

> Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitive working conditions.
>
> *Alberta Reference*, *Intervenor CUPE Book of Authorities*, TAB 1, para. 23 and *BC Health Services, Intervenor CUPE Book of Authorities,* TAB 2, para. 84.

82. The Court in *BC Health Services* also approves of the statement of the 1968 Woods Report that makes the linkage between freedom of association and collective bargaining (see paragraph 64) which is referred to by Chief Justice Dickson *Alberta Reference* at paragraph 92-93 where the Chief Justice states:

92 The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. **The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people.** While trade unions also fulfill other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions. As Professor Paul Weiler explains in Reconcilable Differences: New [page369] Directions in Canadian Labour Law (1980), at p. 31:

> An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.

93 Professor Weiler goes on to characterize collective bargaining as "intrinsically valuable as an experience in self-government" (p. 33), and writes at p. 32:

> ... collective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. That is the essence of collective bargaining.

A similar rationale for endorsing collective bargaining was advanced in the Woods Task Force Report on Canadian Industrial Relations (1968), at p. 96:

> 296. One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place.

Alberta Reference, *Intervenor CUPE Book of Authorities*, TAB 1, para. 92-93, emphasis added.

83. It is the Intervenor CUPE's view that the essential *nexus* between freedom of association and collective bargaining is replicated in considering the linkage between freedom of association and the right to strike. That is, that the ability and capability of putting economic pressure on an employer is inextricably linked to the ability to engage in meaningful collective bargaining in the absence of any other effective method of dispute resolution.

84. Here we note the statements of the Ontario Divisional Court in *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), O.R.(2d) 392 as quoted by Chief Justice Dickson at paragraph 40 and later adopted at para. 97, in the *Alberta Reference*:

> **40** The Divisional Court [in Broadway Manor]was unanimous in rejecting the view of freedom of association embodied in Collymore. All three judges were of the view that the guarantee of freedom of association in s. 2(d) of the Charter extended to the activities of associations, and was not limited merely to the joining and formation of associations. Galligan J. explicitly rejected the interpretation of freedom of association in Collymore, as inconsistent with "a large and liberal construction" (p. 409). He stated at p. 409:
>
>> But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law.
>
> . . .
>
>> The purpose of an association of workers in a union is clear -- it is to advance their common interests. If they are not free to take such lawful steps that they see as reasonable to advance those interests, including bargaining and striking, then as a practical matter their association is a barren and useless thing. I cannot imagine that the Charter was ever intended to guarantee the freedom of association without also guaranteeing the freedom to do that for which the association is intended. I have no hesitation in concluding that in guaranteeing workers' freedom of association the Charter also guarantees at the very least their freedom to organize, to choose their own union, to bargain and to strike.
>
> O'Leary J. said at p. 445:

> But is the right to strike included in the expression "freedom of association"? **The ability to strike, in the absence of some kind of binding conciliation or arbitration, is the only substantial economic weapon available to employees. The right to organize and bargain collectively is only an illusion if the right to strike does not go with it. The main reason that the right to organize and bargain collectively is assured employees is that they may effectively bargain with their employer. To take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless.** If the right to organize and bargain collectively is to have significant value then the right to strike must also be a right included in the expression "freedom of association", and I conclude that it is.

According to Smith J., at p. 463: "The freedom to associate as used in the Charter not being on its face a limited one, includes the freedom to organize, to bargain collectively and, as a necessary corollary, to strike".

Alberta Reference, para. 40, TAB 1, emphasis added.

b. Freedom of Association and Collective Bargaining

85. In *BC Health Services*, the majority adopted a definition of collective bargaining from yet another Chief Justice of the Supreme Court of Canada, Bora Laskin, although made prior to his appointment to the Court. At paragraph 29, the Court quotes Professor Laskin, as he then was:

> Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his [page417] employees on the basis of a comparative equality of bargaining strength.
>
> ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 *Food for Thought* 8, at p. 8)

BC Health Services, *Intervenor CUPE Book of Authorities*, TAB 2, para. 29.

86. It is our submission that the impugned provisions of the PSESA constitute a substantial interference in collective bargaining in violation of the *Charter* s. 2(d) protection of

freedom of association. The capability of the CUPE members to conduct meaningful collective bargaining has been significantly impaired, indeed we argue fatally impaired, by the effective loss of the prospect of being ability to take effective collective action to achieve collective goals.

87. In this regard, consistent with the *BC Health Services* analysis, it is the *process* of collective bargaining for these employees that is now subject to this substantial interference. Thus, while it is speculative to determine specific future outcomes in the bargaining regime, we submit that the evidence supports the proposition that the legislation significantly impairs the ability of the union to engage in meaningful collective bargaining as a result of this legislated state intervention. Here we note the Intervenor SEIU-West submissions distinguishing between positive claims, such as in *Fraser*[1], and negative claims, such as in the present case.

88. The effect of the impugned provisions of the *PSESA* is to overwhelmingly enhance the bargaining power of the employer, with a corresponding reduction in the bargaining power of the union, resulting in substantial interference in the collective bargaining process within the terms set out by the Supreme Court.

89. In *BC Health Services*, the Supreme Court cautioned us with respect to confusing the ability to make representations in collective bargaining with the process of meaningful collective bargaining. Thus, at paragraph 114 of the decision, the Court states:

> 114 We pause to reiterate briefly that **the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion**. This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations. While the language of the Act does not technically prohibit collective representations to an employer, **the right to collective bargaining cannot be reduced to a mere right to make representations**. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.

[1] *Ontario (Attorney General) v. Fraser* 2011 SCC 20. See *infra*.

BC Health Services, per McLachlin C.J. and Lebel J., para. 114, TAB 2, emphasis added.

BC Health Services, per McLachlin C.J. and Lebel J., para. 103, TAB 2.

90. We are dealing in the present case with the impact on the ability make representations. It not simply a question as to whether hard bargaining can occur, but how that capacity to bargain hard has been changed through introduction of legislation that so profoundly undermines the bargaining power of the union and thus substantially interferes with the previous collective bargaining dynamic. Of course it is in the interests of an employer to bargain hard as it has been given the means to do so by legislation. That simply again begs the question as to whether the legislative interference is constitutional.

91. The union does not have the ability to bargain hard if it lacks means to persuade the employer to accept the terms it offers; on the other hand, the employer has an enhanced ability to bargain hard as the union no longer has the means to persuade it to do otherwise. In the absence of any other acceptable method to resolve the issues, the ability of the employer to conduct "hard bargaining" as a direct result of the legislative interference means that a meaningful process of collective bargaining is not being maintained.

92. It is submitted that it is not necessary to establish that the *PSESA* allows for bad faith bargaining in order to make a finding of *Charter* violation, but only that the impugned provisions of the *PSESA* so unbalance the collective bargaining process as to create only the ability to make representations and thus create substantial interference in that process.

93. This, it is submitted, is a reason why the Supreme Court cautions us that a *Charter* case must be based on a contextual analysis. In *BC Health Services*, the issue was the *effect* of the prohibitions on collective bargaining, not whether or not there was a technical ban on collective bargaining (see paragraph 114). A finding otherwise would be a triumph of formalism over substance. The restriction on strike activity arising from the PSESA and the outright ban on such activity otherwise has the *effect* of substantive interference in

collective bargaining in the same manner as the prohibitions referred to by the Supreme Court. Bearing this distinction in mind, we now turn to the Court's conclusions in *B.C. Health Services* with respect to collective bargaining as a *Charter*-protected activity.

94. First, at paragraph 89, McLachlin C.J. and Lebel J. state:

> **89.**…Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and **their capacity to act in common to reach shared goals related to workplace issues and terms of employment**. In brief, **the protected activity might be described as employees banding together to achieve particular work-related objectives**. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. **It meant that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals.** [emphasis added]
>
> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, *Intervenor CUPE Book of Authorities,* TAB 2, para. 89, emphasis added.

95. The Court goes on, at paragraph 90, to note that s. 2(d) protects only against "substantial interference" with associational activity and goes on to describe the nature of such interference:

> **91.** The right to collective bargaining is thus conceived as a limited right. First, as the right is to process, it does not guarantee a certain substantive or economic outcome. Moreover the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method…Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial – so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but **with the very process that enables them to pursue those objectives by engaging in meaningful collective bargaining.**
>
> **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 common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining….**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.**
>
> **93.** Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. **The first inquiry is into the importance of the matter affected to the process of collective bargaining**, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. **The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation**.
>
> **94.** Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s.2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation.
>
> *BC Health Service*, *Intervenor CUPE Book of Authorities,* TAB 2, para. 89, emphasis added.

96. As per paragraph 89 of the decision set out above, the Court in *B.C. Health Services*, focused on "shared goals" and removing the capacity for CUPE employees to continue to act in concert in collective bargaining creates substantial interference within the terms of the Court's description and analysis. As also is argued below with respect to the *TUAA*, the capacity of CUPE members to act in association has been compromised within the meaning of *B.C. Health Services*.

97. Turning to the first inquiry set out in paragraph 93 of *B.C. Health Services*, it is submitted that there is a substantial impact on collective bargaining for the affected employees. This must be patently obvious once the linkage between the ability to collective bargain in an effective manner and the ability to persuade the other party is recognized. However, as the evidence in this case also established, collective bargaining, under the *PSESA* scheme is characterized not just by employer reticence and demands for concessions at the table, but by a refusal to respond to union bargaining initiatives. The health care evidence here is that unlike in the past, the traditional lever for settlement, the strike vote, had no effect on the employer bargaining agent, SAHO. In the absence of any meaningful ability to

strike, the threat to do so has no impact - a labour relations reality noted by labour boards and international bodies in these submissions.

98. The outcome of the second inquiry from *B.C. Health Services* at paragraph 93 of the Court's judgment also supports a finding of substantial interference. That is, the changes may superficially preserve the elements of consultation and good faith negotiation in collective bargaining for these employees, but only in the same manner as they were preserved "technically" in the *BC Health Services* case. If *effect*, the collective bargaining process has been significantly impaired as a result of the implementation of the *PSESA*.

99. In the *Mounted Police Assn. of Ontario* case, the interference found by the Ontario Divisional Court was with respect to the ability of police officers to engage in meaningful collective bargaining. The Court noted the relationship between collective bargaining and bargaining strength in adopting the definition of collective bargaining by Professor Bora Laskin:

> **49.** … **If one side can unilaterally determine the outcome of the 'negotiations', it can hardly be said that there is a comparative equality of bargaining strength.** [emphasis added]
>
> *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2009] O.J. No. 1352, *Intervenor CUPE Book of Authorities,* TAB 3.

100. "Determining the outcome" characterizes the quality of collective bargaining as a result of the interference in that process arising from the *PSESA*. The Intervenor CUPE submits that the effect of the *PSESA* here is the capacity it generates for the employer to unilaterally determine the outcome of negotiations. Bargaining outcomes are not protected under the *Charter*, but it is submitted that the ability of a party to determine outcomes is an important element in determining whether there has been substantial interference in the collective bargaining process. The effect is foreseeable.

101. Thus, in the 2008 case, *Confédération des syndicates nationaux v. Attorney General of Québec*, the specific occupational group consisted of home childcare providers and home

caregivers for those with mental illness or capacity issues. In applying *Dunmore* and *B.C. Health Services*, Grenier J.S.C. held that the impact of Bills 7 and 8 of the Quebec legislature, which stripped away employee status for those workers, resulted in a violation of s.2(d). The learned justice stated:

> [229] …these declaratory statutes cancelled all previous gains, i.e. the certification and the collective agreements that could have otherwise been negotiated or were in the process of being negotiated. They also revoked all the decisions rendered by administrative, quasi-judicial and judicial tribunals prior to December 18, 2003.
>
> [Court translation]
>
> *Confédération des syndicates nationaux v. Attorney General of Québec* (No. 50017-018968-043 et al, October 31, 2008), *Intervenor CUPE Book of Authorities*, TAB 4.

102. The "previous gains" were achieved by collective bargaining. The Court, in ruling on the two bills that removed those rights, stated:

> [289] In summary, Bill 7 and Bill 8 limit the formation of unions by stripping away the very function of those associations, the ultimate goal of which is to negotiate fair working conditions for their members. To say their existence is not challenged by the amending statutes is tantamount to saying that, as long as their members retain the possibility of getting together to discuss this and that, the unions exist. But can they exist if they serve no purpose? In other words, without the possibility of bargaining on behalf of their members, the unions have a purely vegetative life, with no real foundation.

103. The Court's concerns are relevant in the present case, given the loss of the union's ability to engage in meaningful collective bargaining in the face of the PSESA provisions has also resulted, in certain circumstances such as in the recent round of health care bargaining , in the employers attempting to reverse previous gains of the Union. Again, it is the unilateral ability of the employer to effect outcomes that is relevant, not the specific outcomes themselves.

104. We also note the 2007 *Confédération des syndicates nationaux v. Québec (Procureur general)*, a judicial review application with respect to a Quebec Labour Relations Board decision, where Madam Justice Roy held that provisions of the health care restructuring act in that province were invalid as offending s.2(d) of the *Charter*. Four general or "umbrella" groups of employees were designated under the act, to be represented by one union, a combination of unions or a new merged union of those affected.

> *Confédération des syndicates nationaux v. Québec (Procureur general)*, Quebec Superior Court, November 30, 2007, *Intervenor CUPE Book of Authorities*, TAB 5.

105. While the conclusions of the Court in that case relate to the change in bargaining structure, we note here the reach of the constitutional protection of collective bargaining in that the Court's conclusions were based almost exclusively on the impact of the legislative changes on the ability of the unions affected to engage in meaningful collective bargaining (see paragraph 387-394).

106. In conclusion, the Court in *B.C. Health Services* focused on "shared goals" and in removing the capacity for the Intervenor CUPE and its members to continue to act in concert in collective bargaining creates substantial interference within the terms of the Court's description and analysis. The Intervenor CUPE submits that the capacity of the Intervenor CUPE and its members to act in concert has been compromised within the meaning of *B.C. Health Services*.

c. Right to Strike

107. Courts have yet to pronounce separately on the right to strike since the *Labour Trilogy*, but it is submitted that the comments of the Courts and Labour Boards with respect to the right of collective bargaining apply equally to with respect to the inclusion of the right to strike within the protection of s.2(d) of the *Charter* as an essential element of collective bargaining. Reasons in support of this conclusion include the three-element analysis of the Court in *B.C. Health Services* with respect to collective bargaining no less applies when considering the right to strike. That is:

(i) the "historical analysis" undertaken by the Court at paragraphs 40-68 of *B.C. Health Services* will reach a similar conclusion with respect to the historical recognition of the right to strike in Canada as it there is no conceptual basis for recognizing one (collective bargaining) and not the other (right to strike);[2]

(ii) as discussed below, international law, the second of the three elements considered by the Court in *B.C. Health Services* at paragraphs 69-79, also supports the recognition of the right to strike under s.2(d) subject to a narrow exclusion to maintain essential services on a minimal and proportionate basis; and

(iii) given the essential linkage to collective bargaining,[3]consideration of *Charter* values, discussed by the Court at paragraphs 80-86, the analysis can lead to no different conclusion that right to strike is important in enhancing worker autonomy and achieving workplace democracy.

108. Indeed, Professor Brian Etherington suggests the Dickson *Alberta Reference* model as one which would be the broadest in recognizing a right to strike under s. 2(d), leaving the justification to a s. 1 analysis. But for our purposes, we note that even at the narrow end of the spectrum of possible outcomes in considering the right to strike under s. 2(d), Professor Etherington captures a scenario that is our present application:

> In order to avoid continuous oversight of the plethora of restrictions on the right to strike in all jurisdictions, I believe it is fairly likely that the pragmatic interests of the Court will lead it to recognize a fairly limited right to strike, one that is limited to protection for a right to strike, that will enable access to a meaningful process of collective bargaining. **Under this model the right would be violated only where strike activity was prohibited or so severely restricted as to substantially interfere with the process of collective bargaining denying the affected employees access to any meaningful collective bargaining.**

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[2]See also Fudge and Tucker, *The Freedom to Strike in Canada: A Brief Legal History*, *Intervenor CUPE Book of Authorities,* TAB 7, discussed by is its submissions by the Intervenor SEIU-West and also below.
[3] See Dickson C.J., *Alberta Reference*, *Intervenor CUPE Book of Authorities,* TAB 1, at para. 94-97,

> Etherington, "Does Freedom of Association under the Charter Include the Right to Strike after *BC Health Services*? Prognosis, Problems and Concerns", *Intervenor CUPE Book of Authorities,* TAB 6 at p12 (also see Conclusion at pp18-19), emphasis added.

109. As noted, the Court in *B.C. Health Services* relied on the pre-*Charter* recognition of collective bargaining as one of its three rationale for finding that s.2(d) freedom of association includes a right of collective bargaining. Judy Fudge and Eric Tucker undertake a similar analysis to conclude that a right to strike has also been in place prior to the *Charter* and indeed long before the present statutory labour regimes were put into place.[4] In a conclusion that has relevance to the Saskatchewan Government's action here with the passage and implementation of the PSESA, the authors note:

> …[L]ess than two decades after legislative support for collective bargaining was extended to the majority of public sector workers in the 1960's, increasingly one or more of public sector workers' freedoms have been suspended or limited without compensation rights. From an historical perspective, the pattern of government restraint of the past thirty to thirty-five years is a marked departure from previous regimes that either gave workers nearly unlimited freedom to strike without rights (liberal voluntarism) or gave workers limited freedom to strike without compensation rights, including a right to strike (industrial pluralism)**. It is the imposition of these 'exceptional' limits on the freedom to strike, without compensating rights**, or indeed, accompanied by employer unilateralism (imposed terms and conditions of employment) that is likely to provide the context for a claim that the *Charter* protects the freedom to strike. [emphasis added]
>
> Fudge and Tucker, "The Freedom to Strike in Canada: A Brief Legal History". *Intervenor CUPE Book of Authorities,* TAB 7 at p21. "Compensating rights" reflects to the ILO formulation in the CFA decision in the current matter whereby there must be some meaningful alternative dispute resolution mechanism available to compensate those who have lost the right to strike.

110. This in turn leads us back to the words of Chief Justice Dickson in *Alberta Reference*. The Chief Justice adopts the words of Kahn-Freund, "if the workers could not, in the last resort, collectively refuse to work, they could not bargain collectively" (see *Alberta Reference* at paragraph 97, and note the adaptation by the CIRB in the 2002 *Nav Canada*

[4] Fudge and Tucker, "The Freedom to Strike in Canada: A Brief Legal History". *Intervenor CUPE Book of Authorities,* TAB 7 at p20.

Case, *infra* in the discussion of board jurisprudence below). Chief Justice Dickson states:

> **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 sanctions in support of the bargaining.
>
> **95.** The Woods Task Force at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:
>
> > 408. Strikes and lockouts are an indispensible 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 economic sanction of the strike. At p. 176, it is said, “The strike has become part of the whole democratic system.”
>
> *Alberta Reference*, per Dickson C.J., para. 94-96, TAB 1.

111. We emphasize this *nexus* between collective bargaining and the right to strike because it is consistent with labour relations reality. Absent any such right and any other acceptable mechanism for dispute resolution, the union becomes powerless where, as here, the employer can dictate the course of collective bargaining. For instance, in the Regina Qu’Appelle Regional Health Authority, approximately 87% of its workforce was designated as essential, a level that may even be higher than available on a normal

workday.

112. In those circumstances, a strike places no real pressure on the employer in the absence of any other mechanism for dispute resolution. The union could take its 13% out at Regina Qu'Appelle Regional Health Authority and walk a picket line for years, even if supplemented by workers on their time off as there is no impact on services where such is otherwise being provided by such workers. The employer can even hire replacement workers as it sees fit given the lack of any legislative prohibition. This is the remains of the "lever" the union retains in the collective bargaining process through the application of the *PSESA*. Would the prospect of a strike impact be any different where there is a 72% designation (Prince Alberta Regional Health Authority) or 90% (Sunrise Regional Health Authority)?

113. The *ability* of an employer to unilaterally designate at such high levels is the fatal flaw to the *PSESA*. There is no alternative in the *PSESA* should the level of designation be of such a level as to make a strike ineffective and hence substantially interfere with the process of collective bargaining itself.

<u>Cross-Canada Essential Services Jurisprudence</u>

114. As stated, the nature of the Canadian legislative framework and consequent interpretation is also relevant in considering the role of the strike in collective bargaining, and as such the interpretation of s. 2(d) of the *Charter*. We refer to selected jurisdictions below. We also note that such a summary may also be relevant in considering a s. 1 analysis, but we leave that discussion, in need be, for reply.

115. With the notable exception of Nova Scotia, essential services legislation exists across Canada. As far as the Intervenor CUPE, is presently aware, none has yet been subject to constitutional challenge under the *Charter* and thus we take no position as to whether or not this legislation, or parts thereof, is constitutional. Rather, this review is intended to

highlight the approaches taken by labour relations boards under selected legislative schemes across the country that reflect the realities of collective bargaining and, in particular, the role of the right to strike as part of this process. As will be seen, such an approach is in contrast to the approach taken by Saskatchewan in this case.

a. British Columbia

116. The following section provides the definition of essential services found in Part 6 of the British Columbia *Labour Relations Code*:

> **72** (1) If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute,
>
> (a) investigate whether or not the dispute poses a threat to
>
> (i) the health, safety or welfare of the residents of British Columbia, or
>
> (ii) the provision of educational programs to students and eligible children under the *School Act*,

117. We note here the similarity of the BC definition to that set out in international law where the withdrawal of a particular service poses a threat to the health, safety or welfare of the residents of the province.

118. This definition has been applied in a number of cases in British Columbia in resolving disputes that arise where job action has been taken. One such case, *Health Employers Association of British Columbia,* resulted in the creation of the "standard global provisions" or "order." These were developed to provide the terms of a standard order dealing with global issues arising from the designation of essential services, i.e. issues that one could expect would always arise in the essential services process and in an effort to prevent the lengthy hearings that were becoming problematic to reaching timely resolutions to issues around essential services. The result is a framework within which the parties' joint obligation to provide essential services is set out, while the essential

services designations themselves are included as particulars in separate schedules to the Order.

> *Health Employers Association of British Columbia (Re),* BCLRB No. B73/96, *Intervenor CUPE Book of Authorities,* TAB 8.

119. The BC Board has been extremely reluctant to stray from the standard global provisions even in the face of requests to do so. These provisions include such information that speaks directly to the facility and the services to be provided. We note here that reference is also made to the obligation of management and excluded personnel to work sixty hours per week unless otherwise agreed to and that a record of these hours is to be kept. The provisions also include a prohibition on hiring replacement workers or extending the utilization of volunteers. Both of these elements can be contrasted with s.7(2) of the PSESA where, not only are replacement workers allowed but neither they nor management employees can be considered in determining the number of employees who must work to provide essential services in the event of a work stoppage. This is inconsistent with a stated policy goal of ensuring the preservation of essential services during a work stoppage as it excludes consideration of non-bargaining unit employees in providing such services.

120. The general framework is maintained by the BC Board while making the appropriate adjustments depending upon the particular issues between the parties. The British Columbia global order does not designate particular persons as essential. The global order provides for unions to schedule its members into classifications which are designated as essential. Additionally, the global order provides that those employees performing work as essential workers are doing so under the collective agreement which has just expires. Thus the employer cannot use an essential services designation to compel an employee to work hours in excess of those provided in the collective agreement. This is in contrast to the Saskatchewan legislation where there are no limits or restriction to the employer designating and scheduling employees whose status is that of a casual employee. Thus, under the CUPE health care collective agreement a casual employee accepts or declines work offered by the employer at their own will and cannot

be compelled to work any particular hours. Under the *PSESA* health care employers in Saskatchewan have designated casual employees as essential under this legislation. As such the flexibility that such employees have as a term and condition of their employment in accepting or turning down a shift has been stripped away because of the designation.

> *Health Employers Association of British Columbia (Re), supra, Intervenor CUPE Book of Authorities,* TAB 8.

121. Another example of a variation in the BC standard global order is provided in *Revera Retirement LP and BCGEU* at s. 2 (ii)(c) wherein the parties agreed to include an additional subsection providing that "the employer may use outside contractors only for those services which would be provided on a contract basis in the absence of a strike or lockout." Again, this stands in contrast to the provisions of s.7(2) of the *PSESA* which not only fails to regulate such contractor services, but expressly provides they cannot be considered in determining numbers of those employees who must work to provide essential services in the event of a work stoppage – again in contrast to a policy goal of ensuring the provisions of essential services in such circumstances.

> *Revera Retirement LP and BCGEU (Re)* 2009 CLB 7318, *Intervenor CUPE Book of Authorities,* TAB 9.

122. The development of the standard global order in British Columbia reflects the BC Board's analysis of the purpose and effect of essential services pursuant to its *Labour Relations Code*. Thus, in *Chantelle Management*, the Board considers the effect that a strike has on the public. In that case, at page 10 the Board comments that "more fundamentally, often only a small minority of the public are affected with no idea of the level of services being provided. The "inconvenience" …is not felt by the general public, but rather by a disproportionate few, who are the least able to affect the outcome in a political sense." This illustrates the BC Board's recognition of their role in the balancing act that is at play: the need to provide essential service to the public in accordance with the definition in the Act, with the need to ensure that an appropriate degree of pressure is exerted on the parties as motivation to conclude a collective agreement. At page 10, the

Board comments, "if management's resources are not stretched, there will be less pressure on the employer to seek innovative solutions to outstanding issues." This is also illustrated at paragraph 20 of *Compass Group Canada (Health Services) and HEU.*

> *Chantelle Management Ltd. et al and British Columbia Nurses' Union and Hospital Employees' Union*, [1993] B.C.L.R.B.D. No. 364, *Intervenor CUPE Book of Authorities*, TAB 10, at 10.
>
> *Compass Group Canada (Health Services) and HEU (Re),* BCLRB No. B72/2009, (April 1, 2009), *Intervenor CUPE Book of Authorities*, TAB 11.

123. The BC Board begins from the premise that what is ultimately in the public interest is for a labour dispute to be of the shortest duration possible. This is accomplished by maximizing the pressure on both parties.

124. At paragraph 85 of *Emergency and Health Services Commission – and – Ambulance Paramedics of British Columbia* decision, the B.C. Board commented that the legitimacy and integrity of the essential services system must be maintained, and that the Board ought not interfere with each parties' ability to maximize the pressure on the other to settle the dispute.

> *Emergency and Health Services Commission – and – Ambulance Paramedics of British Columbia,* [2009] BCLRB No. B93/2009 – May 4, 2009, *Intervenor CUPE Book of Authorities,* TAB 12.

125. In summary, the British Columbia Labour Relations Board has established a system that ensures essential services will be provided based on a health and safety definition. The BC Board has also illustrated that they are alive to the need of balancing protection to the public within this ILO type definition of essential services against the need to ensure that the parties are able to maximize pressure on one another to resolve a dispute. This approach stands in stark contrast to the regime established under *The Public Services Essential Services Act* of Saskatchewan whereby the impact on the union's ability to engage in meaningful collective bargaining has been significantly, indeed we maintain *fatally* compromised by the failure to consider any such balance in the essential services definition, determination, designation and dispute resolution process.

b. New Brunswick

126. The following sections are the material provisions of the New Brunswick *Public Service Labour Relations Act* speaking to the definition and the provision of essential services:

> **43.1**(1) In relation to any bargaining unit the employer may, within the time limits established under subsection (2), by notice in writing advise the Board and the bargaining agent for the relevant bargaining unit that the employer considers in whole or in part the services provided by the bargaining unit to be essential in the interest of the health, safety or security of the public.

This is a definition that is also consistent with international law.

127. In *CUPE, Local 1253 v. New Brunswick (Board of Management),* the Labour and Employment Board concluded that custodians responsible for cleaning schools would be considered an "essential service" within the meaning of s. 43.1 of the *Public Service Labour Relations Act*. The Union applied for judicial review of that decision and the Court of Appeal found that the Board's decision was unreasonable because there was a false assumption made that schools will remain open if custodians go on strike[5]. The Court also held that the Board failed to properly consider the purpose of s.43.1 of the Act by asking a broad question rather than a narrow one. The proper question was, what is the ultimate impact on the public interest if the employer is no longer able to provide the services which the custodians offer. Instead, the Board asked if custodians are required to perform duties that may impact on the health of the public

> *CUPE, Local 1253 v. New Brunswick (Board of Management),* 2006 N.B.C.A. 101, *Intervenor CUPE Book of Authorities,* TAB 13.

128. This is not unlike the manner in which the employer has designated essential services pursuant to the *PSESA*. Where in the *CUPE, Local 1253* case, the Board of that province made the incorrect assumption that schools will remain open if custodians were to strike,

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[5] By reference from the Chief Justice in the province, the Court of Appeal heard this matter as an application for judicial review, no as an appeal. See *Decision,* para. 1.

employers in the case at hand as demonstrated in health care, have used the Act in an improper manner by assuming that each and every service that has been deemed "essential" is in fact essential. While health care facilities do remain open in the event of a strike, this cannot mean that each service that is provided within those facilities are an essential service, particularly given the need to balance the rights of the union with the safety of the public. Health authorities in Saskatchewan, as permitted under the Act, have taken a "business as usual" approach to the provision of services in the event of a work stoppage by designating a level of services with an accompanying level of designations that is little different from normal services and staffing levels when leaves and other absences are considered.

129. In the New Brunswick CUPE case above, in considering the matter the Court looked to the right of the school employees to strike and adopted the statements of Paul Weiler, in his book, *Reconcilable Differences*: (Toronto: Caswell, 1980) before concluding, at paragraph 22:

> If we cannot accept the cold-blooded logic of collective bargaining, let us be candid about what we are doing. If we tell a school union that in order to secure concessions from the school board they can go on strike, as long as they do not interrupt the delivery of education - or we tell other government unions that they can strike but they cannot disturb the welfare of the public – then **we are really telling these unions that they will not have an effective lever with which to budge a recalcitrant government employer from the bargaining position to which it has committed itself**. We do leave the public employees with the right to unionize, to try to persuade their employer to improve their contract offers - with the right to collective "begging" as some unionists derisively put it – but we do not give them collective bargaining in the true sense of the word. [emphasis added]

130. In a related discussion of bargaining power in the context of collective bargaining, the N.B. Labour and Employment Board in *International Union of Operating Engineers, Local 946 and Her Majesty in right of the Province of New Brunswick and Canadian Union of Public Employees, Local 1252,* was tasked with making a determination on an application by the International Union of Operating Engineers ("IUOE"), Local 946 to represent "all employees working as paramedics/ambulance attendants ("Paramedics") in

the listed hospitals. The application before the Board was a request by IUOE to carve out a unit comprised solely of Paramedics from a larger existing bargaining unit. The New Brunswick Board concluded that there were no substantive reasons to carve out a unit that existed solely of Paramedics as doing so has the potential to impact negatively on the viability and balance of the bargaining relationship between the union and the employer. Significantly with respect to our case, at paragraph 46, the Board concluded:

> …historic high designation levels among Paramedics during strike situations are problematic. **That is the justifiable high designation levels significantly reduce the bargaining power of the paramedics generally. It prevents the Paramedics from withdrawing their services and renders negligible the effect of the controlled strike upon the Employer. In essence it disrupts the balance of the bargaining relationship.** To offset the effect of high designations is to place these employees within a bargaining unit that respects the integrity of the classification system and also allows for the natural tug and flow of collective bargaining to be pursued. Thus the same classification within a larger bargaining unit permits the overall bargaining unit to pursue their lawful rights effectively without sacrificing any protected rights of the Paramedics. [emphasis added]
>
> *International Union of Operating Engineers, Local 946 and Her Majesty in right of the Province of New Brunswick and Canadian Union of Public Employees, Local 1252,* (2008), *Intervenor CUPE of Authorities* TAB 14.

131. The *IUOE* case is thus of interest in that it addresses the effect that essential services designations can have on a particular group of workers and is explicit in recognizing the importance of protecting the balance of bargaining power. The right to strike cannot be viewed as a separate and distinct element from the collective bargaining process. The threat or ability to conduct an effective strike can be a powerful incentive to resolving issues in the collective bargaining process, while an actual strike may lead the parties to quickly come to terms as has been demonstrated in the health care in the past.

132. This linkage is also illustrated in the evidence provided by union witnesses Sinda Cathcart, Pearl Blommaert and Michael Keith in the *CUPE v. Regina Qu'Appelle* case heard by the Saskatchewan Labour Relations Board, wherein there was evidence provided with respect to the conclusion of a collective agreement during past round of bargaining in relation to a strike vote taken by the union. It is submitted that the employer

failed to respond to the strong strike mandate from the health care providers unions in the last time around, leading to the common sense conclusion that the threat of a strike is an empty one.

133. An employer in Saskatchewan covered by the *PSESA* can operate with a level of designated employees based on its unilateral determination of essential services, performing the full range of their work and does not even have to consider the ability of managers, contractors or replacement workers to provide essential services in the event of a work stoppage. This is not about providing essential services, it is about reducing bargaining power.

134. Contrast *New Brunswick (Board of Management)*, where the Board was asked to determine if the mechanics and mechanic supervisors who were responsible for the repair and maintenance of school buses were or would be “necessary for the health, safety or security of the public” as provided in s. 43.1(3)(a) of the *Act.* The Board followed the reasoning provided by the Court in the above mentioned 2006 judicial review of the *CUPE, Local 1253* decision. The Board recognized that the right to strike is an inherent right that is then restricted by the legislation. It is the job of the Board to consider the extent of that restriction while also recognizing the purpose of the inherent right, to apply pressure on the employer. It was concluded that the impact would be one of inconvenience felt by parents and students rather than the general public.

> *New Brunswick (Board of Management) (Re),* [2009] N.B.L.E.B.D. No. 29, *Intervenor CUPE Book of Authorities,* TAB 15.

135. A modified conclusion may well be appropriate in health care *viz.* hospitals and other care facilities and services as demonstrated in the British Columbia cases, but the significance of the New Brunswick approach is the recognition of the balancing of interests that must still take place in determining what is essential and how it is to be maintained.

c. Canada (Federal Jurisdiction)

136. The *Public Service Labour Relations Act* applies in the federal public service:

> s. 4(1) "essential service" means a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public.
>
> "essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies
> (*a*) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;
> (*b*) the number of those positions that are necessary for that purpose; and
> (*c*) the specific positions that are necessary for that purpose.

137. In the initial case brought under the Act, *Public Service Alliance of Canada v. Parks Canada Agency,* 2008 PSLRB 97 two applications were filed for determination by the Board. The Public Service Labour Relations Board (PSLRB), decided to hear evidence within the context of two Parks Canada organizational units as a test case that could then be applied to negotiate essential services for the entire bargaining unit. There was a limitation on evidence not unlike what occurred with respect to the six representative classifications chosen by the Intervenor CUPE, and the Intervenor CUPE, Regina Qu'Appelle Regional Health Authority in the Saskatchewan LRB case.

> *Public Service Alliance of Canada v. Parks Canada Agency,* 2008 PSLRB 97, *Intervenor CUPE Book of Authorities,* TAB 16.

138. The Board applied the reasoning of the New Brunswick Court in the *CUPE, Local 1253* decision noted above. The Board thus held that the first question to ask was, "what services are necessary for public safety or security in the event of a strike?", not what services were essential during the normal course of affairs as the employer suggested. At paragraph 168, the Board comments that the intent of the legislator is revealed in the specific provision that an essential services agreement "serve the unique purpose of creating the conditions under which employees may exercise the right to strike without jeopardizing the capacity of the employer to protect public safety and security during a strike." At paragraph 180, the Board determined that the onus rested with the employer to

establish that a designated service is in fact essential and that a particular number of positions are necessary to provide those essential services.

139. The *PSAC* case has been adhered to and applied by the PSLRB in subsequent cases where the determination of whether a service is essential or not is in question. The cautious approach that the Board takes to ensuring that not too broad a definition of essentiality is adopted is evident. The Board acknowledges that there is a need to balance the right of the union to strike with the safety of the public.

140. Moving to the federal jurisdiction for employees covered by the *Canada Labour Code, Part* I, we first note the definition of essential services found in the *Code* and also highlight the portion of s. 87.4 that provides for binding settlement:

> **87.4** (1) During a strike or lockout not prohibited by this Part, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public.
>
> ...
>
> 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.

141. The seminal essential services decision of the Canada Industrial Relations Board under this language is *Nav Canada (Re) and Canadian Air Traffic Control Association, et* al. The Board set out to provide an examination of the essential services designation by first setting a framework that employers should not be given the ability to carry out business as usual where the right to strike does not threaten public health or safety. There was a clear understanding that a free collective bargaining process cannot take place where the threat of the right to strike cannot be used to counter the employer's economic power. This is precisely what the *PSESA* in Saskatchewan has achieved. The prospect of an

effective strike is a a means to exert pressure on the employer and no longer exists for employers able to achieve the level of designations this legislation permits.

> *Nav Canada (Re) and Canadian Air Traffic Control Association, et al.*, [2002] CIRB No. 168, Intervenor CUPE Book of Authorities, TAB 17.

142. There are many references in *NAV CANADA* that speak to the critical connection that is present between collective bargaining and the right to strike. The Board extensively reviews the comments of Chief Justice Dickson and the sources he relied upon in his judgment before concluding:

> 228 Accordingly, it is the Board's view that any abridgement of the right to strike must be to the minimum level required to cautiously protect the health or safety of the public. Accordingly, if the Board is assured that the risk or danger is not "immediate" or "serious," or if the operation of facilities, production of goods or supply of services in question can be limited or will not reasonably be necessary to protect public health or safety or to prevent an immediate and serious danger the Board should determine such services not to be required. [emphasis added]

143. A second NAV CANADA decision in 2007 by the Canada Board held that a careful and methodical plan worked out to address safety concerns is a way in which to allow for the withdrawal of services, even in an incredibly demanding and critical role such as air traffic control. At paragraph 74, the Board assessed how a general strike of the air traffic controllers may take place to ensure that no serious danger would arise. Each position and function was considered and those that were in direct support of operations were considered necessary to prevent the immediate and serious danger to the public health and safety.

> NAV *CANADA (Re)* [2007] CIRB No. 374, *Intervenor CUPE Book of Authorities,* TAB 18.

144. Further, in *City of Ottawa (Re) and Amalgamated Transit Union, Local 279 and Canadian Union of Public Employees, Local 5500*, [2009] C.I.R.B.D. No. 12, the Canada Board stated:

> **Because it has the potential to place significant limits on the ability of the parties to freely negotiate and engage in economic sanctions to enforce their collective bargaining demands, the Board is of the view that section 87.4 must be carefully interpreted.** To give effect to Parliament's intent, it is necessary for the Board to interpret and apply section 87.4 in a manner that, to the greatest extent possible, balances the principles of free collective bargaining with the protection of the safety and health of the public.
>
> *City of Ottawa (Re) and Amalgamated Transit Union, Local 279, bargaining agent, and Canadian Union of Public Employees, Local 5500, intervenor* [2009] C.I.R.B.D. No. 12, *Intervenor CUPE Book of Authorities,* TAB 19. [emphasis added]

145. Finally, with respect to the *Canada Labour Code,* we again note s. 87.4(8) which provides that a union may apply to the Board to order interest arbitration if the level of designations arising from a decision of the Board were to render a strike ineffective. This is a provision consistent with international law whereby those who right of strike is properly limited under an essential services assessment must have an appropriate binding alternative dispute resolution mechanism available.

146. Parliament thus expressly recognizes the *nexus* between the ability to negotiate a collective agreement (i.e. collective bargaining) and the right to strike. There is no such mechanism in the *PSESA,* which provides for high levels of designation without the ability of a union to challenge the essentiality of the claim that the service is even essential.

d. Conclusion

147. In contrast to the Board's approach in Saskatchewan in the one case heard under the *PSESA* to date (*CUPE v. Regina Qu'Appelle Regional Health Authority*), recognizing the linkage between bargaining power and the ability to engage in meaningful collective bargaining is a consistent theme in Canadian labour board essential services jurisprudence. What the right to strike provides is an essential element in assessing bargaining power. A strike does not have to occur - and by far most collective

agreements are negotiated without recourse to a strike - but the *prospect* of such is an essential element in the collective bargaining process as it directly impacts on bargaining power and the ability to engage in meaningful collective bargaining. There is thus an understanding that arises out these various labour board and related court decisions in other Canadian jurisdictions of the impact high essential services levels will have on collective bargaining given the accompanying erosion in union bargaining power.

International Law

148. The Intervenor CUPE submits that international law is consistently relied upon in interpreting provisions of the *Charter*. Professor Macklem in his Expert Analysis, at paragraph 112 attests:

> 112. The Supreme Court of Canada consistently relies on various sources of international and regional human rights law- declarations, covenants, conventions, customary norms, and judicial and quasi-judicial decisions of international and regional tribunals and treaty monitoring bodies- when interpreting provisions of the *Canadian Charter of Rights and Freedoms.* These sources include treaties to which Canada is party as well as treaties, such as the European Convention on Human Rights, the African Charter on Human Rights, and the American Convention on Human Rights, to which Canada is not party.

149. Further, international law and its interpretation by bodies tasked with such a role is relevant and persuasive in considering the protection offered by s. 2(d) freedom of association under the *Charter*. As stated by Professor Lynk in Part 1 of his Expert Report, at paragraph 13:

> 13. The Supreme Court of Canada has held that, in the *Charter* era, international law, and specifically international labour law, is a critical interpretative source for determining the meaning and content of the Section 2(d) guarantee of freedom of association. In *British Columbia Health Services,* the Court stated that: "Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*".

150. We also note that court's adoption of former Chief Justice Dickson's words in the *Alberta Reference* at para. 70 of *B.C. Health Services*:

> …As Dickson C.J. observed in the *Alberta Reference*, at p. 349, **the Charter should be presumed to provide as least as great a level of protection as is found in the international human rights documents** that Canada has ratified. [emphasis added]

151. And again, with reference to paragraph 79 of *B.C. Health Services*:

> 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*.
> [emphasis added]

152. Chief Justice Dickson also stated, at paragraph 60 of the *Alberta Reference*:

> In short, although I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source of interpretation of provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.
>
> *Alberta Reference*, *Intervenor CUPE Book of Authorities*, TAB 1, para. 60.

153. The significance of the Supreme Court's recognition of the importance and role of international law in interpreting and applying the *Charter* must be considered in the present case[6] given that former Chief Justice Dickson made no distinction between the application of international law in collective bargaining from the application of such law in the context of the right to strike.

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[6] We note here that, with respect to international law, the SCC majority in *Fraser* address the criticism of Rothstein J. in his dissent that was directed not at whether it was appropriate to apply such law, but whether the majority had made the correct finding on the application of such law: see *Fraser*, *supra*, at para. 91 – 95, *Intervenor CUPE Book of Authorities* at TAB 29.

a. Collective Bargaining

154. It is important to first note that there is a "positive duty" to promote collective bargaining under international law (*Lynk*, paragraph 16) and that:

> Governments do not have a policy choice as between the promotion of free collective bargaining and the selection of other more restrictive and intrusive means for the determination of the terms and conditions of work for employees who are unionized, who may wish to be unionized or who are eligible to be unionized. Rather, governments have the duty to create viable mechanisms to enable and ensure free collective bargaining, and can only adopt other means to determine working conditions where the circumstances strictly justify a lesser alternative.

Further, that the "justified" removal in whole or in part in international law terms (see *Lynk*, paragraph 18) is subject to the substitution of compulsory arbitration or "some other method short of collective bargaining".

155. Professor Lynk noted that the provision of essential services may be one of the circumstances in which collective bargaining may be removed in whole or in part (*Lynk*, paragraph 18(iii)) but only where "essential services" is given a strict and purposive meaning (paragraph 18 (iii) and (iv)).

156. The review of international law principles with respect to collective bargaining by Professor Lynk reflects the high status of the collective bargaining process in international law.

> The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of independence and autonomy of the parties and the free and voluntary nature of the negotiations; it is requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organizations as the parties to bargaining.
>
> Gernigon, Odeo and Guido, "ILO principles concerning collective bargaining", *International Labour Review*, v. 139 (2000) No. 1. at page 34. *Intervenor CUPE Book of Authorities* at TAB 20.

157. We note the review by Professor Macklem focusing on non-ILO instruments.

b. Right to Strike

158. In discussing the application of the right to strike in the public sector, Professor Lynk notes three categories and the limitations in policy choice that arise. At paragraphs 27 and 28, Professor Lynk states:

159. Drawing from the jurisprudence and standards established by the two Committees, the application of the right to strike in the public sector can be characterized as falling into three distinct categories:

(i) The broad and general right to strike, which would be the governing rule;

(ii) A partial and restricted right to strike; and

(iii) A prohibition on the right to strike.

160. A government does not have a policy choice as to which one of the three categories it might wish to apply, even in the public sector. Given that the withdrawal of labour is a fundamental component of the freedom of association, a decision by a government to restrict or prohibit the right to strike must be conducted in a manner that is faithful to the protection and guarantee of any significant right. The restriction or prohibition to the right to strike must be plainly justifiable by the government, and it must be strictly proportional to the degree of reasonable and probable danger to the life, personal safety or health of the whole or part of the population.

161. In his discussion leading up to that conclusion,[7] Professor Lynk notes the ILO Committee of Freedom of Association statement (*Lynk*, paragraph 19):

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[7] Professor Lynk notes that the right to strike is not expressly stated in ILO Conventions 87 and 98, but developed by Committee on Freedom of Association caselaw and reports of the Committee of Experts on the Application of Conventions and Recommendations (see *Lynk,* para. 19). The right to strike is, however, expressly set out in the *International Covenant on Economic, Social and Cultural Rights* and regional human rights instruments (para. 21).

> the right to strike [is] one of the essential means through which workers and their organizations may promote and defend their economic and social interests."

162. And he then goes on to reference (at para. 20) the connection the ILO makes between collective bargaining and the right to strike:

> The purpose for placing the right to strike at the heart of the freedom to associate has been explained by the International Labour Organization as "the logical corollary of the effective realization of the right to collective bargaining" because, where it does not exist, "bargaining risks being inconsequential – a dead letter."

163. This *nexus* between the right of collective bargaining and the right to strike[8] is reinforced in the Canadian context by the words of Chief Justice Dickson (see *Lynk* at para. 22 and below). Although Professor Lynk goes on to note that "employees working in essential services, **within the strict meaning of that term**" may be denied the right to strike, (*Lynk*, para. 23, emphasis added), he also states (at para. 26):

> The Committee of Experts has cautioned that the determination of which public sector employees would have the right to strike denied or restricted must be exercised as a limited and confined exception to the general right. The exercise in restricting access to the right must be minimal and proportional:
>
> > The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

164. Professor Macklem, in his Expert Analysis, at paragraph 116, perhaps with a greater focus on non-ILO instruments, similarly notes that the circumstances in which the right to strike may be restricted or prohibited are limited under international law.

See also Hepple, "The Right to Strike in an International Context" at pp4-7 *Intervenor CUPE Book of Authorities* at TAB 30 and Servais, "The ILO law and freedom to strike", pp1-2, *Intervenor CUPE Book of Authorities* at TAB 31.

[8] In this regard, see the conclusion in Servais, "ILO law and the freedom to strike" at p11, *Intervenor CUPE Book of Authorities* at TAB 31.

> 116. The right to bargain collectively as an incident of freedom of association enjoys a secure legal footing as a human right in international law from its recognition as such in several international and regional legal instruments and institutions. 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.
>
> To the extent that Saskatchewan's *Public Service Essential Services Act* contravenes any of these principles, it is inconsistent with freedom of association as understood in international law.

165. As can be seen from both Professor Macklem's and Professor Lynk's reports, there is a parallel between restrictions on the right of collective bargaining and the right to strike in the context of maintaining essential services. That is, both of these rights, which are fundamental elements of freedom of association in international law, may be abridged or constrained in the context of ensuring provision of essential services in the "strict sense of the term" (see para. 18 and 23). Professor Lynk notes this may extend to such restrictions in the hospital sector. Further "hospital sector" does not address the range of occupations within that sector that may not be essential or the corresponding different conditions that may be reached on "essentiality".

166. Nonetheless, Professor Lynk sets out at para. 30 of his Report the principles by which such essential services restrictions may be determined and applied. In referencing this paragraph we note the role trade unions have in international law in determining appropriate levels of "minimum services" as well as the meaningful alternative process required where such exclusions from the right to strike are justified on the "minimal and proportionate" test.

167. Thus, under ILO jurisprudence, 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;

(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.**

[emphasis added]

168. Finally, we note para. 581-594 of the *Digest of decisions and principles of the Freedom of Association Committee of the Government Body of the ILOI* (*Intervenor CUPE Book of Authorities* TAB 21). The *Digest* confirms the need to establish a clear and imminent threat to life, personal safety or health and the concepts of minimal interference in collective bargaining. Thus, it is not an answer to point to employees as being employed in a sector that can attract essential service designations, but rather in establishing that employees in such a sector are essential within the context of their duties and responsibilities.[9]

169. We now have some specific guidance from the ILO in this case arising from a decision of the Committee on Freedom of Association. In June 2008, a complaint was filed with the International Labour Organization (ILO) by the National Union of Public and General Employees (NUPGE), Canadian Labour Congress (CLC) and Saskatchewan Federation of Labour (SFL), supported by the umbrella global union body of public service unions, Public Services International (PSI) against the Government of Canada with respect, *inter alia*, to the *Act Respecting Essential Public Services* (Bill 5), now known as the *PSESA*.

170. The complaint was considered by the ILO body tasked with considering complaints with respect to freedom of association, the Committee on Freedom of Association (CFA). This is the same committee whose jurisprudence is reviewed by Professor Lynk in the examination of international law in these proceedings. The Committee issued its decision in March 2010. With respect to the *PSESA*, the Committee made two specific recommendations material to the present application in para. 384 of its decision:

> (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

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[9] See also Servais, "The ILO law and freedom to strike" at p5, *Intervenor CUPE Book of Authorities* TAB 31: "Even in essential services, certain classes of personnel…should not be deprived of that right because of the possible interruption of their functions does not, in practice, have any bearing on people's life, personal safety or health.." One can also add, that even where interruption may have such an effect, the degree of impact should be reflected in the application of restrictions in a "minimal and proportionate" manner.

> 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 o f a broader labour dispute….
>
> (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.
>
> *Complaint against the Government of Canada*, Case No. 2654, GB307_7_[2010-03-0271-1]-En.doc, *Intervenor CUPE Book of Authorities*, TAB 22.

171. With respect to its recommendation set out in (b) above, the Committee concludes, *inter alia*, at para. 375 of its decision that:

> …The Committee recalls that a definitive ruling on whether the level of minimum services was indispensable or not – made in full knowledge of the facts – can be pronounced only by the judicial authorities, in so far as it depends, in particular, upon a thorough knowledge of the structure and functioning of the enterprise and establishments concerned and of the real impact of the strike action [see **Digest**, op.cit., para. 614]. The Committee considers that the LRB may serve as such an independent body but requests the Government to ensure that the provincial authorities amend the legislation as it is currently drafted so as to ensure the Board may examine all the above mentioned aspects relating to the determination of an essential service and may act rapidly in the event of a challenge arising in the midst of a broader labour dispute. **In this regard, the Committee expects that the LRB will bear in mind the principle according to which the determination of a minimum service should be clearly limited to the operations which are strictly necessary to meet the concerns set out in section 2(c)(i) and (ii) [of the PSESA] while ensuring that the scope of the minimum service does not render the strike ineffective…**
>
> *Complaint against the Government of Canada*, Case No. 2654, *supra.*, *Intervenor CUPE Book of Authorities*, TAB 22. Emphasis added.

172. The ILO Committee on Freedom of Association does not find that the definition of "essential services" under the PSESA with respect to a minimum service to be maintained in a labour dispute is inconsistent with freedom of association principles *per*

se[10]. However, the limitations on the LRB's ability to review the provision of essential services are precisely those powers which the Committee concludes the LRB should have in assessing essential services as set out above.

173. With respect to the recommendation set out in (c) at paragraph 169 above, the Committee is referencing the requirement to provide a meaningful alternative means of dispute where the right to strike is restricted. Thus, we note the conclusion at paragraph 376 of the Committee's decision:

> …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 case 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].

174. The Intervenor CUPE submits that that the failure to provide such an alternative remedy in the PSESA is inconsistent with the ILO principle. The Committee on Freedom of Association recognizes the relationship between the *capability* of carrying on an effective strike and the *effect* on collective bargaining where there is no such mechanism for alternative dispute resolution. The latter point is significant in international law in that where essential services are legitimately protected within the terms recognized in that law by limiting or restricting the right to strike there must be a mechanism for final and binding dispute resolution – a process to help balance the loss of bargaining power in such circumstances.

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[10] At para. 371, the Committee states:

> The Committee recalls that a minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling in to question the right to strike of the large majority of workers, one might consider ensuring that users' basic rights needs are met or that facilities operate safely or without interruptions [see **Digest**, op. cit. para. 607]. The Committee considers that the definition of essential services where a minimum service is to be maintained as provided under section 2 of the Act **may** satisfy these criteria. [emphasis added]

c. Development of an International Common Understanding of Freedom of Association

175. The Intervenor CUPE submits that a common understanding of freedom of association in domestic law is developing internationally based on the application of shared international law principles. This development is supported by the increasing impact of globalization as a factor influencing domestic activities and may indeed be signaling the development of customary law, analogous to international "common law", with respect to the scope and content of freedom of association as an element of human rights. Such development was recognized as a persuasive source for interpreting Charter provisions by the court in *BC Health Services*. Thus, at paragraph 78, the majority states:

> ... Canada's *current* international law commitments **and the current state of international thought on human rights** provide a persuasive source for interpreting the scope of the *Charter*. [emphasis added]

i. Europe

176. The *Convention for the Protection of Human Rights and Fundamental Freedoms*, known as the *European Convention on Human Rights*, applies to the 47 countries in the Council of Europe comprising over 800 million people. The Treaty came into effect on September 3, 1953 and provides protection for a number of fundamental rights and freedoms, including freedom of association (Article 11). The state parties undertake to secure those rights and freedoms within their jurisdiction and the European Court of Human Rights ["ECHR"] was set up to ensure observance of the Treaty obligations. The parties to a case before the ECHR must abide by the judgments of the Court and take all necessary measures to comply. In that sense, the *European Convention* acts as a constitutional document that overrides contrary domestic state legislation.

> *Convention for the Protection of Human Rights and Fundamental Freedoms*
> CETS No.: 005, Member States of the Council of Europe,

http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG, *Intervenor CUPE Book of Authorities*, TAB 23.

Convention for the Protection of Human Rights and Fundamental Freedoms, Summary of the treaty, http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm, *Intervenor CUPE Book of Authorities*, TAB 24.

177. The jurisprudence of the ECHR with respect to the interpretation of freedom of association pursuant to Article 111 of the *European Convention* followed a similar path to that of the Supreme Court of Canada in the interpretation of freedom of association under s. 2(d) of the *Charter*. Since 2001, both courts have moved from an initial position whereby collective bargaining was excluded from the scope of protection for freedom of association under their respective instruments. Subsequently, this previous caselaw was first distinguished and then expressly overturned to accept collective bargaining as an essential component of freedom of association.

See Peter Barnacle, "*Dunmore* meets *Wilson and Palmer*: Interpretation of Freedom of Association in Canada and Europe" (2004), 11 C.L.E.L.J. 143:173, TAB 25 and Peter Barnacle, "Interpretation of Freedom of Association in Canada and Europe: Convergence Revisited" (2011) forthcoming, 34 pages, 16 C.L.E.L.J., *Intervenor CUPE Book of Authorities*, TAB 26.

178. This circumstance arose from two pairs of cases decided contemporaneously by the respective courts. The first set was *Dunmore* (2001, SCC) and *Wilson and Palmer* (2002, ECHR) where both courts worked around their restrictive caselaw to find some measure of collective representation was protected by their respective constituent provisions. The second set of *BC Health Services* (2007, SCC) and *Demir and Baykara* (2008, ECHR), gave up on distinguishing that caselaw and overturned it in coming to the conclusion that collective bargaining was protected.

179. This development did not simply arise because of similar language in the constituent instruments *per* s.2(d) and Article 11, and the language justifying infringement, s. 1 and

Article 11(2),[11] but as a result of similar analysis of the concept of freedom of association based on common sources of international law. The decisions of both courts:

> [R]eflect consideration *and deference to* much of the same international law and consequent legal principles, in respect to trade union freedom of association, including respect for the decisions of the relevant institutional international bodes charged with interpreting and contemplating that law. The Courts both recognized that a "common" interpretation between national and international concepts of freedom of association simply makes sense, and as such the international law analysis can only be considered persuasive for both courts. [emphasis in original]
>
> Barnacle, "Interpretation of Freedom of Association in Canada and Europe: Convergence Revisited", *supra*, *Intervenor CUPE Book of Authorities*, TAB 26 at page 7. Generally, see the summary at pages 1-9.

180. The implication for the present case is that the ECHR has since gone further and also recognized the right to strike as a protected element of freedom of association, largely by recognizing the link between the right to strike and collective bargaining either as related or a component of the latter.

> Barnacle, "Interpretation of Freedom of Association in Canada and Europe: Convergence Revisited", *supra, Intervenor CUPE Book of Authorities*, TAB 26 at page 30 and the related discussion pages 28-31.

181. The Court in *BC Health Services* expressly noted that "the present case does not concern the right to strike" (paragraph 19), but as noted below its international law analysis did not distinguish between the application of the Chief Justice Dickson words with respect to collective bargaining from those with respect to the right to strike.

182. Recognition of the right to strike as an essential element of collective bargaining protected under s. 2(d) will thus reflect continued convergence in the interpretation of freedom of association between the Canadian and the European courts:

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[11] See the side-by-side presentation of the text of s. 2(d) and s. 1 of the *Charter* and Article 11(1) and (2) of the *European Convention* at Barnacle, "Dunmore meets Wilson and Palmer: Interpretation of Freedom of Association in Canada and Europe", at 153 and "Interpretation of Freedom of Association in Canada and Europe: Convergence Revisited" at pages 9-10 and *Components for s. 1 and Article 11(2) Justification Analysis* and discussion at pages 25-28.

> In such circumstances, convergence supports a shift in the debate from over recognition of a right to strike under s. 2(d) of the *Charter* to a justification of limits imposed on that right in particular circumstances pursuant to s. 1, in the same manner as the European Court has done in applying Article 11(2) of the *Convention.*

> Barnacle, "Interpretation of Freedom of Association in Canada and Europe: Convergence Revisited", *supra*, *Intervenor CUPE Book of Authorities*, TAB 26 at page 32.

183. While the justification language is not identical, "the tests that the two courts apply under s. 1 of the *Charter* and Article 11(2) of the *Convention* are similar enough to result in that similar result on application".

> Barnacle, "Interpretation of Freedom of Association in Canada and Europe: Convergence Revisited", *supra, Intervenor CUPE Book of Authorities*, TAB 26 at page 27. See the side-by-side presentation of s. 1 and Article 11(2) at pages 25 – 26 and discussion on its application at pages 26 – 28.

184. The use of international law to inform constitutional interpretation of freedom of association under domestic law is not unique to Canada or Europe. For example, As Judge Dhayanithie Pillay of the Labour Court of South Africa states, the use of international law is accepted in South Africa in interpreting the rights set out in section 23 of the *Bill of Rights*, part of the *Constitution Act of South Africa*, N0 108 of 1996:

> Dhayanithie Pillay, *The Constitutionalism of Fair labour Practices in South Africa*, New York Law School, Public Policy and Legal Theory, Research Paper Series 04/05 #13 (2006) at page 2, *Intervenor CUPE Book of Authorities*, TAB 27.

185. Judge Pillay describes the application of international law in interpreting in respect to labour legislation in South Africa:

> The primary objects of the LRA [Labour Relations Act] include giving effect to and regulating the fundamental labour rights conferred by the labour rights clause of the Constitution, and giving effect to obligations incurred by South Africa as a member state of the ILO…The interpretation of the LRA must give effect to its primary

> objects and be in compliance with the Constitution and t he public international law obligations of the Republic.
>
> Pillay, *The Constitutionalism of Fair labour Practices in South Africa*, *supra*, at page 3, *Intervenor CUPE Book of Authorities*, TAB 27.

186. The application of constitutional law in South Africa is also subject to a limitation clause that contains some familiar language. Section 36 of the *Bill of Rights* provides:

> 36. Limitation of rights
>
> 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
>   a. the nature of the right;
>   b. the importance of the purpose of the limitation;
>   c. the nature and extent of the limitation;
>   d. the relation between the limitation and its purpose; and
>   e. less restrictive means to achieve the purpose.
>
> 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

187. The reliance on international law to reflect a common understanding also may arise in states where freedom of association is not constitutionally protected, such as Australia. In a 2003 case, *Belandra Pty Ltd,* the Federal Court of Australia found the actions of the employer in refusing to employ union workers as a violation of s. 298L(1)(a) of the then, *Workplace Relations Act, 1996*. In doing so it considered not just international law, but the domestic interpretation in Europe and Canada that also applied international law.

188. Thus, the Australian Court considered the ECHR decision in *Wilson and Palmer* noted above in respect to the application of international law and Chief Justice Dickson's analysis of international law in the *Alberta Reference*. North J. then adopted a similar role for international law in considering the issue before the Court:

> 197. In Australian law, the right to join a union without attracting adverse consequences is conferred by s 298L(1)(a). This section should be constru3ed comfortably with Australia's international obligations under the *Freedom of Association Convention* [Convention No. 87], the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.*
>
> *Australian Meat Industry Employees' Union v. Belandra Pty Ltd,*, [2003] FCA 910 at para. 197, *Intervenor CUPE Book of Authorities*, TAB 28.

189. The development of a common understanding of freedom of association and its constituent elements of collective bargaining, including a right to strike, in a constitutional setting will be subject to the domestic limitations, such as provided under our *Charter*, s.1, the *European Convention,* Article 11(2) or Article 36 of the South African *Bill of Rights*. But those limitation provisions themselves are also similar enough that their application will also be a feature of this development.

190. Domestic state interpretations may becoming consistent given the international law forming the platform on which the interpretative exercise is conducted. Such a prospect is to be welcomed and encouraged as an international understood with respect to freedom of association is a positive aspect of globalization. And, as noted, the use of that development as an interpretation and persuasive tool reflects *BC Health Services*.

d. Conclusion

191. It is the Intervenor CUPE's respectful submission that the *PSESA* is in conflict with the international law principles with respect to both the right of collective bargaining and the right to strike in that, *inter alia*:

- the legislation violates the principle of independence and autonomy in collective bargaining by significant interference in the process of collective bargaining;
- the definition of essential services is too broad and constitutes unwarranted state interference in the collective bargaining process, including restricting the potential for economic pressure on the employer by a trade union which is a crucial

element in the collective bargaining process in the absence of any alternative dispute resolution process;

- the legislation does not incorporate the concepts of minimal and proportional impairment in determining essential services, those who should provide them and in the manner in which they are provided;

- there is no recognition of the collective rights in the collective bargaining process that underlies the application of the *PSESA* given the level of designation permitted by the *PSESA* significantly impairs meaningful collective bargaining;

- the legislation does not contemplate the level of meaningful trade union participation required under international law in the determination of essential services or in the dispute resolution process with respect to such services deemed essential by an employer; and

- there is no meaningful alternative process to the loss of collective bargaining and right to strikes rights even where essential services may be established within the strict requirements of international law.

(b) If the *PSESA* (or parts and provisions thereof) is found to violate s. 2(d) of the *Charter*, is the *PSESA* (or the impugned parts and provisions thereof) saved by s. 1 of the *Charter*

192. As stated, the Intervenor CUPE submits the onus is on the Attorney General to establish that the *Charter* violations identified are "reasonably justified in a free and democratic society" and are thereby saved by s. 1 of the *Charter* and the Intervenor CUPE reserves the right to respond to any submissions in this respect.

(c) Does the *TUAA* (or parts and provisions thereof) violate s. 2(d) of the *Charter*

193. In support of the following submissions with respect to the *TUAA*, the Intervenor CUPE relies upon the expert report of Dr. Chris Riddell, and his cross-examination on affidavit, which establishes:

(a) that the rate of certification success in Saskatchewan has declined to a degree consistent with the declines in other Canadian jurisdictions following the introduction of mandatory votes;

(b) that the said decline in Saskatchewan has and will be exacerbated by the failure to incorporate a limited timeframe for conduct of such votes as the longer the delay, the greater the negative impact on certification success (as evidenced by the research submitted with respect to the United States experience);

(c) that the primary reason for the decline in certification success rates following the introduction of mandatory votes is the opportunity for employers to influence the outcome of that vote through employer illegal action; and

(d) that there is no effective remedy for unlawful employer interference in the certification process in the absence of a provision in *The Trade Union Act* that provides for certification of a trade union as a remedy for unlawful interference in the certification process (The Intervenor CUPE notes that the TUA (s.10.1) provides only that a vote may be ordered amongst a proposed bargaining unit that has experienced illegal employer action and thus results in a vote that cannot fairly represent the wishes of the affected employees).

194. The Intervenor CUPE relies also upon the evidence of Bill Robb, National Representative of the Intervenor CUPE, with respect to the impact on organizing experienced by the Intervenor CUPE since the implementation of the *TUAA*.

195. The Intervenor CUPE further relies upon the evidence of the Attorney General with respect to the studies it has introduced by the Fraser Institute noted above in support of that agency's position that measures to limit union density are important in enhancing competitiveness in the Province.

196. In light of the evidence presented, the Intervenor CUPE submits that the amendments to *The Trade Union Act*:

(a) requiring mandatory votes in all certification applications regardless of the majority support demonstrated through membership evidence filed in support of such applications (s.6(1)); and

(b) requiring a minimum of 45% of the employees in the proposed bargaining unit to support such an application (s.6(2)(b));

constitute a violation of s.2(d) of the *Charter* and are not saved by s. 1.

197. The Intervenor CUPE submits that the s.2(d) violation arises in two ways, namely:

(a) by interference in the ability of employees to engage *in the act of association* to pursue collective goals; and

(b) by interference restricting the ability of employees *to act in association* by engaging in meaningful collective bargaining .

(a) Interference in the ability to engage in the act of association to pursue collective goals

198. While the debate continued following the *Labour Trilogy* of 1987 as to the scope of freedom of association in respect to the protection of collective bargaining, including the right to strike, it is submitted that there is no debate that s.2(d) at the very least protects the rights of employee to act in association through joining trade unions to promote collective goals. Thus, in its review of initial s. 2(d) cases, the majority of the Supreme Court of Canada states in *Fraser*:

> [25] In summary, the early cases affirmed that the core protection of s. 2(d) focuses on the right of individuals *to act in association with others to pursue common objectives and goals*.
>
> *Ontario(Attorney General) v. Fraser*, *supra*, at para. 25. *Intervenor CUPE Book of Authorities*, TAB 29. Emphasis added.

199. It is submitted here that the *TUAA* interferes with the ability of Saskatchewan workers to come together in association to pursue common objectives and goals through the introduction of criteria that directly and indirectly severely impact on the ability to engage in the act of association itself.

200. Thus, looking first to an indirect effect, the level of support required to support a certification application is increased to 45% of the proposed bargaining unit under the amendment to s.6(2)(b) (formerly 25%). As has been pointed out by the ILO's Committee on Freedom of Association, that level actually exceeds the level of employee support that must be subsequently demonstrated through the vote process itself.

201. Nonetheless, while the inconsistency between support required for a vote and support required to win a vote is perhaps not well thought out, the real problem is that an artificially high bar has been set to allow employees to vote at all and thus indirectly interferes with the ability to associate in any meaningful manner. If there is to be a mandatory vote to determine support then why is the bar to obtain such a vote set at such a height? The gateway to the mandatory vote under the *TUAA* is a ladder not a step.

202. Further, as noted, evidence establishes that the mandatory vote itself, exacerbated by the failure to impose a statutory timeframe to limit employer influence in the vote, limits the certification success rate in the province and therefore drive down union density in Saskatchewan. That this may be a conscious policy choice by the Government is illustrated by the studies which it references. Certainly that is an impact also accepted by the Attorney General's expert, Dr. Marcel Boyer. In other words, we have direct evidence of interference in trade union organizing by implementation of a policy that in either effect or by intention reduces the chances of employees being able to act in association to pursue collective objectives and goals through trade union membership.

(b) interference restricting the ability of employees *to act in association* by engaging in meaningful collective bargaining

203. In *Fraser*, the SCC majority stated that "the protection for collective bargaining in the sense affirmed in *Health Services* is quite simply a necessary condition of meaningful association in the workplace context." (paragraph 43.)

204. Further, the Court states, "Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless." (paragraph 46).

205. While these words have application in the context of the constitutionality of the *PSESA*, which it is argued does indeed make meaningful collective bargaining impossible, they are also applicable to consideration of the impact of the *TUAA* in respect of s. 2(d).

206. That is, the impugned provisions of the *TUAA* render collective bargaining impossible for whole groups of workers – those who fall within the 20% or more of certification applications that will not succeed under this legislation. A significant number of Saskatchewan workers have lost the opportunity to act in association. It is not a question, in this sense, that their ability to do so has been compromised by legislation such as the *PSESA*, but that the effect of the *TUAA* is that they do not even get to the table.

(d) If the *TUAA* (or parts and provisions thereof) is found to violate s. 2(d) of the *Charter*, is the *TUAA* (or the impugned parts and provisions thereof) saved by s. 1 of the *Charter*

207. As stated with respect to the similar question in respect of the *PSESA* set out above, given the onus with respect to satisfying section 1 the Intervenor CUPE reserves the right to respond to any submissions in this respect in reply.

ORDER SOUGHT

208. Pursuant to s. 52 of the *Charter*, the Intervenor CUPE requests this Court issue a declaration that the *PSESA* and/or the *TUAA* are of no force or effect or, in the alternative, are no force or effect to the degree either is inconsistent with the provisions of the constitution.

209. The Intervenor CUPE reserves the right to make submissions on any and all s. 24 remedies as may subsequently be considered in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 12th day of August, 2011.

Per:

PETER J. BARNACLE

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APPENDIX "A"

1. The Intervenor CUPE presented evidence that, during the CUPE strike in 2007 (prior to the introduction of the *PSESA*), essential services were maintained at the University. Although certain non-essential services may have been abandoned, the Intervenor CUPE presented evidence that the Intervenor CUPE's local, CUPE Local 1975 provided coverage in situations considered critical and that the University also maintained essential services in critical areas by re-deploying out-of-scope employees, managers and volunteers.

> *Affidavit of Lois Lamon* – paras. 20 and 24
> *Reply Affidavit of Lois Lamon* – para. 5

2. The Intervenor CUPE Local 1975further presented evidence that, during the strike, there were no reports of any serious incidences or dangers.

> *Affidavit of Lois Lamon* – para. 24

3. In response to the Intervenor CUPE Local 1975's evidence that essential services were maintained, the University presented evidence that, during the strike, a number of critical areas were left exposed to potential failure. In particular, the University presented evidence that the University's Heating/Cooling Plant, the Western College of Veterinary Medicine, the College of Medicine, the College of Agriculture, Campus Security, the Information Technology service and the Library System were exposed to potential failure during the strike.

> *Affidavit of Wade Epp* – paras. 30 and 31

4. This evidence was directly contradicted by the reply evidence of the Intervenor CUPE Local 1975. The Intervenor CUPE Local 1975 presented evidence that the University had the requisite personnel to maintain all essential services in all of the above-mentioned

areas and there is no reason why any of these areas would have been left exposed to potential failure.

Reply Affidavit of Lois Lamon –p4

5. In further response to the Intervenor CUPE Local 1975's evidence, the University presented evidence that, in the absence of employees critical to its operation, the Western College of Veterinary Medicine was unable to perform a number of critical procedures for animal care. The University also presented evidence that, due to the unavailability of certain key staff members, many patients in the College of Medicine were unable to undergo their in vitro fertilization procedures as planned.

Affidavit of Wade Epp – paras. 59 and 72

6. These two allegations of harm were also directly contradicted by the reply evidence of the Intervenor CUPE. With respect to the allegation in the Western College of Veterinary Medicine, the Intervenor CUPE presented evidence that out-of-scope personnel, namely, Veterinarians, Residents and Veterinary Students were available to provide and maintain the services at the College. With respect to the allegation in the College of Medicine, the Intervenor CUPE presented evidence that all appointments were pre-booked for a period ranging from six weeks to three months in advance and that patients with previously scheduled appointments would have had their appointments proceed as scheduled.

Reply Affidavit of Lois Lamon – paras. 10 and 13

7. With the exception of these two allegations of damage/harm, both of which were contradicted by the reply evidence of the Intervenor CUPE, the University presented no evidence of any actual harm or damage caused during the strike. Although the University presented evidence of a "potentially catastrophic" impact, a "serious risk", potential "irreparable harm" and likely "observable and unobservable effects", there was no other

evidence of actual harm caused during the 2007 strike, prior to the introduction of the *PSESA*.

Affidavit of Wade Epp – paras. 43, 51, 57 and 81

<u>APPENDIX "B"</u>

1. The Intervenor CUPE presented evidence that, during the CUPE strike in 2007 (prior to the introduction of the *PSESA*), the Intervenor CUPE's local, CUPE Local 1975-01 organized an essential services committee to ensure that essential services would be maintained at the University during the strike action. Following a request from the University for an employee to return to work, the essential services committee would, in conjunction with that particular employee, review the request, determine the legitimacy of the request and make a decision as to whether it was necessary for the employee to work to maintain essential services.

   Affidavit of Don Puff – paras. 15 and 16

2. In response to the Intervenor CUPE's evidence, the University presented evidence that, at a meeting on November 5, 2007 (three days into the strike), the Intervenor CUPE denied requests from the University that the Intervenor CUPE Local 1975-01 provide services in certain areas. In particular, the University presented evidence that it requested that the Intervenor CUPE provide the services of employees in the areas of Campus Security, Technical Support, Clerical Registration at the Dr. Paul Schwann Centre and Research Positions in laboratories, all of which requests were denied by the Intervenor CUPE Local 1975-01. With respect to the areas of Technical Support, Clerical Registration at the Dr. Paul Schwann Centre and Research Positions in laboratories, the University presented further evidence that, as a result of the denial of services, the duties were performed by out-of-scope employees.

   Affidavit of Kelly Kummerfield – para. 40

3. The Intervenor CUPE did not present any evidence to dispute the allegations that the Intervenor CUPE denied these requests for services. To the contrary, the Intervenor CUPE presented corroborating evidence that the Intervenor CUPE Local 1975-01 did, in

fact, deny the requests and further presented evidence regarding their reasons for doing so.

Reply Affidavit of Don Puff – para. 3

4. With respect to the areas of Technical Support, Clerical Registration at the Dr. Paul Schwann Centre and Research Positions in laboratories, the Intervenor CUPE presented similar evidence that the duties were performed by out-of-scope personnel and as such, the Intervenor CUPE Local 1975-01 believed that the University was able to maintain essential services in that area without the Intervenor CUPE providing services.

Reply Affidavit of Don Puff – paras. 3(iii), (iv) and (v)

5. With respect to the area of Campus Security, the Intervenor CUPE presented evidence that, at the time of the request for services, the University had already hired outside contractors to provide security services at the campus and as such, the Intervenor CUPE Local 1975-01 believed that the University was able to maintain essential services in that area without the Intervenor CUPE Local 1975-01 providing services.

Reply Affidavit of Don Puff – para. 3(i)

6. With respect to the area of the Central Plant, the Intervenor CUPE presented evidence that, at the time of the request for services, the University had out-of-scope engineers available to provide essential services. The Intervenor CUPE presented evidence that the engineers had been purposefully moved out-of-scope so that they would be available in the event of a strike and, given their availability, the Intervenor CUPE Local 1975-01 believed that University was able to maintain essential services in that area without the Intervenor CUPE providing services.

Reply Affidavit of Don Puff – para. 3(ii)

7. The Intervenor CUPE presented further evidence that, following the initial request for services, no further request was made by the University for the Intervenor CUPE Local 1975-01 to provide these services.

Reply Affidavit of Don Puff – para. 7

8. In further response to the Intervenor CUPE's evidence, the University presented evidence that, in the absence of essential services legislation, a work stoppage has the "potential to cause irreparable harm", can cause "significant building damage" and could have a "prejudicial effect" on additional organizations operating within the campus. However, the University presented no evidence of any actual harm or damage caused during the 2007 strike, prior to the introduction of the *PSESA*.

Affidavit of Kelly Kummerfield – paras. 9, 10 and 14

APPENDIX "C"

1. The Intervenor CUPE presented evidence that reported the number of citizens in the City of Regina who could "potentially" be impacted on by the withdrawal of services yet fails to provide any actual evidence of resulting harm.

   Affidavit of Brad Bells – para. 2

2. The Intervenor CUPE presented evidence that the "protection and preservation of city owned assets" was a consideration in the designation of essential services.

   Affidavit of Brad Bells – paras. 15 and 19

3. The Intervenor CUPE presented evidence that the essential services negotiations that took place were informed by the month long strike that took place in August and September of 2005 where one of the problems encountered by the city was that there were not enough out-of scope managers available to provide and maintain the services considered essential.

   Affidavit of Dorian Wandzura – para. 8

4. In response to the Intervenor CUPE's evidence that there were problems that arose during the course of the strike, the Intervenor CUPE presented evidence that to avoid any negative impact on the City of Regina or the success of the Summer Games that were taking place in the city during the summer of 2005, there was a decision to postpone strike action until the Summer Games had concluded.

   Affidavit of Tim Anderson – para. 6

5. In further response to the Intervenor CUPE's evidence, the Intervenor CUPE presented evidence that a meeting was held with the employer representative and the City of Regina was informed that the Intervenor CUPE was committed to providing any emergency service that was required during the length of the strike.

Affidavit of Tim Anderson – para. 7

6. The Intervenor presented evidence that the employees who were not on strike were not willing to perform the duties of the employees in the striking unions.

Affidavit of Dorian Wandzura – para. 11

7. This evidence was directly contradicted by the reply evidence of the Intervenor CUPE. The Intervenor CUPE presented evidence that members of non-striking unions did perform some of the supervisory functions that fell within the duties of Local 21 members.

Affidavit of Tim Anderson – para. 9

8. The Intervenor provided evidence that in addition to the use of out-of-scope managers, the City of Regina also attempted to employ third party contractors to assist in the provision of essential services, however, this was difficult to accomplish due to the uncertainty of the length of the contract. Further, the Intervenor presented that the contractors who were retained were not able to keep up on the essential services to be maintained.

Affidavit of Dorian Wandzura – paras. 14 to 17 and 22 b.

9. In reply, the Intervenor CUPE presented evidence that the strike did not change the difficulty in finding third party contractors as the retention of third party contractors is always an issue that is present for the City of Regina. This applies even with respect to water main breaks as they are always prioritized and some do not get fixed right away.

Affidavit of Tim Anderson – para. 10

10 The Intervenor presented evidence that the essential services negotiations that took place with CUPE in 2010 were concluded with little negotiation and overall, were non-contentious.

Affidavit of Brad Bells – para. 13

11. In reply, the Intervenor CUPE presented evidence that negotiations were concluded easily because the union saw little point in refusing to sign the essential services agreements given that the employer had the ultimate right to designate employees considered to be providing an essential service thus, rendering any potential strike ineffective. The union was anxious to get to the task of bargaining the substantive issues.

Affidavit of Tim Anderson – paras. 11 and 12

<u>APPENDIX “D”</u>

1. The Intervenor CUPE presented evidence that there was a general strike of city employees that occurred in 1994 which later informed the essential services designations in the 2009 essential services negotiations with the Intervenor CUPE.

    Affidavit of Judy Schelchte – para. 12

2. In response to the evidence presented by the Intervenor CUPE, the Intervenor CUPE presented evidence that the “strike” referred to in 1994 was actually a lockout of all City of Saskatoon employees who were members of the particular unions involved. This was in response to limited job action taken by the union.

    Affidavit of Kim Huechert – para. 4
    Affidavit of Mike Stefiuk – para. 4 and 5
    Affidavit of Stan Macala – paras. 6 and 7

3. The Intervenor CUPE presented evidence that the City of Saskatoon prepared a plan to maintain essential services during the lockout and utilized out-of-scope staff who were able to maintain essential services throughout the lockout.

    Affidavit of Judy Schelchte – paras. 13 to 16

4. In reply, the Intervenor CUPE presented evidence that at no time during the lockout was the union requested to assist in the provision of essential services.

    Affidavit of Kim Huechert – para. 5
    Affidavit of Mike Stefiuk – para. 6
    Affidavit of Stan Macala – para. 8

5. The Intervenor CUPE presented evidence that the essential services negotiations that took place with CUPE in 2009 were concluded easily without the need to spend an inordinate amount of time negotiating the essential services agreements. The Intervenor CUPE understood that the Intervenor CUPE was engaging in the negotiations because they were required to under the legislation

Affidavit of Patricia Savoie – paras. 8 and 11

6. In reply, the Intervenor CUPE presented evidence that negotiations were concluded easily because the union saw little point in refusing to sign the essential services agreements given that the employer had the ultimate right to designate employees considered to be providing an essential service thus, rendering any potential strike ineffective. The union was anxious to get to the task of bargaining the substantive issues.

Affidavit of Kim Heuchert – paras. 7 and 8
Affidavit of Mike Stefiuk – paras. 8 and 9
Affidavit of Stan Macala – paras. 10 and 11

7. The Intervenor CUPE presented further evidence that bargaining in 2010 was considerably different and more drawn out than previous rounds of bargaining had been past years. There was little to no discussions occurring at the bargaining table for a significant period of time.

Affidavit of Kim Heuchert – para. 8
Affidavit of Mike Stefiuk – para. 9
Affidavit of Stan Macala – para. 11

APPENDIX “E”

CUPE HEALTH AUTHORITIES

- Prairie North Regional Health Authority (“PNRHA”)
- Prince Albert Parkland Regional Health Authority (“PAPRHA”)
- Regina Qu’Appelle Regional Health Authority (“RQRHA”)
- Sun Country Regional Health Authority (“SCRHA”)
- Sunrise Regional Health Authority (“SRHA”)

I. Background

1. The Intervenor CUPE presented evidence that CUPE consists of approximately 13, 000 members.

   Transcript of Michael Keith - LRB Hearing – p. 373, line 8 to 9

2. The bargaining process between CUPE and SAHO commenced in September 2008 with an initial exchange of proposals and some discussion about the process.

   Transcript of Sinda Cathcart - LRB Hearing – p. 208, line 10 to line 15

   Transcript of William Allan Parenteau - LRB Hearing – p. 422, line 1 to line 5

3. The Intervenor CUPE presented evidence sworn October 29, 2009 that negotiations of an essential services agreement between CUPE and the Saskatchewan Association of Health Organizations (“SAHO”), on behalf of all the health regions, were quite contentious with the parties unable to find any common ground from which to commence the negotiation process. In November 2008, draft essential services lists were provided to the Intervenor CUPE by the Employers, however, there was no indication of the services that were to be provided, only that almost all employees were considered essential. Further information was requested by the Intervenor CUPE in accordance with the *PSESA* with no adequate response provided by the Employers. The Employers took the positions that they had provided all the information that they were required to provide under the *Act*

   Affidavit of Michael Keith, October 29, 2010 – Return of the Board, Volume I – TAB 2

   Transcript of Sinda Cathcart - LRB Hearing – p. 231, line 17 to p. 235, line 24

Affidavit of Sinda Cathcart, July 6, 2010 – para. 6

4. In reply, SAHO provided evidence that the bargaining process was a long arduous process that was at times confrontational and at times cordial and considered this to be a normal round of bargaining. Further evidence was presented by SAHO that the attitude or tone at the bargaining table was very formal and confrontational for the first few weeks.

   Transcript of William Allan Parenteau - LRB Hearing – p. 423, line 14 to line 26; p. 426, line 1 to p. 427, line 1

5. The Intervenor CUPE presented evidence that negotiating an essential services agreement was not a priority for the Union since it was more important to bargain a new collective agreement that once concluded, would nullify the need for an essential services agreement.

   Transcript of Sinda Cathcart - LRB Hearing – p. 267, line 24 to p. 268, line 15

6. In reply, SAHO acknowledged that the Intervenor CUPE voiced concerns about using resources to negotiate essential services rather than a new collective agreement. Discussion included an idea that the parties would bargain a collective agreement and if an impasse was reached, the parties would then negotiate essential services. This proposal was taken back to the Employers for discussion and rejected on the basis that the *Act* requires the parties to first negotiate essential services.

   Transcript of William Allan Parenteau - LRB Hearing – p. 430, line 23 to p. 431, line 26

7. The Intervenor CUPE presented evidence that in February 2009, the Employers provided the Intervenor CUPE with revised essential services lists that included those individuals and positions that the Employers considered necessary to provide essential services in the event of a strike. Again, the lists were extensive designating approximately eighty-seven (87%) percent of employees in the RQRHA as being required to provide an essential service in the event of a strike. In June 2009 matters culminated to the point where the Intervenor CUPE took a strike vote resulting in an eighty-eight (88%) percent strike

mandate. Prior to the strike vote being taken, the Employers began issuing essential services notice to CUPE members pursuant to section 9(3) of the *PSESA,* who were designated as essential and based on the list provided to the Intervenor CUPE in February 2009.

> *Affidavit of Michael Keith, October 29, 2010* – Return of the Board, Volume I – TAB 2
> *Transcript of Sinda Cathcart* - LRB Hearing – p. 207, line 19 to p. 218, line 19
> *Affidavit of Sinda Cathcart, July 6, 2010* – para. 5

8. Evidence was presented by the Intervenor CUPE that when CUPE members began receiving the notices from the Employers, there was mass confusion. CUPE members felt intimidated and were confused in terms of what the letters meant and if they were still permitted to participate in the strike vote; members were also unsure if they would still be able to participate in potential job action. The letters also created a great deal of discord in the workplaces as some people were considered "essential" while others were not. The Local offices were inundated with calls and questions.

> *Transcript of Sinda Cathcart* - LRB Hearing – p. 218, line 21 to p. 220, line 23
> *Affidavit of Pearl Blommaert, December 20, 2009* – para. 13
> *Cross Examination of Pearl Blommaert, March 23, 2011* – p. 7, line 1 to p. 9, line 8
> *Affidavit of Brian Manegre, December 20, 2010* – para. 13
> *Affidavit of Sandra Seitz, December 21, 2010* – para. 13

9. The Intervenor CUPE presented evidence that shortly thereafter, upon the request of the Minister of Health, that the parties get down to the business of bargaining, the Intervenor CUPE approached SAHO and communicated that they were prepared to make a significant move on many of their proposals. The Intervenor CUPE indicated that they expected SAHO would reciprocate. The Intervenor CUPE withdrew 16 or 17 items from their proposals while SAHO withdrew 4 or 5 insignificant proposals. The numbers were not disputed by the evidence presented by SAHO at the SLRB hearing. This had a drastic

and negative effect on bargaining and was an indicator that the strike vote had no effect on SAHO.

Transcript of Michael Keith - LRB Hearing – p. 384, line 14 to p. 386, line 23

10. In reply, SAHO presented evidence that when they became aware that there was a strike vote being taken, they agree that there was a discussion with the Intervenor CUPE about moving on the proposals and the Intervenor CUPE communicated that they were prepared to make a significant move. SAHO considered the movement from CUPE to be only in withdrawing the number of proposals taken off the table rather than those with major impact. After reviewing the proposals that the Intervenor CUPE withdrew, SAHO in response withdrew 4 or 5.

Transcript of William Allan Parenteau - LRB Hearing – p. 424, line 9 to p. 425, line 21

11. The Intervenor CUPE disputed all classifications that were included in the Employer's lists of essential services and applied to the Saskatchewan Labour Relations Board ("SLRB") for an order pursuant to section 10 of the *PSESA* seeking a review of the number of individuals that the Employer had included in their essential services designation. The Intervenor CUPE further sought a declaration that the *PSESA* was in violation of the section 2(d) of *The Canadian Charter of Rights and Freedoms.* RQRHA was selected as one of the five CUPE health regions in the province to pursue this type of application since it was the first of its kind and would provide some guidance in terms of how future applications would proceed.

Affidavit of Michael Keith, October 29, 2010– Return of the Board, Volume I – TAB 1 and TAB 2

Affidavit of Sinda Cathcart, July 6, 2010 – para. 5

Affidavit of Sinda Cathcart, December 21, 2010 – paras 8 and 9

12. The Intervenor CUPE presented evidence at the SLRB hearing that took place on December 16, 17 and 18, 2009 with respect to the classifications and the numbers within those classifications deemed essential by the Employer. The Intervenor CUPE

considered the Job Evaluation Ratings and the Impact of Action Ratings as being relevant in determining the need for particular classifications. The difference between those deemed essential and the number proposed by the Intervenor CUPE in RQRHA was as follows:

- The Employer designated 25 Special Care Aides at Whitewood Community Health Centre as essential. The Intervenor CUPE submitted that 5 Special Care Aides should be designated as essential.

- The Employer designated 6 Recreation Workers at Regina Pioneer Village as essential. The Intervenor CUPE submitted that zero Recreation Workers should be designated as essential.

- The Employer designated 43 Staff Schedulers at Central Scheduling, 4211 Albert Street as essential. The Intervenor CUPE submitted that zero Staff Schedulers should be designated as essential.

- The Employer designated 11 Licensed Practical Nurses at Pasqua Hospital as essential. The Intervenor CUPE submitted that 4 Licensed Practical Nurses should be designated as essential.

- The Employer designated 30 Medical Laboratory Technologists at Regina General Hospital as essential. The Intervenor CUPE submitted that 5 Medical Laboratory Technologists should be designated as essential, on a stand-by basis only.

- The Employer designated 72 Environmental Services Worker as essential. The Intervenor CUPE submitted that 15 Environmental Services Workers should be designated as essential.

Transcript of Sinda Cathcart - LRB Hearing – p. 237, line 23 to p. 251, line 9

Cross Examination of Pearl Blommaert, March 23, 2011 – p. 10, line 9 to line 23

13. The Intervenor CUPE presented evidence with respect to an explanation of the Joint Job Evaluation Ratings and the Impact of Action Ratings.

Affidavit of Pearl Blommaert, December 20, 2009 – para. 20, Exhibit “G”

14. The Intervenor CUPE presented evidence that an essential service designation should include only those services within each classification considered essential and emergent rather than all of the duties of a classification deemed essential as allowed for under

section 18 of the legislation. Other designated classifications included Seamstresses, Office Administrative Assistants, Plumbers, Recreation Coordinators, Storespersons, Vehicle Operators, Finance Assistants, Carpenters, Laundry Service Workers and Purchasing Clerks to name a few.

Transcript of Sinda Cathcart - LRB Hearing – p. 268, line 16 to p. 271, line 11
Affidavit of Brian Manegre, December 20, 2010 – paras. 21 to 23
Affidavit of Sandra Seitz, December 21, 2010 – paras. 20 to 23
Affidavit of Carol McKnight, December 20, 2010 – paras. 21 to 23

15. Evidence was presented by the Intervenor Saskatoon Regional Health Authority that in preparing essential services lists, a minimalist approach was not taken. There was no consideration given to out-of-scope staff or the use of volunteers to provide services, there was no consideration to reducing the duties of classifications to include only those duties considered essential or re-bundling of duties.

Cross Examination of Karen Lyn Newman, April 11, 2011 – p. 25. line 18 to p. 27, line 26

16. The Intervenor CUPE presented evidence that over the past number of collective agreements, significant gains had been made in terms of wage parity, benefits, standardized hours, standardization of standby and weekend premiums and workloads to name a few. The proposals that were presented by SAHO would take away many of the gains that had been achieved by the Intervenor CUPE.

Transcript of Pearl Blommaert - LRB Hearing – p. 290, line 6 to p. 295, line 16; p. 307, line 11 to p. 319, line 8

17. The Intervenor CUPE presented uncontroverted evidence that the monetary offer presented by SAHO came much later in the process then it had in previous rounds of bargaining. This was significant because the entire bargaining process is a give and take where if the monetary offer is known it can impact on decisions at the bargaining table with respect to gains or concessions. The request for the monetary offer was made by the

Intervenor CUPE but was ignored by SAHO. This impacted on the ability of the parties to reach any agreement on the proposals.

Transcript of Pearl Blommaert - LRB Hearing – p. 334, line 16 to p. 336, line 20

18. The SLRB issued their Reasons for Decision on February 9, 2010 finding that the *PSESA* was not in violation of the *Charter* and directing the parties to negotiate further on the provision of essential services.

Canadian Union of Public Employees, Local 3967 v. Regina Qu'Appelle Health Region and the Attorney General for Saskatchewan, LRB File No. 124-09 – Return of the Board, Volume VIII – TAB 45

19. After the SLRB issued their Decision, SAHO began an escalating campaign of communicating to the members in an effort to garner support for their proposals that were the same ones that had been rejected by the membership with the eighty-eight (88%) percent strike mandate. Threats were made that retroactive pay would be taken away unless the Intervenor CUPE agreed to SAHO's final offer which was presented on January 27, 2010. This had never before occurred in collective bargaining. The Employers posted ads in support of SAHO's offer on the doors of washroom stalls, threatening discipline if they were removed. This created a number of issues for the Intervenor CUPE in terms of holding meeting to educate members on the issues and addressing any concerns. One of the most pressing concerns was the possibility of the members losing retroactive pay.

Affidavit of Sinda Cathcart, *July 6, 2010* – paras. 8 to 16.
Affidavit of Sinda Cathcart, December 20, 2010 – paras. 12 to 22
Affidavit of Sandra Seitz, December 21, 2010 – paras. 26 to 28

20. The Intervenor CUPE filed a Notice of Motion in the Court of Queen's Bench on March 8, 2010 for judicial review of the SLRB Decision, which was adjourned pending the outcome of the within action to which CUPE is an Intervenor.

Affidavit of Sinda Cathcart, December 21, 2010 – para. 10

II. Provision of Essential Services Prior to the *PSESA*

21. With respect to the provision of essential services prior to the *PSESA,* the Intervenor CUPE presented evidence that in January 1999 a one day strike took place where no essential services were provided across CUPE health regions other than those that were raised as emergent. A negotiated process was in place where the Intervenor CUPE and the Employer sat down and discussed what classifications were considered necessary to provide essential services. Further to this, a contact person was provided to the Employer in the event that an emergency would arise that required quick action. At that time, approximately four (4%) percent of CUPE members were considered necessary to provide essential services. The Intervenor CUPE presented evidence that during this work stoppage a letter of thanks was sent by the Employer recognizing the effective manner in which essential services were carried out during the one day strike preventing the loss of life of two individuals. A collective agreement was concluded shortly after the one day strike.

    Transcript of Sinda Cathcart - LRB Hearing – p. 221, line 2 to p. 223, line 25
    Transcript of Pearl Blommaert - LRB Hearing – p. 295, line 17 to p. 299, line 6

22. Evidence was presented by the Intervenor RQRHA that during the 1999 strike, the facilities within the region prepared a contingency plan to provide essential services in the event of a strike. Concerns were raised by departments with respect to the inability of out-of-scope staff being able to carry out even the most basic essential services without the support of CUPE members, this would affect the blood bank, elective surgeries, inpatient services, lab services, and would require a reduction in available beds. The Intervenor RQRHA presented evidence that a request for essential services and rationale for the requests were forwarded to the Intervenor CUPE who responded that services would be provided in life and death situations. The process in place for requesting essential services included an assessment of whether out-of-scope staff or SUN members could perform the particular service. Work slowdown had already had an impact on the workplaces with a number of elective surgeries and diagnostic procedures cancelled.

Physicians were requested to see patients in their offices rather than the facilities. There was no evidence presented of actual harm that occurred during the strike.

Affidavit of Diane Larrivee, January 26, 2011 – paras. 7 to 19

23. The Intervenor CUPE presented further evidence that in June 2001 a six day strike took place where again no essential services were provided other than those needed on an emergent basis. The Intervenor CUPE and the Employer again sat down to discuss the classifications considered necessary to provide essential services. Further, a document was created by the Intervenor CUPE and the Employer as a means to provide a protocol and direction to the Locals and facilities for the provision of essential services and also in the event that further essential services were required. The Intervenor CUPE achieved some significant gains for members in the collective agreement that was concluded shortly after the six day strike.

Transcript of Sinda Cathcart - LRB Hearing – p. 224, line 4 to p. 224 line 13
Transcript of Pearl Blommaert - LRB Hearing – p. 301, line 18 to p. 303, line 15; p. 307, line 4 to p. 315, line 14

24. The Intervenor RQRHA presented evidence with respect to the CUPE strike that occurred in 2001. The Intervenor CUPE communicated to the Employer that essential services would be provided in life and death situations. RQRHA prepared and put forward a proposal for minimum staffing levels but there is no evidence in terms of if an agreement was reached between the parties. Patients were discharged while elective surgeries and other procedures were cancelled and admissions were reduced. The various departments provided contingency plans which illustrated a need to change operations during the strike due to the withdrawal of services by the Intervenor CUPE. Volunteers and family support were used to meet patient needs during the course of the strike. There was no evidence presented of actual harm that occurred during the strike.

Affidavit of Diane Larrivee, January 26, 2011 – paras. 35 to 42

25. In response to this, the Intervenor CUPE presented evidence that the Local did provide members on stand-by in two facilities who were housed in a room and dispatched when

required. The Intervenor CUPE also complied with legislation to staff powerhouses throughout the 1999 as well as the 2001 and also carried out daily boiler inspections. The Intervenor CUPE presented further evidence that at the request of the Employer, CUPE members conducted resident checks and provided services for the residents if required.

Reply Affidavit of Gordon Campbell, March 10, 2011 – paras. 4 to 6

26. Evidence was presented by the Intervenor CUPE with respect to what occurred in SCHRHA during the 2001 strike. The Employer and the Local discussed the essential services that were to be provided and it was agreed upon that maintenance and lab services would be available. Evidence was further presented that upon a request from the Employer for an assessment of services, one of the facilities was toured and it was concluded that essential services were being maintained. There was no evidence presented of actual harm that occurred during the strike.

Affidavit of Sandra Seitz, December 21, 2010 – paras. 41 to 42

27. The Intervenor CUPE presented evidence that there was a very positive relationship with the Employer in the SRHA; there was an open communication policy where discussions were ongoing during the strike in terms of the services that were required and the Employer was aware that essential services would be provided when needed.

Cross Examination of Pearl Blommaert, March 23, 2011 – p. 29, line 24 to p. 35, line 15

28. Evidence was presented by the SRHA that long-term care facilities as well as home care services were affected by the 2001 strike. While consideration was given to closing facilities during the strike, this was not done. The patients who were housed in these facilities are mostly highly dependent on the support received from the facilities. The Intervenor SRHA did stop admitting patients to long-terms care facilities and those within the facilities were impacted on in the following ways:

- Day wellness programming was cancelled;
- Patients had to stay in bed for longer periods of time;
- Linens and clothing were not changed as often;

- Facilities used disposable items where possible;
- Food was ordered in from restaurants; and
- Cleaning was reduced

There was no evidence presented of actual harm and this was confirmed through evidence presented by the Employer.

Affidavit of Christina Denysek, January 31, 2011 – paras. 39 to 42

Cross Examination of Christina Denysek, May 13, 2011 - p. 14, line 13 to line 25

29. In reply, the Intervenor CUPE presented evidence that the impacts as noted in the aforementioned paragraph are concerns with respect to reduced services that exist outside of a strike situation due to short staffing and budgetary constraints.

Reply Affidavit of Pearl Blommaert, March 9, 2011 – para. 4

30. Evidence was presented by SRHA that acute care services were affected by the 2001 strike. Patients who would have normally been held for observation were turned away and patients were discharged earlier than they otherwise would have been. There was also no home care services provided during the 2001 strike. The services that were provided were being carried out by out-of-scope staff and volunteers such as lifting, turning, dressing, toileting and bathing patients. According to the Intervenor SRHA, this created "potential" injuries to residents as well as staff and volunteers. There was no evidence presented of actual harm that occurred during the strike.

Affidavit of Christina Denysek, January 31, 2011 – paras. 43 to 45

31. In reply, the Intervenor CUPE presented evidence that staff represented by SUN and HSAS were on duty to provide acute care services. Further, evidence was provided that SRHA maintains a robust volunteer program where volunteers are provided with a schedule and in fact, a grievance was filed by the Intervenor CUPE because volunteers were performing CUPE work.

Reply Affidavit of Pearl Blommaert, March 9, 2011 – paras. 5 to 6

32. The Intervenor CUPE presented evidence that in the SRHA it was communicated to the Employer that there were CUPE members on stand –by who would be available, if needed, to provide essential services. The individuals who were on stand-by would be picketing and within very close proximity to the facility if needed on an emergent basis. This included among others, Laboratory Technicians, X-Ray Technicians, Engineers and tradespersons. Less than 0.5% of CUPE member in both the SRHA and the SCRHA were required to perform an essential service. This was not contradicted by evidence presented from the Employer however, the Employer did take issue that there were no services provided in relation to direct patient care so that out-of-scope staff and volunteers were not required to work extended hours. In reply, the Intervenor CUPE provided evidence that there were no further requests for services other than those provided.

Affidavit of Pearl Blommaert, December 20, 2010 – paras. 40 to 44
Affidavit of Christina Denysek, January 31, 2011– paras. 46 to 47
Reply Affidavit of Pearl Blommaert, March 9, 2011 – para. 7
Affidavit of Sandra Seitz, December 21, 2010 – para. 43

33. Evidence was presented by the Intervenor PAPRHA that prior to the 2001 strike, the Local and the Employer met to discuss what would be required in terms of essential services during the course o the strike. The Employer was provided with cell phones by the Union and were to call if services were required. The Local agreed to provide services such as Biomedical, Operating Room Technologists, Licensed Practical Nurses for Obstetrics in addition to other services on an as needed basis while also agreeing to provide fifty (50%) percent of certain services in long terms care homes again, on an as needed basis. There was also one instance where the CUPE members offered to show the Employer how to use the tubs to provide baths to residents. Less than one (1%) percent of CUPE members were required to work during the 2001 strike in the PAPRHA. There was no evidence presented of actual harm that occurred during the strike.

Affidavit of Carol McKnight, December 20, 2010 – paras. 41 to 43

34. Evidence was presented by the Intervenor PNRHA that prior to the 2001 strike, the Local and the Employer discussed what would occur in the event essential services were

required. Members who were normally on call were to remain on call and in emergent situations, the Employer was to call the member directly and subsequently notify the Union. Evidence was further presented that there was no request from the Employer for the provision of essential services. The Union requested an opportunity to tour the facility to assess how the volunteers and nurses were handling the workload. During this tour, it appeared that the volunteers present exceeded the number of staff that would be working on a regular day. There was one instance where a CUPE member attended at the facility during the strike to ensure the computer system was operating properly without a request to do so. There was no evidence presented by the Employer of actual harm that occurred during the strike.

Affidavit of Brian Manegre, December 20, 2010 – paras. 41 to 43

35. The Intervenor CUPE presented evidence that in 2005 a strike vote was taken but no job action resulted from that strike vote as a collective agreement was concluded soon after the strike vote was taken.

Transcript of Pearl Blommaert - LRB Hearing – p. 319, line 9 to p. 320, line 7

36. The Intervenor Cypress Hills Health Region provided evidence that the Employer's approach to services that could be eliminated in 2005 was not the same approach as that taken in 2009.

Cross Examination of Brenda Nadeen Schwan, April 12, 2011 – p. 16, lines 19 to 23

37. Evidence provided by SAHO supported the evidence provided by the Intervenor CUPE with respect to essential services being an issue that has always been present when the Union is in a strike situation. Essential services have been provided on a case by case basis.

Transcript of William Allan Parenteau - LRB Hearing – p. 443, line 15 to p. 444, line 17

III. <u>Employer Communciation</u>

38. After the February 9, 2010 Decision of the SLRB was issued, the Employer began an escalating campaign to the membership in an effort to garner support for the final offer. There was a push to have the membership vote on the final offer. This resulted in threatening phone calls and emails to the local executives. The communications included among other things:

- Radio, television ad newspaper advertisements;
- Posting advertisements in the workplace and specifically on the inside of bathroom stalls;
- Placards and brochures throughout the workplaces;
- Preparing and sending negotiation related material directly to members homes;
- Direct communication in the workplace from managers to members to accept the final offer; and
- Creating and posting documents on the SAHO website.

The Intervenor CUPE could not agree to take the final offer to a vote as doing so would forever alter bargaining between the parties. The Employer would then not be required to bargain, they could present an offer and take it to the membership. The information provided by the Employer and SAHO was misleading requiring the Intervenor CUPE to prepare communications to counter the misleading information. There was a great deal of time and resources spent on holding meetings and preparing material for the membership.

Affidavit of Sinda Cathcart, December 21, 2010 – paras 13 to 21
Affidavit of Suzanne Posyniak, December 22, 2010 – paras 13 to 17
Cross Examination of Pearl Blommaert, March 23, 2011 – p. 14, line 9 to p. 18, line 6; p. 37, line 20 to p. 40, line 13
Affidavit of Brian Manegre, December 20, 2010 – paras 26 to 30

39. The Intervenor CUPE presented evidence that there were efforts made to educate the members on the way in which the *PSESA* was intended to operate, however, this was difficult given some of the concerns were around the impact of the legislation where the Union was not able to provide a conclusion.

Cross Examination of Pearl Blommaert, March 23, 2011 – p. 37, line 20 to p. 42, line 8

IV. Impact on Collective Bargaining and the Right to Strike

40. The Intervenor CUPE presented evidence that in February 2009, the affect of designating eighty-sevent (87%) percent of CUPE members in RQRHA as necessary to provide essential services impacted on collective bargaining to the degree that the Intervenor CUPE was left with no ability to effectively take job action given that only thirteen (13%) percent of CUPE members in RQRHR were left with the ability to walk off the job. The eighty-sevent (87%) percent of those deemed essential left the facilities in RQRHR with as many if not more members working during a strike than there would be on a regular work day. This translates into a "business as usual" day in the workplaces since the member are typically working with eighty-seven to ninety (87 – 90 %) percent staffing levels due to retention and recruitment issues.

    Transcript of Sinda Cathcart - LRB Hearing – p. 224, line 17 to p. 226, line 10; p. 265, line 14 to p. 266, line 3
    Transcript of Michael Keith - LRB Hearing – p. 388, line 13 to p. 389

41. The Intervenor CUPE presented evidence that the round of bargaining that commenced in September 2008 was considerably different in tone and conduct than was the case in past rounds of bargaining. There was no meaningful exchange of ideas and proposals at the bargaining table and the Employer took a very rigid, inflexible position on their proposals unlike the bargaining process in the past. There were a number of concessions in SAHO's proposals that took away many of the gains that had been made in previous rounds of bargaining. These included among others, moving members from site to site rather than remaining in one facility; restricting bumping rights where a layoff occurs; taking away the members input into their earned days off; restricting the period of time in which an error was made in the offer of overtime; requiring members to work every weekend rather than having one weekend off out of three and taking away the premium if this does occur; reducing the rest time between shifts and requiring that the members work an eight

hour shift anytime within a twelve hour window and not eight consecutive hours and allowing the Employer to schedule vacation hours not taken by members. SAHO in turn refers to these items as efficiencies rather than concessions.

> *Transcript of Pearl Blommaert* - LRB Hearing – p. 320, line 8 to p. 332, line 15
>
> *Transcript of Michael Keith* - LRB Hearing – p. 379, line 13 to line 24
>
> *Transcript of William Allan Parenteau* - LRB Hearing – p. 442, line 16 to p. 443, line 14

42. The Intervenor CUPE presented evidence that in previous rounds of bargaining, taking a strike vote had a clear impact on moving the bargaining process along while the strike vote in 2009 had no effect at the bargaining table, even with an eighty-eight (88%) percent strike mandate. Bargaining between the parties was quite strained in comparison to other rounds of bargaining, the process was dictated entirely by the Employer who decided what would be discussed and when it would be discussed. In previous rounds of bargaining, issues fell away at a steady rate in contrast to the 2008 round of bargaining where large issues remained throughout.

> *Transcript of Pearl Blommaert* - LRB Hearing – p. 336, line 22 to p. 337, line 13
> *Transcript of Michael Keith* - LRB Hearing – p. 377, line 3 to line 26; p. 379, line 25 to p. 381, line 11

43. The Intervenor CUPE presented evidence that the 2008 round of bargaining included a great deal of "media bargaining" in contrast to what had occurred in previous rounds. This was distracting and disruptive at the bargaining table. The Intervenor CUPE would on occasion, read SAHO's position on a particular issue prior to it being presented at the bargaining table. This was unlike anything that had taken place in previous rounds of bargaining. The Intervenor CUPE presented evidence that the change in bargaining during this round was believed to be based on the limited ability of the Intervenor CUPE to take effective and meaningful job action. The members were bombarded with communication from the Employer on a daily basis. The Intervenor CUPE presented evidence that the 2008 round of bargaining was the worst that was ever experienced, there was a feeling of helplessness and powerlessness. Prior to the creation of the *PSESA*

the Union had some tools that would work to balance the power between the Union and the Employer, the Intervenor CUPE presented evidence that amendments to the *Trade Union Act* and the creation of the *PSESA* prevented any influence over the Employer's actions. From the Intervenor CUPE's perspective, the members had never been treated in this manner before while SAHO and the Employer had a new found power that they abused.

> *Transcript of Pearl Blommaert* - LRB Hearing – p. 338, line 13 to p. 339, line 11; p. 359, line 13 to p. 360, line 23
> *Cross Examination of Pearl Blommaert, March 23, 2011* – p. 17, line 3 to p. 25, line 12

44. Evidence was presented by SAHO that the only effect that the *PSESA* has had on bargaining is with respect to the tone at the bargaining table. After the Intervenor CUPE received the Employer's information with respect to essential services, the Union was much more contentious.

> *Transcript of William Allan Parenteau* - LRB Hearing – p. 441, line 14 to p. 442, line 15

45. The Intervenor CUPE presented evidence that the relationship between a strike mandate and collective bargaining is one where the Union is given the ability to exert the only influence over the Employer at the bargaining table that they possess. A strike or even the threat of a strike provides an effective means for the Union to apply pressure on the Employer where they otherwise would not have a voice. The *PSESA* could potentially create a situation where there is no end to bargaining.

> *Transcript of Michael Keith* - LRB Hearing – p. 382, line 14 to p. 384, line 13

46. The Intervenor CUPE presented evidence that in some cases, the members questioned why CUPE would even bother with a strike vote given that most members were prohibited from striking. Another concern expressed was with respect to the length of a strike in the event that the few members who were permitted to strike were required to

walk off the job. Members expressed a desire to take job action in spite of being designated as essential and were frustrated at their inability to take any action.

Affidavit of Brian Manegre, December 20, 2010 – paras. 24 to 25, 31

Affidavit of Sandra Seitz, December 21, 2010 – paras. 31

47. In reply to this, SAHO presented evidence that the Union taking a strike vote does not create pressure on the Employer at the bargaining table; that the ability to withdraw services in a strike does not put pressure on the Employer; and that the ability to put pressure on the Employer does not influence collective bargaining. These are things that the Employer takes into consideration but do not effectively influence an Employer during the bargaining process. Further evidence was presented by this witness that essential services has no impact on collective bargaining however, this witness was challenged on this point by the Intervenor CUPE. The witness later stated that this may or may not place pressure on the Employer depending on where you are in the bargaining process.

Transcript of William Allan Parenteau - LRB Hearing – p. 453, line 7 to 456, line 13; p. 461, line 22 to p. 463, line 16; p. 469, line 7 to line 26

48. Evidence was presented by SAHO that the members who were designated as essential were not prevented from picketing in their off time in spite of section 14 of the *PSESA*. The Intervenor CUPE challenged the witness on this point on the basis that picketing in your off time is not the same as striking or withdrawing services. The witness disagreed on this point.

Transcript of William Allan Parenteau - LRB Hearing – p. 434, line 16 to p. 435, line 25; p. 457, line 8 to p. 460, line 24

49. The Intervenor CUPE presented evidence that a collective agreement was concluded on October 26, 2010 however, in doing so the Intervenor CUPE made a number of concessions and was unable to achieve many improvements to the terms and conditions of employment for the members. After the final offer, SAHO refused to move off of their position and would only make changes to language rather than the substantive issues. It

was necessary to conclude a collective agreement in order to protect the loss of retroactive payments for the membership.

> *Transcript of Sinda Cathcart* - LRB Hearing – paras. 22 to 24
>
> *Cross Examination of Pearl Blommaert, March 23, 2011* – p. 26, line 8 to p. 28, line 24

<u>APPENDIX "F"</u>

1. *The Public Service Essential Services Regulations* (hereafter, the "*Regulations*") list specific services, and related programs, performed by employees of the Government of Saskatchewan which are prescribed as essential services for the purposes of section 2 of the *PSESA*. In the Community Living Division – Valley View Centre in the Ministry of Social Services, the services prescribed as essential services include such services and programs as laundry, food services, housekeeping, dental clinic and medical equipment repair.

   The Public Service Essential Services Regulations – Appendix TABLE 1

2. The Intervenor CUPE presented evidence that, as a result of the introduction of the *Regulations*, the Intervenor CUPE's local, CUPE Local 600 was effectively left without the ability to negotiate which classifications of employees should be designated as essential. Although the Intervenor CUPE Local 600 believed that many of the services prescribed as essential services in the *Regulations* were not in fact essential services, the designation of the services as essential in the *Regulations* removed the Intervenor CUPE Local 600's ability to challenge the services. Furthermore, the introduction of the *Regulations* also effectively meant that the classifications of employees that maintained these prescribed services were also essential.

   Affidavit of David Stevenson – para. 8

3. The Intervenor CUPE further presented evidence that, absent the ability to negotiate which classifications of employees should be designated as essential, the negotiation of an essential services agreement was limited to the negotiation of the number of employees in each classification that would be required to work to maintain what the Defendant claimed to be essential services.

   Affidavit of David Stevenson – para. 9

4. The Intervenor CUPE presented further evidence that the parties subsequently executed an essential services agreement which designated approximately sixty-nine (69%) percent of members as essential. Although the Intervenor CUPE Local 600 believed that believed that essential services could be maintained using fewer employees than the number set out in the agreement, the Intervenor CUPE Local 600 believed that a designation level of sixty-nine (69%) percent was the most favourable designation level they could negotiate given their inability to negotiate which classifications of employees should be designated as essential.

Affidavit of David Stevenson – para. 12

5. The Defendant did not present any evidence to contradict or dispute the evidence presented by the Intervenor CUPE.

APPENDIX "G"

1. Dr. Riddell specializes in labour relations and empirical labour law. He has previously authored or co-authored six articles reflecting on union certification experience under card check and mandatory vote (or "election") statutory regimes in BC, Manitoba and Ontario. Dr. Riddell was retained to provide an analysis of certification success in Saskatchewan over the period 2000 to 2010 using similar methodological procedures as in previous Canadian studies with respect to certification experience.

   Affidavit of Chris Riddell at para. 3(i)
   Transcript, Q23-25

2. Dr. Riddell attested that, historically in Canada, union recognition was achieved by certification through card check, whereby signatures in support about a minimum threshold (a "majority" in Saskatchewan) would be certified as the bargaining agent for a proposed bargaining unit without a vote. As of May 2008, Saskatchewan joined British Columbia, Alberta, Ontario, Nova Scotia and Newfoundland as the sixth Canadian jurisdiction to require a vote to establish majority support regardless of the level of support demonstrated by signatures – mandatory vote.

   Affidavit of Chris Riddell, Exhibit "A" (the "*Riddell Study*") at p. 1

3. Dr. Riddell further attested that studies on the impact of mandatory votes (or "compulsory election laws in the United States") establish a reduction in union certification success. While there tends to be little discernable effect on public sector certification success rates, the private sector rates drop upwards of twenty (20%) percent when mandatory votes are implemented and, as occurred in British Columbia, rises by the same percentage when card check is reinstated.

   Reply Affidavit of Chris Riddell, Exhibit "A" (the "*Riddell Analysis in Reply*") at paras. 1 – 6, 10
   Riddell Study at pp. 1-2

Riddell Transcript" at Q253ff.

4. On the issue of union pressure of coercion, Dr. Riddell attested that there is no empirical evidence that union pressure or coercion inflates the level of support in a card check system. However, there is such evidence of employer actions in a mandatory vote scenario. The evidence of employer actions having an impact on certification outcome in a mandatory vote regime is supported by the fact that the decline in union success rate is largely confined to the private sector. Further, election delay always has a negative effect on certification success where there is no quick-vote procedure or low compliance with such procedures. Three decades of American experience with mandatory vote scheme establishes that employer action reduces union win rates in election contests.

Riddell Study at pp. 1 – 4
Riddell Transcript at Q172 – Q180 and Q242ff

5. On the issue of time limits, Dr. Riddell further attested that the mandatory vote system brought in for Saskatchewan in May 2008 is unique in Canada in that there is no time limit for when election would take place. This makes Saskatchewan the only province that operates under a similar system as in the United States. Dr. Riddell attested that, although the impact of time delay in Saskatchewan on the holding of votes has yet to be determined, in the absence of a statutory requirement, it is likely that the delay will be greater than in other Canadian jurisdictions.

Riddell Study at p. 4
Riddell Analysis in Reply at para. 32
Riddell Transcript at Q84

6. Dr. Riddell attested that the movement to mandatory vote regime in Saskatchewan has resulted in a decline in union certification success in the private sector of approximately twenty (19.6%) percent. The decline is higher if controls on the statistical analysis are applied – up to 25.8% decline.

Riddell Study at p. 8

7. Dr. Riddell further attested that, extrapolating from these two bodies of evidence, i.e. (1) the findings from the switch from card-check to elections, and (2) findings on the direct effects of election delay, the introduction in Saskatchewan of compulsory elections with no time limits on the elections would imply a reduction in union certification success rates by perhaps an even greater magnitude that seen in other jurisdictions in Canada where mandatory time limits for a vote apply.

8. In response to the evidence from Dr. Riddell, the Defendant presented evidence from Dr. Marc Van Audenrode, a managing principal of a consulting firm. Dr. Van Auderode was retained by the Defendant to review and critique, if warranted, the analysis presented in the *Riddell Study*.

9. Dr. Van Audenrode attested that the decline in success rates in Saskatchewan is due to confounding factors; in particular, economic conditions that prevailed at the time in Saskatchewan and not due to the change in the certification regime.

Audenrode Opinion at p. 10

10. Dr. Van Audenrode further attested that the academic literature relied upon by Dr. Riddell does not properly support the assertions in the *Riddell Study*. In particular, Dr. Van Audenrode attested that the literature relied upon by Dr. Riddell is either not current or analyzes the 1980s and early 1990s and further that the *Riddell Study* fails to establish that the conclusions from past experiences are still relevant today.

Affidavit of Marc Van Audenrode, Exhibit "A" (the "*Audenrode Opinion*") at pp. 3 and 4

11. Dr. Van Auderode further attested that the conclusion in the *Riddell Study* that secret ballot voting is associated with lower union certification, in part, because of delays in the certification process implied by election is unsupported by empirical evidence.

Audenrode Opinion at pp. 8 and 9

12. The conclusions of Dr. Van Audenrode were subsequently contradicted in reply evidence from Dr. Riddell.

13. On the issue of the decline in success rates in Saskatchewan being due to economic conditions, Dr. Riddell presented evidence that, factoring in economic factors and labour market factors through statistical analysis with respect to British Columbia and Manitoba data shows such conditions have little if no influence on the outcome of a union certification application.

Riddell Analysis in Reply at para. 24

14. On the issue of academic literature, Dr. Riddell presented evidence that the twenty-one (21%) percent reduction in union certification success in a compulsory vote regime is consistent in British Columbia and Manitoba in the later 1990s and early 2000s as in earlier periods in time.

Riddell Analysis in Reply at p. 2, 4 – 6, Table 1 and Figure 1

15. On the issue of delays in the certification process, Dr. Riddell attests that Dr. Van Audenrode misconstrues the time frame for considering delay. Dr. Riddell attests that under card-check laws, an employee's decision is affirmed prior to the application date unless an election is required, which is rare. Under compulsory elections legislation, an employee's decision is affirmed at the election date, which is clearly beyond the application date. None of this has any relationship to the disposition date. There is, therefore, no question that compulsory election laws delay the point in time where employee's final decision about certification is made.

Riddell Analysis in Reply at p. 7 – 11