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

Q.B.G. No. 1059 of A.D. 2008

Between:

The Saskatchewan Federation of Labour

Plaintiff

-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)
SEIU-West
Saskatchewan Government and General Employees' Union (SGEU)
Regina Qu'Apelle Regional Health Authority
Cypress Regional Health Authority
Five Hills Regional Health Authority
Saskatoon Regional Health Authority
Heartland 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

Interveners

Written Argument
On behalf of the intervener union, SEIU-West

INDEX

I. Introduction **3**

II. Summary of Evidence **3**

III. Issues **6**

IV. Analysis and Argument **7**

a) Does freedom of association include the protection of strike activity? *7*

The Reasoning of the Labour Trilogy regarding strikes no longer applies 7

In the context of the Challenge to the *PSESA*, what is a "strike"? 8

The Right to Strike is a Necessary Element of the Process of Collective Bargaining 9

The Right to Strike is a part of the process of collective bargaining 16

b) Does the PSESA restrict or remove the right to strike and a meaningful process of collective bargaining? *18*

No claim to constitutionalize the Wagner Act nor any particular labour relations scheme 18

The *PSESA* is limiting legislation, not facilitating legislation 19

What is the appropriate analytical approach? 22

Application of the Analytical Approach 25

V. Relief Sought **29**

VI. Authorities **30**

I. Introduction

1. The plaintiff's statement of claim questions the constitutionality of *The Public Service Essential Services Act* ("*PSESA*"), among other claims. These submissions on behalf of SEIU-West focus on the constitutionality of the *PSESA*.

2. The intervener union, SEIU-West, is a union local chartered by Service Employees International Union, and represents approximately 11,400 members. [1] Although SEIU-West is an affiliate of the Saskatchewan Federation of Labour, SEIU-West did not join as plaintiff in this action. SEIU-West did file a judicial review application, challenging decisions made by several health authorities pursuant to the *PSESA*, and raising administrative and constitutional questions. In a procedural ruling made in relation to the action within, the allegations relating to the consitutionality of the *PSESA* raised in SEIU-West's judicial review application were prevented from proceeding. SEIU-West sought and was granted intervener status to bring evidence and make submissions in this proceeding.

3. SEIU-West submits that the *PSESA* constitutes an infringement on the process of collective bargaining undertaken by the union and its members collectively. This written argument addresses the issue of the infringement of freedom of association protected by s. 2(d) of the *Charter*. Should the Respondent attempt to justify the infringement under s. 1 of the *Charter*, SEIU-West will address those arguments in reply.

II. Summary of Evidence

4. A large volume of affidavit evidence is before the Court in this matter. Most of the materials filed with the Court on behalf of SEIU-West in the matter within were originally filed in support of its judicial review application commenced at the Judicial Centre of Saskatoon. These documents have been transferred to the Judicial Centre of Regina.

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[1] Affidavit of Barbara Cape at para. 9.

The union further filed additional materials with the Court. Much of the evidence set forth in the original documents is not refferable to the matter within.

5. The following summary of evidence applies only to that evidence submitted by or involving the intervener union, SEIU-West referable to the SFL action.

6. Prior to the enactment of the *PSESA*, SEIU-West provided a brief to the government in an effort to make representations concerning the legislation. This matter is covered in the Plaintiff's argument filed with the Court at paragraph 547.

7. SEIU-West's experience with the *Public Service Essential Services Act* arises primarily out of negotiations surrounding revision to its collective bargaining agreement with SAHO and the four regional health authorities employing the union's members in relation to its collective bargaining agreement which expired 31 March 2008. The union gave notice to bargain in February of 2008 and negotiations ensued. Contemporaneous with collective bargaining, the parties also entered into negotiations concerning essential services agreements. The employers delivered draft notices concerning essential services during these negotiations and after a period of what the union submits were sessions of surface bargaining on the employer's behalf, the employers served final notices pursuant to the *PSESA*. No essential services agreements were reached with the employers.

8. The public employers who bargain with SEIU-West appeared to define essential services as "business as usual", and in some cases, appeared to believe the health region was entitled to demand that it provide more and better services under strike conditions than it did in non-strike conditions.[2] SEIU-West submits that one or more health region employers created essential service plans that provided more hours of hand-on care than the employer requires in its normal scheduled hours.[3]

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[2] See Affidavit of Shawna Colpitts (Re: Negotiations with Five Hills Health Region) at paras. 23, 13; Affidavit of Russell Doell (Re: Essential Service Negotiations with Saskatoon Health Region) at paras. 29, 46, 49, 51; Affidavit of Shelly Banks at paras. 13, 28; Affidavit of William Robert Laurie (Re: Negotiations with Cypress Health Region) at para. 32.

[3] See examples at paras. 10 to 14 of the Affidavit of Shawna Colpitts in reply to Affidavit of Bernie Young, Brenda Schwan, and Wanda Ogle.

9. SAHO, the employer bargaining agent, refused to provide the employers' monetary proposal or information about the monetary proposal before it presented a "final offer". SEIU-West submits that this attitude was incompatible with the collective bargaining process, and constituted a significant change in the employers' attitude to the process.[4] In previous rounds of bargaining, the status quo was seen as an acceptable default option to allow the bargaining to move on.[5] In this round of bargaining, the employer did not appear to have any motivation to compromise on proposals that the employers were unable to achieve in prior rounds of bargaining. In his affidavit, lead negotiator William Robert (Bob) Laurie said, "it was as if the employers were daring the unions to strike. Essential services legislation had a chilling effect on bargaining, as there was a) no effective mechanism to challenge or negotiate the implementation of Employer essential services plans, and b) no alternative method where the power imbalance between the employers and the union could be addressed, where the ability to take effective job action had been removed from the unions."[6]

10. The health regions that bargain collectively with SEIU-West imposed essential service schemes. In many cases, the numbers of employees deemed essential in the final result exceeded the initial numbers. The required level of service and number of deemed employees was so high that strike activity would not have put pressure on the employer.[7]

11. In the Cypress Health Region, the union has a total of approximately 1,198 members on its seniority list when the final notices were prepared. These members work in many separate facilities spread over a relatively large geographic area. The employer named a significant number of these employees as essential, leaving only approximately 220 available to take meaningful job action.

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[4] Affidavit of William Robert Laurie re: Process of Collective Bargaining at paras. 20,

[5] See Affidavit of William Robert Laurie re: Process of Collective Bargaining at para. 67.

[6] See Affidavit of William Robert Laurie re: Process of Collective Bargaining at para. 68.

[7] See Affidavit of Katherine Schmit (re Summary of Notices); Affidavit of Janice Plazke; Affidavit of Marilyn Ann Torgerson (re Summary of Notices); Affidavit of Judy Lynne Denniss (re Summary of Notices).

12. In the Five Hills Health Region, the union has a total of approximately 1,192 members on its seniority list when the final notices were prepared. The employer again named a significant number of these employees as essential, leaving only approximately 268 available to take job action.

13. In the Saskatoon Health Region, the union has a total of approximately 7,635 members on its seniority list when the final notices were prepared. Here too the employer named a significant number of these employees as essential, leaving only approximately 2,517 of employees available to take job action.

14. In the Heartland Health Region, the union has a total of approximately 1,281 members on its seniority list when the final notices were prepared. In this instance, the employer named more than the total number of employees as being essential. This obviously left very few or no employees available to take meaningful job action. This appears to be an example of double naming as set forth below.

15. The number of employees named as essential in their classification in some cases exceeds the total number of members on the union's seniority list. This is because some union members are part-time or casual employees in more than one classification. In such circumstances, some members are named as essential in two or three classifications in which they work on a regular or occasional basis.

III. Issues

16. SEIU-West's submissions in this matter address whther the *PSESA* infringes the union and its members' freedom of association as guaranteed by s.2(d) of the *Charter*. The following questions arise:

a. Does freedom of association in the context of labour relations include the protection of strike activity as part of a process of collective bargaining?
b. Does the *PSESA* restrict or remove the right to strike and a meaningful process of collective bargaining?

IV. Analysis and Argument

a) Does freedom of association include the protection of strike activity?

The Reasoning of the Labour Trilogy regarding strikes no longer applies

17. Section 2(d) of *the Canadian Charter of Rights and Freedoms*[8] guarantees the fundamental freedom of association.

18. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. Britich Columbia*, 2007 SCC 27 at paras. 24-31 ("*B.C. Health Services*"), a majority of the Supreme Court of Canada rejected the four main reasons reasons put forward in the "Labour Trilogy"[9] to support the Supreme Court's earlier conclusion that freedom of association guaranteed by s.2(d) of the *Charter* did not include protection of the right to bargain collectively. In rejecting the Labour Trilogy reasoning, *B.C. Health Services* instead (1) accepted that rights to bargain collectively and to strike were not merely modern rights created by legislation; (2) accepted that judicial deference to government policy decisions did not require a "no go" zone for labour relations policy; (3) confirmed that s.2(d) protection must extend to inherently collective activities without an individual analogue; (4) recognized that the characterization of a collective activity as an "object" of an association does not provide a principled basis upon which to refuse to provide protection to collective activities (as distinguished from particular substantive outcomes).

19. Neither *B.C. Health Services* nor the Supreme Court's most recent decision involving s.2(d), *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ("*Fraser*"), specifically address whether the freedom of association guaranteed by s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage in strike activity as

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[8] *Part* I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (the "*Charter*").

[9] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*"), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

part of the process of collective bargaining on workplace issues. Just as the four reasons relied upon by the majority in the Labour Trilogy can no longer be relied upon to exclude the right to bargain collectively from s.2(d) protection, the majority reasoning in the Labour Trilogy can no longer be relied upon as reasons to exclude the right to strike from s.2(d) protection. A reassessment is needed.

20. In *Fraser*, the Supreme Court of Canada confirmed at para. 2:

> *"Section 2(d) of the* Charter *protects the right to associate to achieve collective goals. Laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right of free association and therefore constitute a limit on the s. 2(d) right of free association, which renders the law or action unconstitutional unless it is justified under s. 1 of the* Charter."

21. As set out below, SEIU-West submits that the ability of its members to engage in strike activity as part of the collective bargaining process and in pursuit of workplace goals is a fundamental part of the exercise of frredom of association in the labour relations context.

In the context of the Challenge to the *PSESA*, what is a "strike"?

22. For the purposes of the constitutional questions addressed by SEIU-West as an intervener in this matter, a strike can be defined as union members collectively, temporarily, withholding their labour in the pursuit workplace-related goals.

23. Section 2(k.1) of the Saskatchewan *Trade Union Act* defines strike as

> *"a cessation of work or a refusal to work...by employees acting in combination or in concert or in accordance with a common understanding...[or] other concerted activity on the part of employees in relation to their work...".*

24. Beyond the statutory definition, strike and strike activity have long had a consistent meaning and been recognized as lawful at common law. For example, in *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co. et al.*, [1892] A.C. 25 at p. 47, Lord Bramwell said:

> *"I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence,*

was lawful at common law; perhaps not enforceable inter se, but not indictable."

The Right to Strike is a Necessary Element of the Process of Collective Bargaining

25. Courts have long recognized that a right to bargain collectively is illusory if employees do not have the ability to exercise the right to strike. Canadian labour history further reveals the ability to engage in strike activity as an essential and inextricable part of collective bargaining processes. International covenants support the necessary linkage between collective bargaining and the ability to take strike action. Finally, if the process of collective bargaining is to be meaningful and to be a process consistent with the *Charter*'s underlying values, in this context meaningful collective bargaining requires access to the ability to strike.

26. Courts have recognized the necessary connection between the process of collective bargaining and strike activity in many cases. In *Crofter Hand Woven Harris Tweed Co. v. Veitch et al.*, [1942] 1 All E.R. 142 (H.L.), at pp. 158-9 the House of Lords recognized: "The right of workmen to strike is an essential element in the principle of collective bargaining."

27. The American context is instructive in the necessary link between collective bargaining and the right to strike, despite the differences between the American constitution and the Canadian *Charter*. The plurality majority opinions in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.*, (1985) 38 Cal. 3d 564 (Cal. Sup. Ct.) compile the long history of American judicial recognition of the right to strike as a necessary element of collective bargaining:

"[T]he right to strike is generally accepted as indispensable to the system of collective bargaining and negotiation..."[10]

"In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith; this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a

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[10] 38 Cal. 3d 564 at 569.

strike often provides the best impetus for parties to reach an agreement at the bargaining table, because both parties lose if a strike actually comes to pass. Thus by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than to encourage, work stoppages."[11]

"[T]he right to unionize means little unless it is accorded some degree of protection regarding its principal aim – effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A creditable right to strike is one means of doing so."[12]

"Chief Justice Roberts of the Rhode Island Supreme Court offered similar sentiments [...]: "Obviously, the right to strike is essential to the viability of a labor union, and a union which can make no credible threat of strike cannot survive the pressures in the present-day industrial world. [...] The collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism."[13]

"In an opinion by Chief Justice Taft the [United States Supreme] court declared: "[...] A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court."[14]

28. In the Canadian context, in *SEIU Local 204 v. Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392 (Ont. Div. Ct.) (reversed on other grounds), the three justices each recognized the ability to take strike action is a necessary component of collective bargaining. Per Galligan J., at para. 98:

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[11] 38 Cal. 3d 564 at 583.

[12] 38 Cal. 3d 564 at 588.

[13] 38 Cal. 3d 564 at 589.

[14] 38 Cal. 3d 564 at 596.

> *The freedom to strike is what gives the workers leverage in bargaining with their employers. Labour unions are not social clubs or benevolent societies, although as an adjunct to their primary purpose sometimes they do act as such. Their raison d'etre is to enable workers to have effective economic clout in dealing with their employers. Employees' ultimate and real weapon is their freedom to strike. When that freedom is removed it is my opinion that the workers' freedom of association is more than merely infringed, it is emasculated. While there may be situations where that can be justified and doubtless there are situations where the common good of society as a whole calls for the substitution of freedom to strike with a right to arbitration or some other method of objective dispute resolution, workers' freedom of association is meaningless, empty and devoid of substance if freedom to strike is not part of it.*

Per O'Leary J., at para. 197:

> *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.*

And per Smith J. at para. 261:

> *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.*

29. Employing an analytic approach very similar to the reasoning employed by the majority of the Supreme Court in *B.C. Health Services* twenty years later, Dickson C.J. (in dissent) in *Reference Re. Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (the "*Alberta* Reference") wrote at paras. 92, 94, 96 and 98:

> *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.*

[...]

Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. [...Quoting Carrothers, Palmer and Rayner,] "What are the requirements of an effective system of collective bargaining? From the point of view of employees, such a system requires that they be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining."

[...]

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

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

[...]

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

[...]

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

30. The Supreme Court of Canada in *B.C. Health Services* looked to Canadian labour history and found that collective bargaining has long been recognized in Canada, as a significant collective activity through which freedom of association is expressed in the labour context[15]. Judy Fudge and Eric Tucker draw a similar historical line tracing

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[15] See *Health Services at paragraphs 39 to 68.*

the history of strike activity in Canada as a necessary element of collective bargaining.[16] They note "Unlike other mechanisms for resolving disputes between workers and employers, strikes enable workers directly to participate in the process of determining their wages and working conditions".[17] After describing four legal regimes in relation to strikes in Canada (master and servant until 1877, liberal voluntarism from 1877 to 1907, industrial voluntarism from 1907 to 1943, and industrial pluralism from 1943 to now), Fudge and Tucker conclude that:

> *"long before the modern scheme, workers enjoyed a virtually unlimited freedom to strike for the purpose of pursuing collective bargaining objectives as against their own employers. The historical twist is that since the turn of the twentieth century, and particularly since the advent of industrial pluralism during World War II, legal restrictions on the freedom to strike have grown. However, what is crucial is that rights to form and join unions, to bargain collectively, and to strike have matched these restrictions. Moreover, legal support for these three employee freedoms has coincided with their characterization as fundamental human rights at the international level."*[18]

31. In other words, Canadian labour history reveals the ability to engage in strike activity as a fundamental pillar of labour relations. Where that ability to strike has been limited, for example in relation to union recognition strikes, legal substitutes (in the form of a certification process, etc.) have been provided as a *quid pro quo.* The role of the stike, however, as a fundamental part of the labour relations system as it has developed in Canada is undeniable.

32. As Pierre Elliott Trudeau wrote in 1956,

> *"In the present state of society, in fact, it is the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality. It is wrong to think that the unions are, in themselves, able to secure*

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[16] See Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: a brief legal history" (2010) 15 C.L. & E.L.J. 333.

[17] Fudge and Tucker at 334.

[18] See Fudge and Tucker at page 352, footnote omitted.

> *this equality. If the right to strike is suppressed, or seriously limited, the trade union movement becomes nothing more than one institution among many in the service of capitalism; a convenient organization for disciplining workers, occupying their leisure time, and ensuring their profitability for business."*[19]

33. Strike activity is the common law mechanism in which union members act collectively and in so doing, have access to an enforcement mechanism that has the potential to resolve disputes in relation to their employer. Although strikes have long been regulated by statute, they are not the creature of statute.

34. Further, when the access to this direct action enforcement mechanism is restricted or removed, and no other enforcement mechanism is substituted in its place, the bargaining process becomes hollow and meaningless. An essential activity and reason for associating and working together with others is removed from the union and its members.

35. International instruments and international law also support the view that the ability to engage in strike activity is a necessary element of collective bargaining. Dickson C.J. in the *Alberta Reference* at para. 72 concluded his analysis of international law regarding freedom of association and the right to strike as follows:

> *"Moreover, there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities – that is of collective bargaining and the freedom to strike."*

36. An analysis of current international law with respect to the recognition of the right to strike as part of freedom of association is set out in the written submissions of the intervener union CUPE, filed in the matter within. In the international context, it has been recognized that the right to strike is a fundamental right of workers and their organizations, an essential means for wrokers and their organizations to promote and defend their economic and occupational interests and an intrinstic corollary of the right to

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[19] Pierre Elliott Trudeau, *The Asbestos Strike* (1956), as quoted in Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: a brief legal history" (2010) 15 C.L.&E.L.J. 333 at 334.

organize.[20] Although the ILO Committee on Freedom of Association recognizes that strikes can be prohibited in situations in which a clear and imminent threat to the life, personal safety or health of the whole or part of the population, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings, in which the parties concerned can participate at every stage.[21] Freedom of association as guaranteed by s.2(d) should be interpreted to be consistent with these international standards.[22]

37. In *B.C. Health Services*, the majority reasoning of the Supreme Court explain how protection for a process of collective bargaining within s. 2(d) is consistent with the *Charter*'s underlying values.[23] To be consistent with those underlying values, collective bargaining is seen as a process that promotes and protects human dignity, equality, liberty, respect for the autonomy of the person, and enhancement of democracy. This is done by giving the workers the opportunity to influence the establishment of workplaces rules and enhancing their control over a major aspect of their lives.[24] Collective bargaining is recognized and protected under s.2(d) because it allows workers to deal on more equal terms with their employers. In the context of the labour relations regime that applies to the intervener union SEIU-West and its members (and indeed to all affected by the *PSESA*), this ability to deal on relatively equal terms requires that workers have the ability to engage in strike activity in order to overcome the inherent inequalities of bargaining power in the employment relationship: see the comments of Dickson C.J. as quoted in *B.C. Health Services* at para. 84.

38. In light of the above, SEIU-West submits that, in the current context and under the labour relations model in place in Saskatchewan, meaningful collective bargaining

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[20] *Digest of decision and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th edition (2006) at paras. 520-523.

[21] See the *Digest* at paras. 581-603.

[22] *B.C. Health Services* at paras. 78 and 79.

[23] *B.C. Health Services* at para. 80.

[24] *B.C. Health Services* at para. 82.

requires that the union and its members have the ability to engage in strike activity. Therefore, protection of freedom of association under s. 2(d) of the *Charter* in this context requires protection of a meaningful process of collective bargaining, including the right to strike.

39. There are many different models of labour relations under which meaningful collective bargaining can occur. However, a contextual approach to *Charter* analysis is required.[25] Although writing in dissent, Abella J. in *Fraser* it is submitted accurately described the need for contextual analysis when she wrote, at para. 336:

> *Health Services recognized that s. 2(d) of the Charter obliged the state, either as employer or as legislator, to protect the process of collective bargaining (para. 88). The content of that protection will of course mean different things in different contexts. The determinative question will inevitably be, as Bastarache J. said in Dunmore, what protections are "essential" to the "meaningful exercise" of the right.*

Rather than speculate on the existence possible models of labour relations could be devised in which meaningful collective bargaining would not entail a right to strike as a necessary corrollary, careful attention must be paid to the existing system, in which the right to strike has long been recognized, as outlined above, as a necessary component.

The Right to Strike is a part of the process of collective bargaining

40. Recognition of the right to strike as a necessary part of collective bargaining under a Wagner-type model does not guarantee any substantive outcome. The majority in *Fraser* provide an extensive summary of the Supreme Court's prior decisions interpreting s. 2(d). While summarizing what the Court in *Health Services* said on what constitutes good faith negotiation, the Court stated at para. 41:

> *"Section 2(d) does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislative dispute resolution mechanism in the case of an impasse (paras. 102-103)."*

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[25] See, for example, *B.C. Health Services* at para. 33.

41. With respect, this summary of the Court's decision in *Health Services* has the potential to be misleading. Paragraphs 102 and 103 of *Health Services* read as follows:

> *102 Nevertheless, the efforts that must be invested to attain an agreement are not boundless. "[T]he parties may reach a point in the bargaining process where further discussions are no longer fruitful. Once such a point is reached, a breaking off of negotiations or the adoption of a 'take it or leave it' position is not likely to be regarded as a failure to bargain in good faith" (Carter et al., at p. 302).*
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> *103 The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions (Gagnon, LeBel and Verge, at pp. 499-500). Nor does the duty to bargain in good faith preclude hard bargaining. The parties are free to adopt a "tough position in the hope and expectation of being able to force the other side to agree to one's terms" (Canadian Union of Public Employees v. Nova Scotia Labour Relations Board, [1983] 2 S.C.R. 311, at p. 341).*

42. As these paragraphs from *Health Services* make clear, s.2(d) protects a process of collective bargaining, but does not guarantee that employees acting in association will achieve a particular result, or even achieve a collective agreement. Strike activity, and the threat of strike activity, is a part of the collective bargaining process, but does not guarantee any the union will achieve particular contractual provisions, nor does it guarantee that the employer will agree to conclude a collective agreement at all. That legislators chose to include first collective bargaining agreement assistance provisions in the Saskatchewan *Trade Union Act* (see s. 26.5) is a clear recognition that the right to strike does not guarantee that a collective agreement will be reached. However, the ability to strike and the power that ability creates fosters comparable strength at the bargaining table and best enables workers to reach fair and equitable agreements with their employers. The impugned legislation undoes this balance and allows employers to force agreements with terms inferior to those that would have been otherwise achieved.

43. In any event, there is a large difference between claiming s.2(d) of the *Charter* requires positive legislative intervention that will resolve a collective bargaining dispute (and conclude a collective agreement between parties), and claiming freedom of

association is engaged when legislation removes the common law ability of employees to act in association, though a strike, in order to support the collective bargaining process.

b) Does the *PSESA* restrict or remove the right to strike and a meaningful process of collective bargaining?

No claim to constitutionalize the Wagner Act nor any particular labour relations scheme

44. In *Fraser*, the majority of the Supreme Court of Canada cautioned against an approach to Section 2(d) that constitutionalized any particular model of labour relations, specifically the Wagner System of collective bargaining, to the exclusion of all other possible labour relations and collective bargaining systems. No particular model of collective bargaining is assured under s.2(d). Instead, in each model of collective bargaining, certain aspects are required for the model to function and to be meaningful.

45. This issue does not arise in relation to consideration of the issues related to the constitutionality of the *PSESA*.

46. In *Fraser*, the majority opinion specifically found that in the *Agricultural Employees Protection Act*, legislators intended to institute a model of labour relations different from the dominant Wagner model.[26] The Court seemed to suggest that it was premature to determine whether all aspects of that system could work in a way that respected freedom of association.[27]

47. The same concerns do not arise in relation to the *PSESA* and its impact on collective bargaining in what is clearly the dominant Wagner system of collective bargaining. The issue is not whether a Wagner system of collective bargaining or some other system is appropriate in the public sector and quasi-public sector in

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[26] See *Fraser* at para. 106.

[27] *Fraser* at para. 109 and para. 115.

Saskatchewan. The Wagner Act model is in place, and has been in place since 1944. The context of that system must not be ignored.

48. Further, the international labour relations experience and the jurisprudence of the International Labour Association (ILO), in which the right to strike has long been recognized as a necessary element of collective bargaining and the ability to exercise the freedom of association, provides ample evidence that the recognition of the right to strike as a necessary ancillary to a process of collective bargaining is compatible (and indeed necessary elements) of a wide variety of labour relations regimes.

49. Therefore, the question is, within that context of the bargaining system that is in place, is the purpose or effect of the *PSESA* is such as to impair the ability of a union and its members to participate in a meaningful collective bargaining process. As indicated above, within the context of the Wagner Act model, a meaningful collective bargaining process necessarily entails the ability for union members to participate in strike activity as part of the collective pursuit of workplace goals.

The *PSESA* is limiting legislation, not facilitating legislation

50. Since the Labour Trilogy, most cases involving a s.2(d) claim have involved positive rights claims: claimants have sought access to an underinclusive legislative framework or otherwise claimed entitlement to postive government action to facilitate the exercise of freedom of association. *Fraser* and *Dunmore* were both cases in which, very generally, agricultural workers in Ontario claimed that in order to exercise their freedom of association and right to collective bargaining, the government needed to give them access to either the general provincial labour legislation that facilitated forming a union and bargaining collectively, or a labour legislation regime that had some or all of the same entitlements as the general provincial labour relations legislation. *Health Services* involved a claim that required the government as employer to bargain collectively with the union.

51. In contrast to this, the constitutional questions involving the *PSESA* do not primarily involve a positive claim to legislation facilitating freedom of association nor seek to put any further positive obligations on the government. Instead, the question is whether the limits created by the *PSESA*, which restrict the common law right (as regulated by *The Trade Union Act*) of union members to participate directly in collective

bargaining process by participating in a strike, are in violation of the freedom of association.

52. The *PSESA* prohibits certain forms of collective action and, in doing so, substantially interferes with the exercise of union members' fundamental freedom to association and impairs, undermines, and renders ineffective the collective activities of the union. SEIU-West does not seek access to a faciltating legislative regime, but instead seeks to be free from prohibitions against the exercise of s. 2 rights, particularly participate in strike activity.

53. As explained by Professor Jamie Cameron,

> *"in the case of collective bargaining, the entitlement is a positive obligation which takes the form of a governmental duty to negotiate in good faith. By contrast, the right to strike is more akin to a negative entitlement which seeks freedom from government interference. The significance of this is that the Court has repeatedly drawn a distinction between the two types of entitlement under s. 2, and has indicated that negative rights are the norm for the Charter's fundamental freedoms and that positive rights and obligations are the exception. That is why the Court has adopted more stringent criteria to determine the scope of positive rights under s. 2. B.C. Health is a case in point: B.C. Court's substantial interference test was demanding but appropriate, because the issue there was whether section 2(d) imposed a positive obligation on the government to engage in a process of collective bargaining."*[28]

54. In other words, in order to be able to exercise the freedom of association by engaging collectively in strike activity, the intervener union, SEIU-West, seeks freedom from the limits created by the *PSESA*. SEIU-West does not seek a positive entitlement to government action that would facilitate the union and its members exercise of the right to strike and the freedom of association.

55. As noted by the Supreme Court of Canada in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at paragraph 26, "it is because of the very nature of freedom that s. 2 generally imposes a negative obligation on the government and not a

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[28] Jamie Cameron, "The Labour Trilogy's Last Rites: *B.C. Health* and a Constitutional Right to Strike" (2009-2010) 15 C.L. & E.L.J. 297 at 309-310 (footnotes omitted).

positive obligation of protection or assistance." Of course, in some cases, a positive action by government is required to make possible the exercise of fundamental freedoms. However, a different and more rigorous test is applied to claims seeking a positive entitlement (in the form of access to a specific statutory regime, or other positive action from the government) required to facilitate or enable the exercise of fundamental freedoms.[29] In *Baier v. Alberta*, [2007] 2 S.C.R. 673, the analytical approach to postive rights claims was described as follows:

> *In Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, 2001 SCC 94, a majority of the Court found such an exception to the general rule that s. 2 does not require positive government action. Labour legislation excluding agricultural workers from a protective regime was found to infringe s. 2(d). Bastarache J., for the majority, considered the factors relevant to establishing an exception:*
>
> *(1) Claims of underinclusion should be grounded in fundamental Charter freedoms rather than in access to a particular statutory regime (para. 24).*
>
> *(2) The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a substantial interference with activity protected under s. 2 (para. 25), or that the purpose of the exclusion was to infringe such activity (paras. 31-33). The exercise of a fundamental freedom need not be impossible, but the claimant must seek more than a particular channel for exercising his or her fundamental freedoms (para. 25).*
>
> *(3) The state must be accountable for the inability to exercise the fundamental freedom: "[U]nderinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms" (para. 26).*

56. In order to succeed in a *Charter* challenge involving a positive rights claim, the claimant must be able to establish that the effect of lack of postive action by the government is "substantial interference" with the exercise of a fundamental freedom, or that the purpose of exclusion from a statutory scheme was to interfere with a fundamental freedom.

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[29] See *Baier v. Alberta*, [2007] 2 S.C.R. 673 at paras. 21-30.

57. In contrast, where a claim involves a negative obligation, rather than a postive obligation of protection or assistance, the "substantial interference" test is unnecessary and inappropriate.

58. In order to determine whether a postive or negative rights claim is being made, Rothstein J. writing for the majority in *Baier v. Alberta* at para. 35 set out the following question:

> *To determine whether a right claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity. Making the case for a negative right would require the appellants to seek freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement.*

59. In relation to the *PSESA*, no claim is made that the government must legislate in order that union members may exercise the right to strike in support of collective bargaining goals. Instead, the union seeks to be free from the restrictions and limits created by the *PSESA*, which suppresses the exercise of freedom of association by prohibiting (and empowering public employers to prohibit) union members from engaging in strike activity. This is a "negative rights" claim.

60. Therefore, a "substative interference" test does not apply in the analysis of whether the *PSESA* or sections thereof, limits freedom of association, by prohibiting a significant majority of the union's members from participating in strike activity in their collective pursuit of workplace-related goals.

What is the appropriate analytical approach?

61. In analyzing whether the *PSESA* violates Section 2(d) of the *Charter*, the union submits the primary question to be answered is whether the legislation and the application thereof precludes strike activity, in purpose or effect, because of the activity's

associational nature, and therefore discourages the collective pursuit of collective goals.[30]

62. In *B.C. Health Services*, the government conduct that gave rise to the *Charter* challenge unilaterally changed negotiated provisions of an existing public sector collective agreement, and prevented future negotiations on certain topics. In order to avoid the difficulty of wading into the substance of bargaining topics, and in recognition that the outcome would place postive obligations to bargain on the government, the majority of the court asked itself the following questions at paragraphs 111 and 112:

> *111 The question before us is whether particular provisions of the Act violate the procedural right to collective bargaining by significantly interfering with meaningful collective bargaining. In this context, examples of acts that may have such an impact are: failure to consult, refusal to bargain in good faith, taking important matters off the table and unilaterally nullifying negotiated terms.*
>
> *112 On the analysis proposed above, two questions suggest themselves. First, does the measure interfere with collective bargaining, in purpose or effect? Secondly, if the measure interferes with collective bargaining, is the impact, evaluated in terms of the matters affected and the process by which the measure was implemented, significant enough to substantially interfere with the associational right of collective bargaining, so as to breach the s. 2(d) right of freedom of association?*

63. Heneghan J. summarizes and analyses the analytical approach taken in *Fraser*, in the recent Federal Court decision *Meredith v. Canada (Attorney General)*, 2011 FC 735 at paras. 74-78:

> *74 The Supreme Court of Canada in Fraser adopted the approach to determining whether a subsection 2(d) breach has occurred, but did not apply the two-step test laid out in BC Health Services. Instead, the majority of the Supreme Court in Fraser reformulated the inquiry at para. 47, as follows:*
>
> > *[47] If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see*

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[30] See Jamie Cameron, "the Labour Trilogy's Last Rites" at 308.

Dunmore) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the Charter.

75 In the factual context of Fraser, the majority frames the test as follows, at paras. 98-99:

[98] The essential question is whether the AEPA makes meaningful association to achieve workplace goals effectively impossible, as was the case in Dunmore. If the AEPA process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer effectively impossible, then the exercise of the right to meaningful association guaranteed by s. 2(d) of the Charter will have been limited, and the law found to be unconstitutional in the absence of justification under s. 1 of the Charter. The onus is on the farm workers to establish that the AEPA interferes with their s. 2(d) right to associate in this way.

[99] As discussed above, the right of an employees association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(d) of the Charter, necessary to meaningful exercise of the right to free association. The question is whether the AEPA provides a process that satisfies this constitutional requirement.

76 In his submissions on Fraser, the Respondent repeatedly emphasized the word "impossible", arguing that it creates an overall threshold. In my opinion, the Respondent's focus in this regard is too narrow.

77 The word "impossible" must be taken in the context of other words such as "meaningfully" and "effectively", and the phrase "good faith". If legislation makes it possible for employees to make collective representations that are ineffective or not meaningful, or if representations are possible but government action demonstrates a lack of good faith, a breach of subsection 2(d) of the Charter will still have occurred.

78 In my opinion, the Supreme Court's use of the word of impossibility does not constitute a paramount consideration or a threshold. Rather, it is part of the overall test set out and applied in Fraser.

64. In *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, Bastarache J. writing for seven members of the Supreme Court, stated at para. 13:

In order to establish a violation of s. 2(d), the appellants must demonstrate, first, that such activities fall within the range of activities protected by s. 2(d) of the

Charter, and second, that the impugned legislation has, either in purpose or effect, interfered with these activities (see, in the s. 2(a) context, R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 331-36, and in the s. 2(b) context, Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 971).

65. The union submits that the Court in *Dunmore* formulated the basic questions that ought to be answered in a negative rights claim that freedom of association has been infringed. Since *Dunmore* was decided, the s.2(d) analytical approach has been formulated and tailored to the particular postive rights claims at issue in a number of ways, as outlined above. Where, as here, the *Charter* challenge is based on a straightfoward claim that the *PSESA* results in a direct restriction on associational activity, it is submitted that these subsequent variations on the basic formulation, responding to the concerns peculiar to postive rights claims, are not necessary.

66. Therefore, the union submits that the questions to be answered in determining the challenge to the constitutionality of the *PSESA* ought to be framed as follows: (1) does strike activity as part of a process of collective bargaining fall within the range of activities protected by s. 2(d) of the *Charter*? And (2) does the *PSESA* in purpose or effect interfere with the ability of the union and its members to engage in strike activity as a part of the process of collective bargaining?

Application of the Analytical Approach

67. In answer to the first question, and for the reasons set out in the first section of this analysis, SEIU-West submits that strike activity is an essential ingredient and necessary corollary of the collective bargaining process.

68. In answer to the second question, the *PSESA* interferes with the ability of the union and its members to engage in strike activity in the following ways.

69. SEIU-West submits that the *PSESA* gives a public employer the authority to prohibit some or all of the union's members employed by the employer from engaging in strike activity.

70. Section 6(2) of the Act gives the public employer the authority to determine which services the public employer considers to be essential. There is no mechanism contained within the Act itself for an impartial review of what services are essential, and

the union submits that this scheme undermines the collective bargaining process, by putting into the hands of the employer whether the union and its members can engage in strike activity in pursuit of their collective workplace goals.

71. In the context of federal essential services legislation that provides for an independent determination of which services are essential, it has been recognized that the definition of what services are essential is the cornerstone of the scheme and that from which everything flows.[31] The *PSESA* does not contain an effective nor meaningful definition of essential services.

72. SEIU-West asks the Court have reference to the numbers of workers deemed essential and the hours / shifts identified in the notices. The union submits that the health regions have attempted to use the provisions of the *PSESA* to require staffing levels that are higher in the case of a strike than the staffing levels the employer can consistently maintain in a non-job action environment.

73. Because s.9 of the *Act* allows the employer to unilaterally impose an essential services scheme if no agreement is reached, there is no motivation for the employer to engage in meaningful and good faith negotiations on this issue. The employer can also unilaterally increase the numbers and names of employees deemed to be essential after the original notice is served. Given the number of health regions, the number of employees in each of the health regions, and the number of classifications within the workplace, the process set out in the *Act* makes meaningful negotiations impossible given the timeframe within which the same must occur.

74. For the above reasons, SEIU-West submits that the legislative process for negotiating essential service agreements in unworkable. It is required to occur at a time that takes resources away from the collective bargaining process itself. The process under the *Act*, which took place over many months, did not result in agreements with any of the health regions employing SEIU-West members.

75. Further, in imposing the essential service schemes, the union submits that no consideration was given to the effect the essential services scheme on the union's and

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[31] See *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2011 FCA 143 at para. 33.

its members' ability to take or maintain strike activity in support of its collective bargaining goals.

76. The Act does not provide a mechanism within it for an impartial review of the services, names or classifications. It does provide a review of the numbers of employees deemed to be essential by the Labour Relations Board. However, given that the definition of the service itself is key to the issue of the numbers, the union submits that the review process is not workable. By giving the employer the control over defining the services that are essential, the employer maintains ultimate control over the numbers of employees and classifications and any review in the end proves meaningless In a complaint in relation to the *PSESA* to the ILO Committee of Freedom of Association, the committee requested that the legislation be amended to allow review by an independent body on the issues of names and classifications, as well as the minimum level of service required to deliver the essential service. [32]

77. The union says that the imposition of a unilateral essential services scheme under the *Act* had a significant and serious impact on the process of collective bargaining. As set out in the union's recital of facts, SAHO refused to provide the monetary proposal or information until it presented a "final offer". Further, there is a significant departure from previous rounds of bargaining and the effect of essential services legislation was dramatic. The public employer health regions that bargain collectively with SEIU-West did impose essential service schemes. In many cases, the numbers of employees named as essential in the final result exceeded the numbers initially proposed.

78. The employer defined such a high level of required essential services and named as essential, and thus prohibited from engaging in strike activity, as outlined above, such high proportions of the union's membership that a strike of the union's membership would not have put pressure on the employer. The union asks the Court have reference to the calculations of numbers of employees named as essential set forth in its recital of facts earlier set forth in this brief.

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[32] 356th Report of the Committee on Freedom of Association, Case No. 2654, *NUPGE et al. v. Canada*, at paras. 374-375.

79. Further, because of the high proportion of employees named as essential, and the strategic naming of those employees most needed to reduce the impact of the strike on the employer's ability to maintain operations, the right to take direct collective action by withholding labour as a part of the collective bargaining process was effectively removed.

80. SEIU-West submits that the provisions of the Act that allow the public employer to specify the names of employees required to work during a strike is a violation of the freedom of association of the named individuals, as well as of the union as a whole. In authorizing particular employees to be named and prohibited from engaging in strike activity (rather than setting up a system of rotating, or providing for some other non-employer driven system), the Act removes the ability of these individuals to participate in the associative act of withdrawing their services because of the collective nature of the activity. The strike activity is prohibited because it is done in association with others. Arguably, an employee named as essential could choose, as an individual, to quit during the course of a strike. However, if the reason for not being at work is shared in common with others in the union, and is in common pursuit of workplace related goals as part of the process of collective bargaining, then the activity is prohibited.

81. As a consequence of being named as essential, the employees named are prohibited under s.14 and 18 of the Act from temporarily withholding their labour in association with others. As such, the union submits that their individual freedom of association was infringed. The Act provides no right or entitlement to compensate for this infringement.

V. Relief Sought

82. Upon the above, SEIU-West submits an infringement the freedom of association guaranteed by s.2(d) and has been proven and seeks a declaration the *Public Service Essential Services Act,* or portions thereof, is or are in violation of the *Charter* and therefor is or are of no force or effect.

All of which is respectfully submitted.

Dated at Saskatoon, Saskatchewan, this 12th day of August, 2011.

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Per: _____

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VI. Authorities

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