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

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

BETWEEN:

THE SASKATCHEWAN FEDERATION OF LABOUR ET AL
(per attached Schedule A)

**PLAINTIFFS**

AND

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

**DEFENDANT**

AND:

SASKATCHEWAN UNION OF NURSES
CANADIAN UNION OF PUBLIC EMPLOYEES
SERVICE EMPLOYEES INTERNATIONAL UNION (WEST)
SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEESô UNION
CYPRESS REGIONAL HEALTH AUTHORITY
F1VE HILLS REGIONAL HEALTH AUTHORITY
HEARTLAND REGIONAL HEALTH AUTHORITY
PRINCE ALBERT PARKLAND REGIONAL HEALTH AUTHORITY
REGINA QU'APPELLE REGIONAL HEALTH AUTHORITY
SASKATOON REGIONAL HEALTH AUTHORITY
SUNRISE REGIONAL HEALTH AUTHORITY
SASKATCHEWAN ASSOCIATION OF RURAL MUNICIPALITIES
SASKATCHEWAN URBAN MUNICIPALITIES ASSOCIATION
CITY OF REGINA
CITY OF SASKATOON
UNIVERSITY OF REGINA
UNIVERSITY OF SASKATCHEWAN
SASKENERGY INCORPORATED
SASKATCHEWAN POWER CORPORATION

**INTERVENORS**

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**ARGUMENT OF THE PLAINTIFFS**
**SASKATCHEWAN FEDERATION OF LABOUR ET AL**

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**SCHEDULE A –PLAINTIFFS**

ADVANCED EMPLOYEESô ASSOCIATION AND ITS LOCALS 101 AND 102;

AMALGAMATED TRANSIT UNION, LOCAL 588;

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEESô UNION, LOCAL 397;

COMMUNICATIONS, ENERGY, AND PAPERWORKERSô UNION OF CANADA AND ITS LOCALS;

CONSTRUCTION AND GENERAL WORKERSô 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 US, ITS TERRITORIES AND CANADA AND ITS LOCALS 295, 300, 669;

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, 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 EMPLOYEESô UNION;

SASKATCHEWAN JOINT BOARD RETAIL, WHOLESALE AND DEPARTMENT STORE UNION;

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985;

UNITED MINE WORKERS OF AMERICA, LOCAL 7606;

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND ITS LOCALS;

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES/HOTEL EMPLOYEES, RESTAURANT EMPLOYEESô UNION LOCAL 41;

UNIVERSITY OF REGINA FACULTY ASSOCIATION;

LARRY HUBICH;

BOB BYMOEN;

GARRY HAMBLIN;

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

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## INTRODUCTION

1. On December 19, 2007, the newly elected Government of Saskatchewan announced two pieces of legislation which would fundamentally alter the balance of labour relations in the province and infringe the rights of workers. Bill 5, introduced as *An Act Respecting Essential Public Services* was passed as the *Public Service Essential Services Act*, SS 2008, c P-42.2 (the ñ*PSESA*ò) and Bill 6, introduced as an *Act to Amend the Trade Union Act*, was passed as the *Trade Union Amendment Act*, SS 2008, c 26 (the ñ*TUAA"*) *(*collectively the *"Bills").* The Bills were introduced without prior consultation and notice to the workers and unions who would be and were affected by their introduction and proclamation. The Bills were proclaimed and became law on May 14 2008, after cursory meetings with labour and employer representatives.

2. Many unions, organizations, and individuals, including the Plaintiffs, made comprehensive submissions to the Government in writing and in person. These submissions do not appear to have been considered by the Government as no discussion with the Plaintiffs occurred regarding the need for changes and no real alterations to the Bills were made, only minor changes to Bill 5. This input process did not meet the standard of consultation or negotiation to which unions and citizens are entitled when the Government seeks to amend the labour relations framework and infringe on fundamental freedoms of workers and the standards that the labour movement in Saskatchewan had come to know.

3. The *PSESA* imposed a legislated essential service regime across the public sector. Prior to striking, unions are required to commence negotiations on an essential service agreement with employers. However, if there is no agreement reached, employers are permitted to designate which employees are essential and required to work during labour disputes. Unions and individual workers may not challenge the essential services determined by the employer, job duties, job classifications, or individuals named as essential. Nor can unions ask that the employer consider that managers, other employees, replacement workers or volunteers be assigned to perform essential services

during a strike. The effect of the *PSESA* is to remove the freedom to strike as a way of exerting collective pressure on employers to conclude collective agreements.

4. In addition to explicitly overruling existing collective agreement and other agreements dealing with essential services, the *PSESA* effectively prohibits or prevents collective bargaining with respect to the continuation of essential services during job action, which, the record discloses, has been significant to both employers and unions in the past. Unions have provided essential services in past labour disputes prior to 2007 under a variety of models including negotiated essential service agreements with employers, evaluating employer requests for essential services, and voluntarily providing required essential services.

5. The *TUAA* altered the *Trade Union Act,* RSS 1978, c T-17 (the ñ*Trade Union Act*ò) in several ways, cumulatively rendering the organization, collective bargaining, and administration of trade unions more difficult. In particular card certification is removed and the requirement of mandatory votes in all certification applications is imposed, without a requirement for timely votes. Significantly, the *TUAA* relaxed the restrictions on employer speech, leading to a change in the labour relations climate and increased interference in bargaining and organizing drives. Following introduction of the *TUAA*, the certification success rate in Saskatchewan fell from 87% to 65%. Additionally a time limit is imposed on unfair labour practice complaints, the certification card validity period is reduced from six months to three months, the threshold application for certifications is increased from 25% to 45% support, and the collective agreement length limit of three years was removed, all of which create obstacles to organizing unions and to collective bargaining. The *TUAA* has impacted and reduced the level of unionization in Saskatchewan.

6. Cumulatively, the *PSESA* and *TUAA* have infringed the rights of unions and workers in order to benefit business interests and the Defendantôs stated desire to have an economic ñlevel playing fieldò in Saskatchewan.

## OVERVIEW OF ARGUMENT

7. The Plaintiffsô argument will review the history of trade unionism in Saskatchewan - demonstrating the importance of the freedoms of association, assembly and expression, which have accompanied the struggles of workers to unify and achieve better working and social conditions. The Plaintiffs will explain how unions have historically exercised their freedom to strike without jeopardizing life or safety or the health of citizens in Saskatchewan.

8. The Plaintiffs will review the process of organizing and exercising collective bargaining rights under the *Trade Union Act*. The Plaintiffs will review how the Government introduced the Bills as a package and how the combined Bills alter the labour relations framework in Saskatchewan, swinging the pendulum of labour policy towards management rights and business interests at the expense of workersô freedoms.

9. The Plaintiffs will review the lack of consultation prior to the introduction as well as prior to the proclamation of the Bills and the evidence of the good faith efforts of unions to seek such consultation from the government. While this lack of consultation is an aspect of Charter rights, it properly belongs for consideration under section one submissions and the Plaintiffs reserve their right to file their argument on this aspect upon receiving the Governmentôs submission defending the infringements of the *Charter* pursuant to their onus under section one of the *Charter*.

10. The Plaintiffs will also review a parallel complaint to the International Labour Organization (the ñILOò) Committee on Freedom of Association (the ñCFAò), which found that the Defendantôs actions breached international law. The Plaintiffs will review the affidavit evidence and cross-examination transcripts filed by the Plaintiffs, the Defendant, Unions and Intervenors, to illustrate how the Bills have harmed the rights of unions and workers from their introduction and continue to do so. Evidence demonstrating how the Bills infringe the freedoms of individuals and unions to organize, strike and bargain collectively will also be detailed.

11. The Plaintiffs will demonstrate how the Government has a positive obligation under international law and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the ñ*Charter*ò) to take positive steps to enact rights, and not eliminate rights, which facilitate the ability of unions and individuals to exercise these freedoms.

12. The Plaintiffs will review the application of the *Charter* and explain how fundamental freedoms are infringed by the *PSESA* and *TUAA* including the freedoms:

- to withhold oneôs labour (to strike) for a moment or forever if working conditions are not acceptable and to attempt to change social policy and political structures that impact oneôs working conditions [*Charter* s.2(b),(d), 7]
- to form associations for common purposes related to the above (the right to freely organize) [*Charter* s.2(d)]
- to act for common purpose (collective bargaining) regarding working conditions. [*Charter* s.2(b),(d)]
- to act for common purpose through the means we identify (all forms of assembly and expression). [*Charter* 2, (b),(c),(d)]
- to promote democratic ethos in structures and civil society. [*Charter* inherently and s. 2(d)]
- to defend and promote the concept of equality. [*Charter* inherently and s.15]
- to expect that our elected representatives not act in ways that affect these rights without prior and meaningful consultation before the introduction of laws (duty to consult) as reflected in the labour concept of collective bargaining with employers.

13. The Plaintiffsô argument will establish that a violation of sections 2, 7 or 15 of the *Charter* occurred with the passage of the *PSESA* and *TUAA*. Once an infringement is established, the remaining issue is whether such infringement can be justified under section 1 of the *Charter*. The onus is upon the Government to justify the *PSESA* and *TUAA* under section 1 of the *Charter*. The Plaintiffs will respond to the Governmentôs submission in reply.

## LABOUR HISTORY AND CONTEXT

14. The changes to the labour relations climate of Saskatchewan and the impact on the Plaintiffs brought by the *PSESA* and the *TUAA* cannot be fully appreciated and understood without reviewing the labour history of trade unionism and the role of unions of Saskatchewan. The extensive history of the struggles of the trade union movement is only summarized in this argument, but is thoroughly documented in the expert report of Dr. Lorne Brown.

> Canadian trade unionists in both the private and public sectors have long regarded free collective bargaining as a right not a privilege. Like democracy itself it was achieved after generations of struggle.
>
> [Affidavit of L. Brown, Ex B, page 73, para 145].

15. Dr. Brown details that workers have always acted together to pressure capital for recognition and for some form of collective bargaining, even before they were legal entities. The review of collective bargaining in Canadian labour history in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391, [*Health Services*] similarly reveals that, ñlong before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian societyò. [Affidavit of L. Brown, Ex B, page 36, para 41].

16. In England, throughout the 18th and 19th centuries, an era of labour relations characterized in *Health Services* as ôRepression of Workersô Organizationsô, ñthe law was used as a tool to limit workersô rights to unionizeò [Affidavit of L. Brown, Ex B, page 38, para 46]. Labour organizations were considered illegal under the common law of criminal conspiracy and restraint of trade. The *Combinations Acts* of 1799 and 1800 made it unlawful for ñtwo or more workers to combine in an attempt to increase their wages, lessen their hours of work or persuade anyone to leave or refuse workò [Affidavit of L. Brown, Ex B, page 38, para 47]. It was a criminal offence to be a member of a

trade union, to call a strike, or to contribute money for trade union purposesò [Affidavit of L .Brown, Ex B, pages 38-39, para 47].

17. As Europe and North America transitioned from an oligarchical political system to a more liberal democratic form of government, ñ[t]rade unions and democracy can be said to have evolved togetherò [Affidavit of L .Brown, Ex B, page 1, para 1]. During this time of political transition and repression of labour, ñpopular strugglesò led to ñgreat turmoilò [Affidavit of L. Brown, Ex B, page 3, para 7]. ñTrade unionists joined these struggles in efforts to improve social conditions and their own economic bargaining power but also to extend the legal rights of unions so they could become full participants in the body politic. These struggles led to universal suffrage.ò [Affidavit of L. Brown, Ex B, page 3, para 8].

18. Workers and their allies engaged in underground organizations, working class co-operatives and organized pressure groups to obtain these objectives. Their associational and expressive activities took several forms, including recognition strikes, sympathy strikes, demonstrations and protests.

19. Through several decades of struggle, and as the new Canadian economy took shape during the second half of the 19th century, unions gradually became a political constituency which exerted some influence within the major political parties. They were eventually legally recognized:

> The Canadian legislation of 1872 was an attempt to restore stability to a situation resulting from intense capital-labour conflict. The conflict began with a trade union drive to achieve the nine-hour day spearheaded by the Nine-Hour Movement and led by the Typographical Society of Toronto. The printers struck the major newspapers including the Globe which was owned by George Brown, a prominent Liberal leader. Brown led the employers in a bitter struggle which included the arrest of the printersô strike committee for operating a ñcombination in restraint of tradeò. This provoked great turmoil in the form of mass meetings and demonstrations which spread to other cities. Public support went far beyond the trade union movement.
>
> This legislation was a step forward for unions but they were still a long way from free trade unionism. While it was no longer illegal to belong to a union the balance of power was still overwhelmingly on the side of capital. Nothing

> compelled employers to recognize or deal with unions and trade unionists had no protection in law against reprisals for joining or being active in a union. And many union activities such as picketing remained illegal.
>
> [Affidavit of L. Brown, Ex B, page 5, paras 12-13]

20. This era was described as ñTolerance of Workersô Organizations and Collective Bargainingò in *Health Services*. Workers could no longer be brought up on criminal charges for belonging to a union, but ñemployers could simply ignore union demands and even refuse to hire union membersò. [Affidavit of L. Brown, Ex B, page 43, para 53].

21. Union organizing for unskilled workers in particular, ñrequired much agitation in the broader community and sometimes a resort to massive civil disobedience.ò [Affidavit of L. Brown, Ex B, page 6, para 14]. During the period after legalization until World War I, ñlabour gradually obtained more political reforms like the secret ballot and an expanded franchise and a number of Acts at the provincial level concerning health and safety conditions in factories, the exploitation of child labour and hours of workò. [Affidavit of L. Brown, Ex B, page 6, para 15].

22. By 1905, when Saskatchewan became a province, railroad brotherhoods and unions of skilled tradesmen in construction were well underway and enjoyed some favourable bargaining positions as the province established its infrastructure. This boom lasted until 1913 when a recession hit, unemployment peaked and social conditions deteriorated throughout the war years. [Affidavit of L. Brown, Ex B, pages 8-10, paras 19-25].

23. These conditions laid the groundwork for a period of industrial unrest and working class revolt following the war, with several general strikes occurring across Canada. The Winnipeg General Strike, the largest strike during this period, erupted in 1919 as workers demanded better wages and meaningful collective bargaining [Affidavit of L. Brown, Ex B, pages 10, 12-14, paras 26-28; 30-31]. The impact was felt well beyond Winnipeg, with sympathy strikes taking place in no less than ten Saskatchewan centres [Affidavit of L. Brown, Ex B, pages 15-17, paras 33-35]. This period of revolt

left a lasting legacy on the state of industrial relations ï a working class political consciousness was now undeniably part of the political economy. [Affidavit of L. Brown, Ex B, pages 17-18, para 37].

24. In Saskatchewan, this consciousness included a focus on issues facing women who worked for wages:

> Saskatchewan trade unions had made attempts to support other interest groups and broaden their base in the years before and during World War I and these would be continued in the 1920ôs. They supported passage of the provincial Factories Act of 1909 which regulated hours of work for women and prohibited employment of girls under 15 in factories. The TLC also joined the agitation for female suffrage which was achieved in Saskatchewan in 1916. They also agitated, along with womenôs organizations for the Minimum Wage Act of 1919 which covered women but excluded domestic servants who constituted nearly 40% of the female work force. The Regina TLC helped form a local of the Hotel and Restaurant Employees Alliance of America in 1918 which included women workers. That same year they supported an unsuccessful strike for union recognition by waiters and waitresses and an unsuccessful strike by mainly women telephone operators. They supported another strike of Saskatchewan restaurant employees in 1919 and by Moose Jaw teachers in 1921.
>
> [Affidavit of L. Brown, Ex B, page 19, para 39].

25. Trade unionists also worked with the Farmersô Union of Canada to campaign for the Wheat Pool, and later formed close political alliances with the United Farmers of Canada, ultimately leading to the formation of the Cooperative Commonwealth Federation ( the ñCCFò) [Affidavit of L. Brown, Ex B, pages 21-23, paras 43-48]. The CCF came about in response to the Great Depression, the staggering levels of unemployment and órelieféô camps, which were essentially slave camps. Trade unionists supported the struggles of the organized unemployed for relief rates and residency rules. Several demonstrations of the unemployed took place, at times turning into riots following police intervention, the most famous of which was the On-to-Ottawa Trek. [Affidavit of L. Brown, Ex B, pages 24-24, paras 50-54].

> The On-to-Ottawa Trek was stopped in Regina by the Bennett Government and ended in the Regina Riot of July 1, 1935 resulting in much property damage, many injuries, the death of one policeman and one trekker and many arrests

[Affidavit of L. Brown, Ex B, page 26, para 55].

26. The alliance of the unemployed and trade unionists was ultimately successful in pressuring the national government for a system of unemployment insurance and a more humane welfare system. [Affidavit of L. Brown, Ex B, pages 26-27, para 56].

27. The mining industry underwent a great deal of conflict in the Estevan area during this period, as workers struck to gain union recognition in the face of virulently anti-union mining companies and town vigilantes. Government and Royal Canadian Mounted Police (ñRCMPò) forces cracked down on a peaceful parade of miners and their families in Bienfait. Three miners were shot to death and many more were injured. Miners would not gain union recognition until 1944. [Affidavit of L. Brown, Ex B, pages 27-30, paras 57-61].

28. During this period, ñthe unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American *Wagner Act* model of legislationò, which passed in the United States in 1935 [*Health Services,* at para. 54]. The *Wagner Act*ôs purpose was to bring about some measure of industrial peace by compelling employers to recognize unions and to collectively bargain in good faith. It also purported to provide free choice for workers to choose their representatives and to enhance their bargaining power. The *Wagner Act* was designed to ñpromote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workersò, and to promote the idea of ñindustrial democracy ... providing for the workersô lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizensò [Affidavit of L. Brown, Ex B, page 44, para 57]. Employers could no longer easily fire or intimidate union organizers or members [Affidavit of L. Brown, Ex B, page, 31, para 64].

> The result was a great upsurge of successful union organizing throughout the industrial regions of the United States and the formation of the Congress of Industrial Organizations (CIO) as the most dynamic union federation in the country. These new developments would quickly have repercussions in Canada, including Saskatchewan. Though they still lacked the legal protections of their

> American counterparts Canadian trade unionists began organizing industrial unions and affiliating to the CIO. The big drive in Canada began at General Motors in Oshawa in 1937 and involved 4,000 workers. After a bitter struggle the union won a contract followed up by affiliation to the United Auto Workers (UAW). It was considered a breakthrough and was followed up by organizing drives in the steel, auto, electrical, mining and other industries. This led to many bitter industrial disputes, especially over union recognition, in the late 1930ôs and early 1940ôs. Working with little legal protection the unions lost many but not all of these battles.
>
> [Affidavit of L. Brown, Ex B, pages 31-32, para 65]

29. In 1938, Saskatchewan passed the *Freedom of Trade Unions Association Act*. It recognized the right of workers to form and join unions for the purposes of collective bargaining.

> It was a very modest step forward in that employers were still not required to recognize and bargain with unions but it did have some moral force in recognizing rights which unions had been attempting to practice for years.
>
> [Affidavit of L. Brown, Ex B, page 30, para 62]

30. Brown summarizes that, ñduring the period leading up to World War II, the political situation for organized labour improved slightly, partly because of the desperate struggles waged in the first half of the decade.ò [Affidavit of L. Brown, Ex B, page 30, para 62].

31. During WWII, bargaining was denied to unions under the *War Measures Act* and wage restraints and limits on the right to strike were imposed federally.

> The new situation led to a buildup of frustration among workers to the point where strikes, many of them ñwild catsò without union authorization, became more frequent and reached a peak in 1943 not seen since the labour uprising of 1919. These strikes were concentrated in manufacturing and hit many industries crucial to the war effort. The number of trade unionists in Canada had doubled between 1940 and 1944 and fully one third of them engaged in work stoppages in 1943. An important issue in many of the strikes was union recognition and the disruptions so threatened the war effort that the federal government was forced to step in to settle them and provide more stability to the industrial relations system.
>
> [Affidavit of L. Brown, Ex B, page 33, para 69]

32. This agitation would contribute significantly to the ópost-war compromiseô. As North America moved to a Keynesian economic model, government spending increased and the basic social safety nets of the welfare state, including unemployment insurance, pensions and family allowance were put into place. A focus was placed on putting more purchasing power into the hands of workers in order to stimulate the economy. Unions were a key political agent to bring about this stimulus. Labour peace became enough of a priority for capital that they were forced to agree to recognize collective bargaining, and labour, for its part, would be legally restricted to engaging in job action only upon expiry of collective agreements. [Affidavit of L. Brown, Ex B, pages 33-35, paras 70-72].

33. Thus in 1944, labour achieved greater legal protections in Saskatchewan with the passing of the *Trade Union Act* and other labour legislation.

> The Act recognized and guaranteed the right to strike and for the first time in Canada included government employees. It also prohibited unfair labour practices and especially during organization drives. The definition of union was also narrowed to exclude company unions and union security was provided by requiring compulsory dues check off thus anticipating the rand Formula ruling which came a year later.
>
> [Affidavit of L. Brown, Ex B, page 35, para 72]
>
> Organized labour managed to obtain additional concessions from the CCF government, many of which they had advocated for years. Many of these covered both organized and unorganized workers and in some cases were much more relevant to the latter. Labour representatives were added to the Minimum Wage Board and the level of minimum wages began to improve as did the Boardôs supervision of the Factory Act, the *One Day's Rest in Seven Act* and the *Weekly Half Holiday Act*. In 1947 the Board changed the maximum work week from forty-eight to forty-four hours. Legislation in 1944 provided for mandatory paid annual vacation of two weeks, increased in 1951 to three weeks for employees with five years experience. The Minimum Wage Board also directed that employees be granted eight statutory holidays annually with overtime pay for those who had to work on these days. There was a new Apprenticeship Act and improvements to Workersô Compensation. There was a new Equal Pay Act in 1952.
>
> [Affidavit of L. Brown, Ex B, page 36, para 76]

34. By the mid-1950ôs, union membership totalled about one-third of the population and workers focussed on bargaining pensions, health benefits and seniority rights and were able to make modest wage gains without the necessity of strikes. [Affidavit of L. Brown, Ex B, page 40, paras 84-85].

35. Unions, as always, were active in broader social issues, in particular in the political battle over the introduction of a universal medical care plan.

> Labour proved to be a reliable ally in a major social struggle and medicare was perhaps the single most important example of what has often been referred to as ósocial unionismô in action.
>
> [Affidavit of L .Brown, Ex B, page 40, para 82]

36. During this time, in 1956, the Saskatchewan Federation of Labour (ñSFLò) was born, with unions forming an umbrella organization to advance the principles, policies and resolutions of labour. The Constitution of the SFL contained several purposes, including:

> To promote the enactment of provincial legislation which will safeguard and extend free and unrestricted collective bargaining and to promote the passage of such other labour and social laws, which will provide for social security and welfare for all people.
>
> To protect and strengthen our democratic institutions, to secure full recognition and enjoyment of civil rights and liberties to which we are justly entitled, and to preserve and perpetuate what it describes as the cherished tradition of democracy.
>
> To preserve the independence of the labour movement from political control, to encourage workers to vote, to exercise their full rights and responsibilities of citizenship, and to perform their rightful part in the political life of the municipal, provincial and federal governments.
>
> To promote the cause of peace, bread and freedom throughout the world, and to work to that end with labour movements and peace groups in other countries.
>
> [Affidavit of L. Hubich #1, Ex A, page 2, para 6]

37. By the 1960ôs, labour conflict again exploded as workers fought for wages to keep pace with inflation. Public sector workers began to organize into unions in larger and larger numbers. There were many turning point strikes federally, including those

involving railway and postal workers. [Affidavit of L. Brown, Ex B, pages 42-44, paras 86-89].

38. In Saskatchewan, strike activity was curtailed by Ross Thatcherôs Bill 79, which amended the *Trade Union Act* to allow employers to contact workers during organizing drives (similar to Brad Wallôs Bill 6); and Bill 2, *The Essential Services Emergency Act* of 1966 (similar to Wallôs Bill 5). Bill 2 allowed government to legislate striking workers back to work if it could be demonstrated that a strike was a threat to public safety. [Affidavit of L .Brown, Ex B, page 44, paras 90-91].

> It could be applied to labour relations in public utilities, hospitals, nursing homes and similar institutions. Bill 2 was invoked to end strikes at a Prince Albert hospital and a Regina nursing home. Bill 2 was not used more frequently largely because strikes were rare in the Saskatchewan public sector in the late 1960ôs and the threat of invoking the Act was a discouragement in a sector which was not at that time especially militant in any event though there was some unrest over the fear among workers that their incomes might fall behind the rate of inflation. From 1967 the provincial government attempted to ensure that union contracts did not exceed 6% in the public sector with the sector defined to mean civil servants, crown corporations, teachers and others employed in educational, health and similar institutions. Generally the threat of withdrawal of government funding sufficed to discipline both employers and employees in school districts, educational institutions, hospitals and related institutions. There was at least one teachers strike for the first time in decades and the teachers in some units managed to exceed the guidelines without the invocation of Bill 2.
>
> [Affidavit of L. Brown, Ex B, pages 44-45, para 92]

39. The Government then attempted to impose 6% wage guidelines in the private sector, which resulted in major unrest in the construction industry, including a three-month strike by electricians and plumbers in 1970. Thatcher responded by amending Bill 2 to include construction disputes. [Affidavit of L .Brown, Ex B, page 46, paras 93-95].

40. The 1970ôs restored union rights when Allan Blakeney's NDP government repealed Bills 2 and 79. The Government improved the *Labour Standards Act*; implemented three weeks of annual vacation; legislated the 40-hour workweek; raised

minimum wages; and passed a new *Occupational Health and Safety Act* giving workers the right to refuse dangerous work. [Affidavit of L. Brown, Ex B, page 48, para 97].

41. Friendly relations did however begin to deteriorate as inflation steadily rose and public sector unions, in particular, became more militant. Nurses and government workers moved from associations to trade unions with full bargaining rights, which they exercised. Strikes were common and arose often over wages. [Affidavit of L .Brown, Ex B, page 49, para 98)].

42. Federal wage and price controls in 1975, and an accompanying provincial program to limit wage increases, radicalized workers across Canada.

> The imposition of controls provoked massive protests from trade unionists throughout the country in the form of massive rallies and demonstrations. Examples were four thousand trade unionists marching on the Saskatchewan Legislature in February 1976 and a massive rally of 35,000 on Parliament Hill in March. The protests reached their peak in a one day general strike on October 14, 1976 under the leadership of the CLC which they called the ñNational Day of Protestò. About one million mostly trade unionists left their jobs and the majority of them marched in the streets or attended protest rallies including 28,000 in seventeen different communities in Saskatchewan. Though it only lasted one day and was therefore symbolic it was by far the largest general strike and the only one to be nationwide in Canadian history. It was also a form of civil disobedience in that many of the individual strikes constituting the general strike were illegal.
>
> [Affidavit of L. Brown, Ex B, page 51, para 101]

43. Public sector unions grew notably more militant during this period.

> The largest and one of the longest was a province-wide strike by the Saskatchewan Government Employees Association in November, 1979 over wages, hours of work and other issues. This strike involved large mass meetings and protest demonstrations and the occupation by some union members of the offices of the Public Service Commission which bargains for the government.
>
> [Affidavit of L. Brown, Ex B, page 51, para 102]

44. The Blakeney Government, as other governments were increasingly doing across Canada, employed back-to-work legislation against 5,000 hospital workers. [Affidavit of L. Brown, Ex B, pages 53-54, paras 106-108].

45. The Blakeney Government was replaced by the Conservatives under Grant Devine in 1981. The 1980ôs were a difficult period economically in Saskatchewan due to high unemployment and inflation rates, combined with an agricultural depression. [Affidavit of L. Brown, Ex B, page 53, para 109].

> The new government began what was to be a "decade of discord" by announcing an approach to collective bargaining in the public sector known as the "Minus One Solution" which was a policy of restricting wage increases to a maximum of the rate of inflation minus one percent. This was followed up by financial cutbacks to the civil service and most of the public institutions of the province. In 1983 the government passed Bill 104 which made seventeen amendments, some of them far reaching, to the *Trade Union Act*. More employees were excluded from collective agreements by being designated managers. Previously if a union signed up 25% of employees at a work place the Labour Relations Board (LRB) was required to hold a certification vote. Now the decision to hold a vote was left totally to the discretion of the Board. More notice would have to be given before a strike and a second strike vote had to be held thirty days after the beginning of a walkout - an onerous task for unions like CUPE with over eighty locals scattered throughout the province. Employers could now "communicate" with employees during an organization drive which was frequently used as a means of intimidation.
>
> In addition to amendments to the *Trade Union Act* the personnel of the Labour Relations Board was altered so that Board interpretations of the Act became much more pro-management. They seldom prohibited "spin off" companies, a common tactic in the construction industry for nullifying collective agreements. Companies were allowed to unilaterally change wages and work hours at the expiration of a collective agreement and before a new one had been negotiated. The *Construction Industry Labour Relations Act* was repealed thus ending province wide bargaining and making collective agreements much more difficult to obtain. Under the new LRB certification orders dropped significantly and the unions won far fewer cases in disputes over alleged unfair labour practices.
>
> [Affidavit of L. Brown, Ex B, pages 56-57, paras 110-11].

46. This neo-conservative approach to the political economy clearly undid much of labour's progress from previous decades. The stateôs rolling back and limiting of union rights was now taking place in a post-*Charter* era. Back-to-work legislation was used against dairy workers in 1982. They challenged the Government under the *Charter* for violating their freedom of association; they prevailed at the Court of Appeal, but lost at

the Supreme Court of Canada. A few years later, the Devine Government legislated SGEU back to work.

> Apparently not wanting to risk another *Charter* case, the first one having not yet been settled by the Supreme Court, the legislation also invoked the 'notwithstanding' clause of the constitution. It was the first time it was used to limit union rights and only the second time it had ever been used by a provincial government for any purpose.
>
> [Affidavit of L. Brown, Ex B, pages 57-58, paras 112-14].

47. There were a couple of wildcat strikes during this time, including a bitter month-long recognition strike at the Heavy Oil Upgrader in Regina owned by Federated Co-operatives. [Affidavit of L. Brown, Ex B, pages 58-59, para 116].

> There were relatively few instances of wildcat strikes, civil disobedience and violent confrontations during the major struggles by trade unionists in the 1980ôs. What was much more common was a broadening and deepening of a social unionism which had roots in the past but became more important during this era. Political allies were readily available as larger numbers of people became alienated from the policies of the provincial government. One form this outreach took was the establishment by the SFL of unemployed centres to assist the unemployed in obtaining unemployment insurance, social assistance, retraining and re-entry into the job market. The trade unions were also an integral part of widespread political protest from a great diversity of popular groups. These took the form of briefs presented to all levels of government, petitions, public demonstrations, research and publicity around economic and social problems. Among their public manifestations was what some estimate to be the largest demonstration in the history of the province when about 8,000 people demonstrated in front of the legislature on June 20, 1987.
>
> [Affidavit of L. Brown, Ex B, page 59, para 117].

48. What began as disparate groups and protests eventually coalesced in a more purposeful manner. This led to the founding of the Saskatchewan Coalition for Social Justice (SCSJ), which was created in 1987 by representatives from over 50 organizations from many sectors of the population including farmers, churches, disabled personsô associations, educators, health activists, trade unionists, Aboriginal peoples, students, seniors, women and a myriad of community groups. The SCSJ would meet at annual conferences and at its peak included approximately 80 affiliated organizations with local coalitions active in five cities. The trade unions helped finance the Coalition and

provided organizational assistance. [Affidavit of L. Brown, Ex B, pages 59-60, para. 118].

49. The 1990ôs saw the election of an NDP Government under Roy Romanow, which adopted a neoliberal approach to governing, not much different from its Conservative predecessors. The public sector shrank and government focussed on reducing deficits. Wage guidelines for public sector workers included freezes of 0%, and nominal increases of 1% and 2%. This wage guideline spread to Crown Corporations, municipalities, educational and health institutions. [Affidavit of L. Brown, Ex B, page 62, paras 124-31].

> The Romanow government was very slow about making amendments to the *Trade Union Act* and the *Labour Standards Act* and did not do so until 1994 after much pressure including public demonstrations by the trade unions.

[Affidavit of L. Brown, Ex B, page 63, para 126]

50. The construction industry unions struggled to recover from the decimation of the prior decade. Unfortunately, the Romanow Governmentôs Crown Construction Tendering Agreement only guaranteed that jobs of a certain size would be union, and its ófair wage policyô was not properly enforced. [Affidavit of L. Brown, Ex B, pages 64-65, paras 128-30].

51. Unions responded to the wage restraints by looking for minor concessions on hours of work, pensions and equity pay adjustments in lieu of salary increases [Affidavit of L .Brown, Ex B, page 66, para 132]. A major strike of civic workers turned into a lockout, and a SaskTel strike of 3,600 workers did not succeed in overturning the wage guidelines. Workers at SaskEnergy were locked out and legislated back to work [Affidavit of L. Brown, Ex B, pages 66-67, paras 132-34]. In this instance, the ILO found the government guilty of violating the workersô freedom of association but no domestic legal action was taken, as described below.

52. The Saskatchewan Union of Nurses (ñSUNò) was able to break the wage restraints in 1999. They struck, were legislated back to work a few hours later, and stayed out illegally for another 11 days. Although the nurses faced stiff fines for

disobeying the law, they were able to gain public support since the civil disobedience was seen as necessary in order to deal with the nursing shortage and to call attention to a medicare system in need of urgent improvements. [Affidavit of L. Brown, Ex B, pages 67-68, paras 136-37].

**The Role of Unions in Saskatchewan**

53. As detailed in the affidavit of Don Anderson, medicare is just one example of how unions have been political actors making Saskatchewan society better for the people. Since the formation of the SFL, now an umbrella group for 37 trade unions in the province, this outreach to the broader social justice community has continued. The SFL develops policies, committees, conferences, educationals, position papers, briefs and presentations on a wide range of issues important to Saskatchewan citizens. Just a few of these issues include: environmental sustainability, rural life, taxation and the economy, public healthcare, trade policy, social justice, Crown Corporations, democracy, equity issues and womenôs rights. These efforts are above and beyond the typical focus on workersô issues such as minimum wage, minimum age, pensions, literacy, occupational health and safety and labour rights.

54. Through the SFL, unions have lobbied governments, presented briefs to Standing Committees and planned rallies and protests.

> It (the SFL) also works on campaigns and on the development of public policy with other community groups on issues such as racism, homophobia, womenôs rights, human rights, poverty, fair trade, and peace, either as part of the work of a committee, or when the SFL becomes involved in a particular issue.
>
> [Affidavit of D. Anderson, page 13, para 52].

55. One significant role the SFL plays is to distribute newsletters, campaign information and financial appeals of numerous community organizations to its over 700 locals. Trade unions in Saskatchewan have formed strong partnerships with anti-poverty advocates, as detailed in Bonnie Mortonôs affidavit. Joint activities include lobbying, rallying, education and advocacy. Trade unions provide significant financial support to

organizations that represent and advocate for those living in poverty. [Affidavit of B. Morton, pages 4-6, paras 17-28].

56. Social unionism has been a defining quality of Saskatchewan trade unions [Brown, Anderson and Morton], and as Brown has clearly demonstrated, trade unions and democracy have evolved together.

57. The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the US, its Territories and Canada (ñIATSEò) operates an apprenticeship program, put on through the local unions in Saskatchewan. IATSE recruits members from the universities and regional colleges and encourage them to join the local and take the apprenticeship program. Once they are trained, they are encouraged to make application to the local to have their tuition reimbursed. IATSE also provides on-the-job mentoring. Employers encourage this method of training and method of supplying skilled labour. These methods of training teach safe work practices to workers. Employers contribute financial support to IATSE for these programs [Affidavit of B. Haines, para 12]

***Building Trades Council***

58. Unions, such as the Saskatchewan Building Trades Council (the ñCouncilò), play a vital role in the economy beyond the immediate financial concerns of their members. Unions meet the social needs of their members , provide for training and long term work opportunities for their members, ensure a trained workforce for the province, and advocate for safety issues.

59. Building Trade Unions, play an essential role in supporting members to keep profession turnaround low at the same time as fostering pride in the profession and quality workmanship. The Council's training program is administered through the Saskatchewan Institute of Applied Science and Technology ("SIAST'). Additionally, the unions offer 96 separate training programs and upgrades specific to the building trades such as safety training or training specific to new technologies, equipment and machinery. The Councilôs Joint Training Committee (the "JTC") oversees a training co-

ordinator who is in charge of time-tracking and the dispatch of approximately 350 apprentices. This service ensures consistent, productive, safe and quality work in addition to saving the employer time and money. [Affidavit of R. Nichols #1, para 9-13]

60. The Council has developed an Employee Family Assistance Program and a bereavement leave policy that is shared with the Building Trade Unions. The Employee Family Assistance Program provides access to counseling and support for workers requiring support for emotional, psychological, health, and addiction issues. The Council also represents members as a collective by pooling resources, negotiating as a group and providing the ability to speak with one voice on issues important to all members and the Building Trade Unions. The Council has the ability to provide a voice for members and provided the services because it can pool the resources of all members. Most employers or individual Building Trade Unions do not have the resources to provide these extensive services nor would the Council if there was a significant drop in membership. [Affidavit of R. Nichols #1, para 14-16]

61. The Council speaks as a collective to the media on issues which are important. It represents members' and Building Trade Unions' collective interests to the legislature and in the media on issues which affect their working and non-working lives. This can range from serious and quickly emerging workplace issues, such as occupational health and safety legislation and regulations, to legislative measures which affect members and their families. The Council not only develops and supports programs relevant to their members and the community but also assists employers. The services provided help supplement employer efforts and reduce employer expense. Theprograms have evolved to meet the needs of an industry with short-term projects and inconsistent demand. [Affidavit of R. Nichols #1, para 17-19] [Affidavit of T. Parker, para 11,12]

62. The affiliates of the Council provide training programs including apprenticeship skill development to upgrade and keep current the skills necessary for employment with employers; specialized training for new technology, equipment and machinery; and other trade specific training necessary to meet the needs of employers that are not

offered by postsecondary and trades educational institutions. [Affidavit of T. Parker, para 9-10]

**Essential Services Pre-*Bill 5***

63. Prior to the introduction of Bill 5, labour unions exercised their limited freedom to strike in a responsible manner. While the purpose of strikes is to impose economic harm on employers in order to place pressure to conclude a collective agreement, strikes are inherently inconvenient. Unions in Saskatchewan have historically taken steps to ensure that public safety was not at risk during job action, including during employer lockouts. The Plaintiffs stress, that 96% of public sector collective agreements in Saskatchewan for the 20 years preceding the introduction of Bill 5, were settled without job action. [Affidavit of L. Hubich #3, Ex F, page 27].

64. The Intervenor Unions to this action, SUN, the Service Employees International Union- West (ñSEIU-Westò) and the Canadian Union of Public Employees (ñCUPEò), have provided extensive affidavit evidence setting out their provision of essential services during labour disputes and detail that evidence in their submissions as Intervenors in this action.

**SGEU**

65. The Saskatchewan Government and General Employeesô Union (the ñSGEUò) has approximately 20,000 members employed in six sectors: public servants employed by the Provincial government (the Public Service/General Employees or ñPS/GEò Bargaining Unit), healthcare, Crown Corporations, post-secondary education, retail-regulatory including provincial liquor stores, and community-based organizations. [Affidavit of R Bymoen, para 2].

66. Prior to the enactment of the *PSESA*, SGEU had voluntarily agreed to provide essential or emergency services during strike action. The record indicates that during strikes in 1985-1986, 1993 and 2006-2007 (para 5), SGEU always ensured that essential and emergency services were maintained in order to preserve public safety, including

snow and ice removal on highways and airports, and healthcare and corrections services as set out in the following paragraphs. [Affidavit of R. Bymoen paras 5-7, 11].

67. During a 1999 strike by an SGEU health sector bargaining unit, the union honoured an informal agreement with the employer to provide for the continuation of sufficient staffing to ensure there was no serious risk of harm to the public and clients as a result of the withdrawal of services. [Affidavit of A. Yaremy, paras 4-5; Affidavit of B.Erickson, paras 18, 20, 22]. According to the Affidavit of A. Yaremy, ñ[i]t was agreed that if a particular employee was needed for an emergency, the SGEU strike coordinator would be called to contact that individual and give them permission to cross the picket line and return to work.ò [Affidavit of A. Yaremy, para 4; see also the Affidavit of B. Erickson, para 200]. In accordance with this agreement, during the 1999 health strike, SGEU members voluntarily provided essential services including a Laboratory Technician, three members in the Nursing Home Alzheimer Unit, an Occupational Physical Therapy Assistant and a special care aide. [Affidavit of A. Yaremy, para 5; Affidavit of B. Erickson, paras 19-20, 22].

68. During the 2006-2007 PS/GE strike, which took place in the months of December and January, SGEU voluntarily committed to keep members on the job in provincial liquor stores and in highways maintenance during the holiday season. [Affidavit of J. Rattray, paras 7, 8, 18, 19].

69. During the 2006-2007 PS/GE strike, SGEU agreed to maintain services in classifications historically staffed during labour disputes to maintain public safety, including highways workers engaged in rural airport maintenance, the Prairie Diagnostic Centre, and the Provincial Lab. [Affidavit of R. Bymoen, paras 15-16, 19 and Affidavit of D. Zerr, paras 23-34, Ex I].

70. During the 2006-2007 PS/GE strike, SGEU agreed to return to active duty members employed in highways maintenance, the day after a severe winter storm struck and the employerôs contingency replacement workers were unable to maintain service at a level that would protect public safety [Affidavit of R. Bymoen, para 22, 23, 24;

Affidavit of J. Rattray, para 23]. After a second winter storm hit the following day, SGEU committed to keep highways workers on the job for the duration of bargaining [Affidavit of J. Rattray, para 23, Ex A, page 101, 104,].

71. The Affidavit of Donald Zerr, the former Director of Labour Relations for the Saskatchewan Public Service Commission, confirms that during past job actions, ñSGEU has informally committed to assist in case of emergency.ò [Affidavit of D. Zerr para 22].

72. SGEUôs historical approach to the provision of essential or emergency services during job action is demonstrated through its historical strike manuals, which have, at least since 1977, recognized and affirmed SGEU membersô commitment to provide, in advance, for the continuation of essential services as set out in the following paragraphs.

73. SGEUôs 1977 strike manual specifically recognizes that in-scope employees ñmust cross picket lines by virtue of their positions being defined as essentialò [Affidavit of R. Bymoen, para 6, Ex B, page 2.4] and provides that ñthe question of essential services is to be left with the individual branches to determine the number of employees required to provide such essential servicesò. [Affidavit of R. Bymoen, Ex B, page 2.3]

74. SGEUôs 1981 strike policy provided: ñunits should establish a policy, prior to strike action, regarding emergency or essential services.ò [Affidavit of R. Bymoen, para. 7, Ex C].

75. SGEUôs 1985 strike manual similarly provided: ñBargaining units should establish a policy, prior to strike action, regarding emergency or essential services.ò [Affidavit of R. Bymoen, para 8, Ex D].

76. Over the years, SGEUôs approach to essential services has become increasingly sophisticated. In addition to recognizing that some in-scope positions are essential in the sense that they are required to be operational during a strike, SGEUôs strike manuals contain provisions providing for the resolution of disputes respecting essential services, the unionôs designation of individual members, discussion with the employer respecting

essential services, and union monitoring of the provision of essential services to ensure that struck work is not performed by essential services workers.

77. Thus, SGEUôs 1993 strike manual included the following terms:

> Our collective agreement commits us to discuss the provision of emergency and essential services during the period of issuing strike notice and the commencement of the strike action. (p 38)
>
> The union will designate the individual members required to fill positions providing essential or emergency services.
>
> The union will have the right to carry out on-site inspections during the strike to ensure that only essential or emergency services are being provided. Any unresolved essential or emergency services issues are referred to the (Industrial Regulations Council) for final resolution.
>
> [Affidavit of R. Bymoen, para 9, Ex E].

78. SGEUôs 2006 strike manual, which was in effect during the 2006-2007 PS/GE strike, contains similar provisions:

> Prior to strike action, bargaining units shall establish a policy regarding emergency or essential services. In accordance with individual collective agreements, discussions will take place regarding these services. The union will then designate the individual members required to fill positions providing essential or emergency services. The union will also have the right to carry out on-site inspections during the strike to ensure that only essential or emergency services are being provided. Any unresolved or emergency service issues are referred to the negotiating committee for final resolution.
>
> [Affidavit of R. Bymoen, para 10, Ex F].

79. Additionally, in its only collective agreements with a private sector employer, Prairie Regeneration Technologies, SGEU agreed to an ñemergency servicesò provision that provides for the negotiation of an agreement to provide ñemergency servicesò during any job action. The Article includes a dispute resolution provision and requires that an essential services agreement be concluded prior to, and remain in effect during, a strike:

2.8 Emergency Services

The parties recognize that, in the event of a strike or lockout as defined in the relevant legislation, situations may arise of an emergency nature. To this end, the Employer and the union will agree to provide services of an emergency nature. The Parties will meet and attempt to agree to an emergency services plan of maintaining the nursery crop throughout the strike or lockout. Failing agreement, Dan Ish or in his absence Gord Kuski, will be appointed to assist the Parties, and, if necessary, to make binding recommendations

The Parties agree that the emergency services plan will be established by agreement or by binding recommendation of the mediator prior to the commencement of a strike or lockout.

The Parties further agree that the emergency services plan will be binding for the duration of the dispute.

[Affidavit of R. Bymoen, para 3, Ex A].

80. Finally, and most significantly, it must be noted that at the time the *PSESA* was introduced and passed, SGEUôs Public Service/Government Employees bargaining unit had agreed with the Defendant, in a Memorandum of Settlement that ended the 2006-2007 public service strike and formed the terms of the partiesô renewal collective agreement, to participate in an assisted negotiation process to set the terms for the provision of essential services during any future job action. The process provided for mediation-arbitration if the parties did not agree. At the time the *PSESA* was introduced, the parties had been engaged in fairly extensive negotiations for several months with the Defendant pursuant to this agreement, and they continued to participate in the negotiated process after the passage of the *PSESA*. Ultimately the product of this process ï a mediation-arbitration award designating certain services essential ï was supplanted by Regulations the Defendant enacted days after the award was issued (Affidavit of Barry Nowoselsky, at paras. 6, 8,9,10,11,12,13,15,16,18, 19, 20, 21, 25, 28; Affidavit of D. Zerr, paras 34, 36, 37, 42 )

**HSAS**

81. Health Sciences Association of Saskatchewan (ñHSASò) represents healthcare professionals in Saskatchewan, in all of the health regions, including pharmacists and

respiratory therapists. HSAS has had two strikes prior to the introduction of Bill 5, in 2002 and 2007 respectively. The 2002 strike lasted 28 days, starting as rotating strikes and escalating to a full strike. [Affidavit of C. Driol, paras 13, 16-18].

82. HSAS has provided essential services during strike action prior to the introduction of Bill 5 because it is a requirement under the unionôs constitution. [Cross Examination of C. Driol, page 29, lines 20-242]

83. During the 2002 strike, HSAS provided notice to the employers of the services it would provide during a strike. Pursuant to that notice, HSAS responded to requests for essential services from employers by evaluating the request and providing essential services if HSAS determined that the requested service was necessary. There was no danger to life, health or safety during this strike. [Affidavit of C. Driol, paras 19-21]. [Cross Examination of C. Driol, page 47, lines 4-9]

84. As explained by Chris Driol, the HSAS had a process and criteria for evaluating essential services requests from employers which provided that a request could be refused if there was another person available to perform the task:

> If the request was not on the list of essential services that had been delineated in the letters you referenced in B, our essential services coordinator would discuss the request with a member of the discipline that was being requested, be it respiratory therapy, clinical perfusion, pharmacy, physiotherapy, whatever it might be, and evaluate the urgency of that request. In some cases it was clear that another staff would be able to handle that request, either an out-of-scope manager, or in some cases nursing staff regularly perform that service, and so they might be, it might be decided that they could do that job, and in those cases occasionally we would not perform the requested service.
>
> [Cross Examination of C. Driol, page 10, line 14 to page 11, line 5]

85. The HSAS advised health authorities prior to strike action in 2002 of how the HSAS would evaluate essential service requests from employers and set out which essential services it would continue to provide, such as perfusionists, respiratory therapists, cardio-pulmonary physical therapists, anaesthesia assistants and rural EMS members. HSAS also provided a dedicated essential services phone number, as well as

cell and home phone numbers of the HSAS essential services coordinator. [Affidavit of C. Driol, Ex. B]

86. The HSAS contacted health authorities prior to strike action in 2007 to seek their input on what the health authorities considered to be essential services. The HSAS and the Saskatoon Health Authority and Regina QuôAppelle Health Regions reached a negotiated agreement as to the essential services to be provided in the event of a strike and the numbers of employees required to work or be on call, such as pharmacists and respiration therapists. [Affidavit of C. Driol, para 26, 27]

87. For the other health regions, the HSAS set out which essential services it would continue to provide, such as perfusionists, respiratory therapists, physical therapists, anaesthesia assistants, and pharmacy. HSAS also provided a dedicated essential service phone number, as well as cell and home phone numbers of the HSAS essential services coordinator. [Affidavit of C. Driol, Ex. G]

88. The July 2007 strike, was limited to 29 members withdrawing their services. Prior to this strike, HSAS requested that employers provide a list of services that they deemed to be essential. Many health authorities reached a consensus with HSAS on which services were in fact essential. There is no evidence of any patient harm, although some surgeries were cancelled, despite HSAS advising the Saskatchewan Association of Health Organizations (ñSAHOò) that it would provide post-operative services. A collective agreement was reached with only 150 person days lost due to the limited strike and no risk to the public. [Affidavit of C. Driol, paras 26-37].IBEW, Local 2067

89. The International Brotherhood of Electrical Workers, Local 2067 (ñIBEWò), represents employees working at SaskPower. In 1975, the IBEW went on strike, for two days, advising the Government that it would provide services during the strike if there was a danger to life or limb. During a blizzard, the IBEW voluntarily provided approximately 200 workers to perform essential services. [Affidavit of G. Lewendon, para 2].

90. The Government passed legislation providing for binding arbitration to resolve the matters in dispute when it removed IBEWôs right to strike. [Affidavit of G. Lewendon, para 4].

91. In 1976, the IBEW went on strike for two days, again advising the Government that it would provide services during the strike if there was a danger to life or limb. The strike occurred during the summer and there was no cause for essential services to be provided by the IBEW. The strike ended with a bargained collective agreement. [Affidavit of G. Lewendon, para 5].

92. During the 1998 lockout, IBEW backed job action by withdrawing non-emergency overtime and call out which did not threaten health or safety. In response, SaskPower locked out employees. The IBEW instructed approximately 700 employees to remain available for emergency work, which they did during a Thanksgiving weekend snowstorm. [Affidavit of G. Lewendon, para 10].

93. In 1998, the Government legislated the IBEW back to work and removed the right to strike without consultation or binding arbitration as had been the case in 1975. The IBEW filed a complaint with the International Labour Organization and received a ruling that the Government had breached the principles of International Law. [Affidavit of G. Lewendon, paras 11-13].

**CEP**

94. The Communications, Energy, and Paperworkers Union (ñCEPò) represents employees working at SaskTel, the Crown Corporation providing telecommunications services in Saskatchewan. During job actions prior to 2000, CEP members withdrew their services during strikes and slowdowns on at least four occasions. At all times during job actions, the CEP ensured that there were workers to provide telephone operations to hospitals, fire, ambulance and police services. [Affidavit of R. Carlson, paras 7-8].

95. CEP established the Union Emergency Services Committee, which evaluated requests for essential services during job action reviewing requests and provided essential services when necessary. The structureôs process allowed for Union review of the Committeeôs decisions at the Employerôs request. During these strikes, there was no danger to health, life or safety nor was there damage to the environment or deterioration of machinery. [Affidavit of R. Carlson, paras 9-13].

**IAFF**

96. The International Association of Firefighters provides fire protection services for many municipalities in Saskatchewan. Under the *Fire Departments Platoon Act*, 1978 RSS, c F-14 the unions may, if they adopt no-strike clauses in their constitutions, have access to interest arbitration to resolve collective bargaining disputes. Because of the availability of an impartial and fair means of resolving disputes, the firefighters are able to provide essential services to the public while retaining the ability to effectively bargain collectively. [Affidavit of G. Huget, paras 7-15].

**CUPE, Local 7**

97. In 2005, the City of Regina City Hall Administrative Staff Association, CUPE Local 7 engaged in a work stoppage consisting of a walk out, work to rule, overtime ban, and refusal to perform certain duties. CUPE delayed engaging in job action previously so as not to disrupt the Canada Summer Games, which were occurring in Regina. During the strike, CUPE committed to providing essential services, but none were requested and there was no danger to health or safety during the work stoppage. [Affidavit of M. Meickel #1, paras 68-70].

**Legislative Intervention in Labour Disputes**

98. During the past 40 years, the Defendant has intervened in free collective bargaining disputes on approximately 10 occasions, based on the justification of requiring essential services. The history of labour disputes in Saskatchewan does not demonstrate a pattern of need for Government intervention. However, in almost every

case when the Defendant has removed the right of unions to strike, the *quid pro quo* has been binding arbitration or mandatory mediation to resolve collective bargaining impasses.

99. The following are the situations since 1976 in which the Government has intervened in labour disputes. The pattern has been largely for the Government, when it deems it necessary to impose back to work legislation, to also impose binding arbitration or some other remedy to fairly resolve outstanding issues in recognition of taking away the right to strike.

***The Maintenance of Operations of Saskatchewan Power Corporation Act, 1975*, SS 1974-75, c 28**

100. This legislation ended job action by the electrical workers of SaskPower and continued the expired collective agreement. Sections 8 and 9 provided a process whereby the union and employer were required to submit outstanding matters from the dispute to final and binding arbitration to a district court judge.

***The Maintenance of Operations of Dairy Producers Co-operative Limited and Palm Dairies Limited Act*, SS 1979-80, c M-1.1**

101. This legislation ended job action by dairy workers and two named dairies. It extended the expired collective agreement with set wage increases and sections 8 and 9 provided a process whereby the union and employer were required to submit outstanding matters from the dispute to final and binding arbitration to an arbitrator appointed by the Minister of Labour.

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

102. This legislation ended job action by any trade union during the period of a provincial election, which arose during a CUPE strike in the healthcare sector. It permitted the Government to designate a labour dispute as a matter of pressing public importance or one which created a situation that endangered or might endanger the

health or safety of any person in the province and require any job action to cease until the end of the election period.

***The Cancer-Foundation (Maintenance of Operations) Act*, SS 1982-83, c C-2.11**

103. This legislation ended a labour dispute between the SGEU and the Saskatchewan Cancer Foundation. Sections 8 to 10 provided a process whereby the union and employer were required to submit outstanding matters from the dispute to final and binding arbitration to a Court of Queenôs Bench Judge.

***The Dairy Workers (Maintenance of Operations) Act*, SS 1983-84, c D-1.1**

104. This legislation pre-empted anticipated job action by dairy workers. While taking away the right to strike, it established, in sections 8 to 10, a mechanism for final and binding arbitration on outstanding matters. As discussed below in the argument on the application of section 2(d), the Saskatchewan Court of Appeal found that the Act violated the *Charter*, although that finding was overturned by the Supreme Court of Canada.

***The SGEU Dispute Settlement Act*, SS 1984-85-86, c 111**

105. This legislation ended a strike by the SGEU by taking the extraordinary step of imposing a collective agreement attached as a schedule to the legislation. Section 9(1) of the Act invoked section 33 of the *Charter*, out of a concern that an imposed collective agreement might breach the freedom of association.

> Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, this Act is declared to operate notwithstanding the freedom of association in paragraph 2(d) of the *Canadian Charter of Rights and Freedoms*.
>
> S. 9.1 *SGEU Dispute Settlement Act*

***The University of Saskatchewan (Resumption of Instruction, Teaching and Examinations) Act*, SS 1988-89, c U-7.1**

106. This legislation imposed a cooling off period during a labour dispute at the University of Saskatchewan with the University of Saskatchewan Faculty Association for a fixed period of time, requiring the parties to suspend job action, appoint a mediator, and cooperate with the mediator in resolving outstanding disputes.

***The Regina Police Services (Continuation of Services) Act*, SS 1988-89, c 4**

107. This legislation ended a labour dispute between the City of Regina and the Regina Police Association and appointed a named arbitrator, paid for by the Government, to conduct final and binding arbitration in respect of outstanding issues per sections 8 and 9.

***The Maintenance of Saskatchewan Power Corporation's Operations Act, 1998*, SS 1998, c M-1.2**

108. As discussed above, this legislation ended a labour dispute, both strike and lockout activity, by imposing a three-year collective agreement with set wage increases per section 7. The legislation did permit the parties to vary or alter the collective agreement, but also prohibited the union from taking any strike action and did not include any arbitration mechanism to resolve wage disputes. This Act was found by the ILO to have violated Canadaôs international law obligations. [Affidavit of G. Lewedon, Ex C].

***The Resumption of Services (Nurses - SUN) Act*, SS 1999, c R-22.001**

109. This legislation ended a labour dispute in the healthcare sector involving the SUN by imposing a three-year collective agreement which set wage increases per section 7. The legislation did permit the parties to vary or alter the collective agreement, but also prohibited the union from taking any strike action and did not include any arbitration mechanism to resolve wage disputes.

110. As the history above demonstrates, the Plaintiffs have provided essential services in the past with limited strikes and without risk to the public. More significantly, the history of legislating workers back to work clearly indicates that the Defendant has, in almost every case, allowed for binding arbitration or other resolution when imposing a return to work and eliminated the ability of workers to continue to strike.

111. In two of the three exceptions where no provision for arbitration to resolve disputes existed, the Government expressly declared that the legislation would operate notwithstanding the *Charter* (*The SGEU Dispute Settlement Act*) or it was found to have violated international law by the ILO CFA (*The Maintenance of Saskatchewan Power Corporation's Operations Act*).

112. The history and context of essential services is important to appreciate in the context of the consultation and development of Bill 5. At a minimum, the historical experience of imposed collective agreements in Saskatchewan eliminating the right to strike demonstrates that final and binding interest arbitration was recognized as a historical compensatory measure.

**Consultation in Previous *Trade Union Act* Amendments**

113. The past practice of the Defendant and the Plaintiff SFL was to meet regularly with Government representatives on labour issues. [Affidavit of L. Hubich #1, page 4, para 16; Affidavit of D. Anderson, page 7, para 24].

114. One such example of the legitimate expectation of the Plaintiffs to be consulted prior to the introduction of legislation which would affect their rights occurred in 1993 when the Defendant sought to amend the *Trade Union Act*. The Defendant commissioned a report from a committee with a representative of business, Michael Carr; a representative of labour, Hugh Wagner; and a neutral chair and mediator, Ted Priel, Q.C. (the ñ1993 *Trade Union Act* Amendment Committeeò). [Affidavit of L. Hubich #3, Ex A].

115. The mandate of the 1993 *Trade Union Act* Amendment Committee was to report to the Government on areas of amendments to the *Trade Union Act* in which consensus was reached and those on which it was not, with an outline of the partiesô positions. Both the business and labour representatives held consultations with their labour or employer constituencies and legal counsel on the proposed amendments prior to their introduction. [Affidavit of L. Hubich #3, Ex B, pages 1-2].

116. One of the most important themes was that labour, management, and Government should work together on a consensus of labour/management issues.. [Affidavit of L. Hubich #3, Ex A, page 3].

117. In the course of its deliberations, the 1993 *Trade Union Act* Amendment Committee discussed the role of the strike and no lockout/no strike restrictions during contracts, and the Saskatchewan experience. They explained:

> Prior to Bill 104 being enacted, there was no prohibition in The *Trade Union Act* against strikes or lockouts during the term of a collective agreement. Section 44, as enacted by Bill 104, prohibited strikes and lockouts during the term of a Collective Bargaining Agreement. The proposed provisions would provide that subject to any Collective Bargaining Agreement between the parties, there be no strike or lockout during the terms of a Collective Agreement.
>
> Bearing in mind the fact that the parties are agreed that there should be provision in a Collective Agreement for final resolution of disputes by arbitration, they are in agreement that the *quid pro* quo for that provision is that there be no strike or lockout during the term of a Collective Agreement.
>
> Accordingly, the parties are agreed that Sections 44 (1) and (2), as they were enacted by Bill 104, should remain and that the proposed amendment should not be proceeded with.
>
> [Affidavit of L. Hubich #3, Ex A, page 23]

118. It is noteworthy that the SGEU, which has historically represented public servants employed by the Provincial Government, has at least since 1978 had provisions in its PS/GE collective agreements in which the Defendant as, employer, has agreed to consult with the union in advance of introducing legislation that would amend the *Public Service Act*, SS 1998, c P-42.1 and other public service employment-related statutes

[Affidavit of B Nowoselsky, para. 31, Ex. ñWò, Articles 4.3 (A) and Article 3.1; Affidavit of Donald Zerr, para. 7, Exs. B, C, D, E, F, G, H, I, J, K, L, M].

## DEVELOPMENT AND INTRODUCTION OF THE BILLS

119. Prior to the election, the Saskatchewan Party, then the official opposition, commented on the SGEU strike that occurred in January 2007. The position of leader Brad Wall was that while essential services might be introduced, such legislation would contain mechanisms for providing compensatory guarantees in the event that there was a limitation on the ability to strike.

> The Saskatchewan Party would also consider final offer arbitration or final offer selection as a means to bring both parties closer to an agreement and avoid lengthy labour disputes.
>
> Under this model, parties which deliver services which are deemed essential enter negotiations as usual. However, if they cannot resolve their differences after a specified period of time they are both asked to submit proposals and an arbitrator chooses the one viewed as most reasonable.
>
> I have also indicated that the Saskatchewan Party will consider essential service legislation. However, we will not go the same route of some provinces such as Alberta which designates entire sectors. Rather, we would consider legislative initiatives that could achieve what the Saskatchewan Union of Nurses seems to do on a defacto basis.
>
> January 10, 2007 letter from Brad Wall, [Affidavit of R. Longmore, Ex G].

120. The Saskatchewan Party was sworn in as the new Government on November 21, 2007. [Affidavit of M. Wellsch, para 12].

### Government rationale for the Bills

121. The newly elected Government not only introduced the Bills together on the same day, they explained their rationale and motivation for the Bills as a package, for the same ideologically motivated reasons ï to promote business and their market driven pro-business, ñcompetitiveò political agenda. The recent decision of the Saskatchewan Court of Appeal confirmed this in *Saskatchewan Federation of Labour v. Saskatchewan (Attorney General, Department of Advanced Education, Employment and Labour)*, 2010 SKCA 27, 317 DLR (4th) 127, [SFL 2010].

> The general election held on November 7, 2007 resulted in the resignation of the existing government led by Premier Lorne Calvert, the leader of the New Democratic Party, and the installation of a new government led by Premier Brad Wall, the leader of the Saskatchewan Party. Soon after the election, the new government introduced, or announced its intention to introduce, legislation to amend *The Trade Union Act*, R.S.S. 1978, c. T-17; revamp The Construction Industry Labour Relations Act, 1992, S.S. 1992 c. C-29.11; and bring in The Public Service Essential Services Act, S.S. 2008, c. P-42.2. Each is administered by the Labour Relations Board. Premier Wall said the new government was intent on these changes being made to ensure ña balance in the province between the interests of unions and the interests of managementò and an ñeconomy competitive with other jurisdictions. Weôre going to have people who are able to interpret the lawsé as theyôre passed by the legislature, and again what we have said publicly, and I would expect that Labour Relations Board members willé consider what the government has said publicly, in opposition and in governmenté ò
>
> *SFL* 2010, at para. 5.

**Lack of advance notice of introduction of the Bills**

122. On December 6, 2007, Larry Hubich met with the Honourable Rob Norris, Minister of Advanced Education, Employment and Labour for an introductory meeting. The meeting lasted approximately 30 to 45 minutes. During the meeting, Mr. Hubich asked that the labour movement be consulted prior to the introduction of any legislation that would affect workers. Mr. Hubich offered the services of what he termed the best and brightest experts the labour movement had to offer to discuss any issues in relation to amended labour legislation. The Minister did not reveal his plans for changes to the labour legislation and he did not agree to any consultative process. The Government did not notify the SFL, its affiliates, or the Plaintiffs of its intention to introduce Bills prior to December 6, 2007. [Affidavit of L. Hubich #1, para 23]

123. Less than two weeks later, on December 19, 2007, the Defendant introduced the Bills without consulting the SFL, its affiliates, the Plaintiffs, or any other unions. Despite labour representatives urging the Government both in writing and in person to consult with labour prior to making changes to labour legislation, and offering its expertise on labour matters, the SFL and unions in Saskatchewan were not consulted

prior to the introduction of the Bills. [Affidavit of L. Hubich #1, Ex , pages 1-11, paras 13-15].

**Government advance discussion of the Bills with employer representatives**

124. A proposal was circulated internally suggesting the Government should consult with stakeholders prior to the introduction of the Bills. The proposal was not implemented. [Cross examination of M. Wellsch, Ex , page 13, lines 4-25].

125. Kevin Wilson, a lawyer who represents management and employers, was consulted prior to the introduction of the Bills. Mr. Wilson was retained by the Minister to provide research and advice to a team of government officials and participated in planning meetings with the government officials who were responsible for providing Ministerial briefings on the Bills and for the communications strategy of the government on Bills 5 and 6. [Cross Examination of M. Wellsch, page 14, lines 1-25; page 15, lines 1-22].

126. Peter MacKinnon, President of the University of Saskatchewan, was asked prior to the introduction of Bill 5 to support Bill 5 and he agreed to do so. [Affidavit of P. MacKinnon, paras 4-6]

127. On or about March 13, 2008, the SFL received documents regarding or relating to the Governmentôs essential services legislation that had been disclosed by the Government pursuant to a Freedom of Information request (the ñFOI Disclosureò). The FOI Disclosure included the following documents:

a. draft Government communications strategies including a stated intention of need to consult with unions and the SFL prior to the introduction of the Bills. [Affidavit of L. Hubich #4, Ex A, page 73].

b. email communication prior to the introduction of the Bills which states that Peter McKinnon, President of the University of Saskatchewan, will publically support the Government on essential services. [Affidavit of L. Hubich #4, Ex A, page 288].

c. email communications prior to the introduction of the Bills regarding the communications strategy surrounding the Bills copied to lawyer Kevin Wilson, who regularly represents employers in labour relations matters, and Mr. Wilsonôs notes on changes to communications. [Affidavit of L. Hubich #4, Ex A, pages 382-94].

d. email communication confirming meetings with Kevin Wilson to discuss the content of proposed drafts of the Bills.[Affidavit of L. Hubich #4, Ex A, page 282].

**Failure to consult**

128. In a letter dated January 11, 2008, the Government asked the SFL and select unions to provide ófeedbackô on Bills 5 and 6 by February 15, 2008. [Affidavit of L. Hubich #1, para 28].

129. In February 2008, a 45-minute meeting took place between SFL and the Minister of Labour. The SFL presented a detailed analysis of its concerns regarding the Bills. This brief questioned the constitutionality of the Bills. The SFL strongly objected to the lack of consultation with the labour movement and called for public, transparent consultations. [Affidavit of L. Hubich #1, paras 34-35].

130. The only rationale given by the Government for introducing the Bills at this meeting was it needed to provide "fair and balanced" legislation and that Saskatchewan needed to be "competitive" with other provinces. [Affidavit of L. Hubich #1, para 36]

131. The SFL provided a written brief to Minister Norris setting out its detailed position on the Bills (the ñSFL Briefò) as did at least eight individual unions. Unions expressed their very strong concern over a number of issues in the Bills including the introduction of mandatory certification votes and increased employer communication under Bill 6, and the essential services legislation in Bill 5. [Affidavit of L. Hubich #1, para 38].

132. The primary request from the SFL and the unions who provided feedback to the Government was the withdrawal of the Bills due to the lack of consultation prior to its introduction and the inadequacy of the feedback process for trade unions and workers. They asked the Government to hold public, transparent consultations about any proposed labour legislation in the province, similar to what had occurred in 1993.

133. Some unions took the position that the Bills violated the *Charter* and ILO Convention 87 (on Freedom of Association and Protection of the Right to Organize) 1948, ILO, 9 July 1948, 69 UNTS 17 (entered into force 4 July 1950, ratified by Canada 23 March 1972), [Convention No. 87]. Some unions proposed various alternative models of public consultation. [Affidavit of L. Hubich #3, paras 4-12].

134. The Minister of Advanced Education Employment and Labour knew this was a òbig issueò for the unions and a òconstant themeò. [Cross Examination Transcript of M. Wellsch, page 21, lines 4-25; page 22, lines 1-25; page 23, lines 1-23; page 34, lines 6-25; page 35, lines 1-25; page 36, lines 1-15, page 37, lines 1-8; page 45, lines 12-25; page 46, lines 1-25; page 47, lines 1-19].

135. Concerned over the lack of consultation regarding the Bills, the SFL suggested that Government make a reference to the courts to address its concerns about the *Charter* implications. The Government refused to discuss or meet regarding the SFLôs suggestion that the Government refer the Bills to the Saskatchewan Court of Appeal to review their constitutionality [Affidavit of L. Hubich #1, paras 39, 41, 45-6]. The Government also refused to meet with the SFL regarding potential House Amendments to the Bills. [Affidavit of L. Hubich #1, para 47].

136. On February 29, 2008, the SFL invited Minister Norris to meet with its Executive Council to discuss the Bills. Minister Norris declined the meeting with the SFL. [Affidavit of L. Hubich #1, para 43].

137. Similarly, the Premier refused to speak, at the invitation of the Regina & District Labour Council, on the Bills. [Affidavit of L. Hubich #1, para. 48].

138. The SFL, on behalf of healthcare unions, invited the Minister of Health to meet four times between December 2007 and April 2008 to discuss the Governmentôs plans and approach to healthcare. The Minister never accepted the invitation. [Affidavit of L. Hubich #1; paras 7, 31, 44, 52].

139. The Government did not address the concerns raised by the SFL and unions after they provided briefs to the Government. The Government did not follow up with the SFL or unions regarding their feedback nor did they solicit additional input from the unions. [Affidavit of L. Hubich #1, para 42, 50, 52]

140. The SFL and unions placed advertisements in newspapers, presented petitions to the Government, wrote letters in newspapers, held rallies, and invited citizens in Saskatchewan to email the Government regarding the Bills. In doing so, the SFL and unions asked, *inter alia*, for full consultation to be held regarding the Bills. After the introduction of the Bills, but before it was proclaimed, District Labour Councils in Regina, Saskatoon, Yorkton, Moose Jaw and Humboldt held public meetings concerning the Bills. The Government was invited to attend, but no members of the Government attended any of the public meetings. [Affidavit of L. Hubich #1, para 48, ]

141. At a second reading of the Bills on April 15, 2008, during Committee, minor changes were made to Bill 5. The changes were not substantive in nature, nor did they address any but one of the concerns and recommendations of the SFL, its affiliates, or other unions.

**The Bills are Pendulum Legislation**

142. The legislation was developed and introduced as a package and was intended to enhance Saskatchewanôs economic competitiveness. The changes comprised a radical change to labour relations, precisely the sort that the Government had been urged to avoid by the 1993 *Trade Union Act* Amendment Committee, which noted:

> ... both business and labour recognize that stable labour management relations will be enhanced by avoiding radical changes to labour legislation depending on

> the particular political philosophy of Government of the day. Such change produces a pendulum effect which is not conducive to labour relations.
>
> [Affidavit of L. Hubich #3, Ex A, page 2].

143. Despite the warning of the 1993 *Trade Union Act* Amendment Committee, the Government introduced the Bills to swing the labour relations ñpendulumò towards employer interests at the expense of unions and workers. The Bills operate together as ñpendulumò legislation by diminishing labour rights for the benefit of business interests in the following manner:

a. One of the primary purposes of unionization and reasons when organizing or choosing to join a union is the ability to collectively negotiate with an employer over terms and conditions of employment through collective bargaining as opposed to the vulnerability of attempting such as an individual employee.

b. In choosing collective bargaining, the freedom to withhold oneôs labour to achieve collective workplace goals ï the strike ï is a fundamental organizing tool.

c. Bill 5 removes the strike as an option for thousands of unorganized workers who work in the designated sectors of the economy, including all provincial and municipal employers thus rendering this goal of unionization meaningless. In other words, why join a union if you cannot exercise your freedom to strike and your ability to actually bargain collectively.

d. In addition, Bill 5 removes the freedom to strike from thousands of already unionized workers thus effectively undermining the fundamental reason for staying in a union, and weakening already certified unions pursuant to the *Trade Union Act.*

e. Bill 6 carries forward this same objective of making unionization a less attractive option through changes outlined above, including giving employers the right to communicate the loss of the freedom to strike as a reason making unionization fruitless for workers designated as essential in the relevant sectors ï you canôt

strike anyways and so you are likely not going to gain anything through joining a union to try to bargain collectively.

f. The social impact and message of both Bills are the same: unionization is not desired over the promotion of the market and business and both Bills create a new climate of discouraging citizens to see the value of unions in our society ï the Government does not see unionization as beneficial to individuals our society.

g. Bill 5 creates a culture of disentitlement and second class status for citizens in the designated ñpublic sectorsò which reinforce the changes to discourage unionization made in Bill 6.

144. The Government moved the Bills through the legislative steps to proclamation as a package and in fact the same committee of the Legislature conducted its meetings on both Bills. The Government held its 45 minute ñconsultationsò with employers and unions on both Bill 5 and 6 as one package for discussion, and only after the Bills were introduced. The Government passed the Bills through first, second, third readings and proclamation on the same days for each stage of the legislative lawmaking process.

145. The Government as the public policy maker for civil society, in its actions and in its rationale, introduced, legislated and made clear to all citizens that these two Bills were fundamentally two sides of the same coin. Corporate profit then overrides fundamental freedoms that thousands of individual workers previously enjoyed, that unions have relied upon and promoted, and which benefits civil society:

> The goal of promoting growth requires my government to focus some attention on the current labour legislative environment. The rights of workers to bargain collectively and the rights of employers must be respected. However, the labour legislative environment must also be competitive with other Canadian jurisdictions, if the Saskatchewan economy is to realize its potential. My government will introduce legislation that achieves this competitive balance in labour laws. [Emphasis added]
>
> Premier Brad Wall, Throne Speech, December 10, 2007, page 5.

**Changes to the Bills**

146. On May 14, 2008, the Government of Saskatchewan enacted the *PSESA* and the *TUAA* Bill 5 underwent minor changes between introduction and passage as the *PSESA*. Bill 6 did not have any changes when proclaimed as the *TUAA.*

147. On July 10, 2009, the Government passed the *Public Service Essential Services Regulations,* RRS P-42.2 Reg 1 (the ñRegulationsò), which prescribed certain services as essential.

| **Bill 5 as introduced** | ***PSESA* as proclaimed** |
|---|---|
| 1(c)ñessential servicesò means services that are necessary to enable a public employer to prevent:<br><br>(A) danger to life, health or safety;<br>(B) the destruction or serious deterioration of machinery, equipment or premises;<br>(C) serious environmental damage; or<br>(D) disruption of any of the courts of Saskatchewan;<br><br>and, with respect to services provided by the Government of Saskatchewan, includes prescribed services; | 1(c) ñessential servicesò means<br>(i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:<br>(A) danger to life, health or safety;<br>(B) the destruction or serious deterioration of machinery, equipment or premises;<br>(C) serious environmental damage; or<br>(D) disruption of any of the courts of Saskatchewan;<br>(ii) with respect to services provided by the Government of Saskatchewan, services that<br>(A) meet the criteria set out in subclause (i); and<br>(B) are prescribed; |
| 1(i) ñpublic employerò means..<br>(xi) any other person, agency or body, or class of persons, agencies or bodies, that is prescribed; | 1(i) ñpublic employerò means ..<br>(xi) any other person, agency or body, or class of persons, agencies or bodies, that:<br>(A) provides an essential service to the public; and<br>(B) is prescribed; |
| 19. The board may make any rules of practice and procedure that the board considers necessary to carry out its responsibilities pursuant to this Act. | 19(1) For the purpose of carrying out the intent of this Act, in addition to the powers conferred on it by this Act, the board has all the powers conferred on it by the *Trade Union Act.*<br><br>(2) An order made by the board pursuant to this Act or the regulations is enforceable in the same manner as an order of the board made pursuant to the Trade Union Act.<br><br>(3) There is no appeal from an order or decision of the board pursuant to this Act, and the proceedings, orders and decisions of the board are not reviewable by any court of law or by any certiorari, mandamus, prohibition, injunction or other proceeding.<br><br>(4) The chairperson of the board may make any rules of practice and procedure that the board considers necessary to carry out its responsibilities pursuant to this Act. |

## THE IMPACT OF THE *PSESA*

148. A discussion of how the *PSESA* interferes with collective bargaining must necessarily appreciate that an integral aspect of collective bargaining is the ability to strike. Strikes may not be common, but they are necessary within the bargaining dynamic. Indeed it is the *PSESA*, which has prevented the Plaintiffs the RWDSU, HSAS, an IBEW, from achieving timely collective agreements.

149. In the case of SGEU the passage of the *PSESA* legislatively overruled an essential services protocol arrived at between the parties with the assistance of a mediation-arbitration process, demonstrating to the union that the Government would not hesitate to use its legislative power to relieve itself of collective agreement commitments, and prevent any effective strike from occurring. The evidence of the Plaintiffs demonstrates that the *PSESA* not only removes the right to strike completely from thousands of individual workers, it also infringes unionsô ability to bargain collectively and to carry out an effective strike.

### SGEU – Interference with collective agreement terms

150. The *PSESA* has the effect of repealing collective agreement provisions dealing with essential services in at least two of SGEUôs bargaining units, and preventing meaningful bargaining in the future with respect to essential services for most or all of SGEUôs bargaining units.

151. As noted above, in its only collective agreement with a private sector employer, Prairie Regeneration Technologies, SGEU has agreed to an ñemergency servicesò provision that calls for the negotiation of an agreement to provide ñemergency servicesò during any job action. The Article provides for arbitration by an arbitrator specified in the agreement if the parties cannot agree on appropriate staffing levels. [Affidavit of R. Bymoen, Ex A, para 3]

152. More significantly, SGEUôs PS/GE Bargaining Unitôs 2007 Memorandum of Agreement with the Saskatchewan Public Service Commission, which ended the 2006-7

PS/GE strike and formed the terms of the partiesô new collective agreement, contained provisions obligating the parties to negotiate with respect to essential services, which included a mutually agreed-upon dispute resolution mechanism.

153. As discussed above, SGEUôs PS/GE Bargaining Unit staged legal strike action from December 21, 2006 through February 4, 2007. The strike ended with the adoption of a January 24, 2007 Report by Special Mediator Vince Ready which formed the basis of the partiesô new collective agreement [Affidavit of R. Bymoen, paras 17, 25, 26; Affidavit of B. Nowoselsky, Ex , page , paras4,5,6,7]. The Recommendations included provisions specific to the continuation of certain essential services during future job actions, including:

a. That the parties insert into the Collective Agreement the language necessary to address the continuation of essential services during a labour dispute, particularly in the Highways Department during winter months, and any other services necessary to prevent a danger to the health and safety of the public.

b. That the parties negotiate an essential services agreement as part of the Collective Agreement within 180 days of the date of these recommendations.

c. That, in the event the parties fail to reach agreement, the issue be referred to Vince Ready or Colin Taylor, Q.C. for final and binding resolution.

[Affidavit of B. Nowoselsky, para 6,Ex B; Affidavit of D. Zerr, para 34].

154. The parties began negotiating essential services pursuant to these recommendations in June 2007. In meetings occurring in June and September 2007, substantive negotiations took place respecting the specific services to be continued during a strike. In October 2007 SGEU concluded the employer had expanded the definition of essential services beyond what was contemplated in the Special Mediatorôs recommendation, and referred the matter back to the Special Mediator. The *PSESA* was introduced two months later in December 2007. SGEU was given no notice prior to the introduction of the *PSESA*. [Affidavit of B. Nowoselsky, paras 8,9,10,11,12,13; Affidavit of D. Zerr, paras 36 and 37].

155. However, the parties continued to engage in the mediation/arbitration process included in their collective agreement. They met with the Special Mediator in November 2008, at which time the Special Mediator confirmed that he had the jurisdiction to determine which employees would be designated essential, and prescribe a mechanism to resolve future essential services disputes. [Affidavit of B. Nowoselsky, Ex H, para 15]. After providing the SGEU PS/GE Bargaining Committee with a comprehensive essential services proposal in December 2008 [Affidavit of B. Nowoselsky, para16, Ex I,], in January 2009 the Government wrote to the Special Mediator and advised him that his jurisdiction and the negotiated process had been supplanted by the enactment of the *PSESA* but that it would continue to engage in the mediation/arbitration process only with respect to essential services required to prevent òdanger to life, health or safetyò [Affidavit of B. Nowoselsky para19, Ex L].

156. SGEU responded that the union did not agree and intended to use the Mediation/Arbitration procedure to conclude a ñcomprehensiveò essential services agreement ñeither through negotiations or final and binding resolutionò [Affidavit of B. Nowoselsky, para 20, Ex M]. The parties advanced the matter before Arbitrator/Mediator Colin Taylor on March 3 and 4, 2009 [Affidavit of B. Nowoselsky, para 18, Ex K].

157. On March 26, 2009, Arbitrator/Mediator Taylor provided the parties with a preliminary award setting out which provincial government programs are essential to prevent danger to life, health or safety. [Affidavit of B. Nowoselsky, para 21, Ex N]. After the Government declined to provide Taylor with information respecting services deemed essential under section 2(c)(i)(B), (C) and (D) of the *PSESA* (i.e. disruption of the courts, environmental damage, damage to equipment) [Affidavit of B. Nowoselsky, para. 23, Ex P] (even though this information had previously been provided to SGEU [Affidavit of B. Nowoselsky, para 22, Ex O]), Taylor issued an award on July 2, 2009 finalizing the services and programs to be considered essential to prevent ñdanger to life, health or safety.ò [Affidavit of B. Nowoselsky, para 25, Ex R,]. An application for judicial review of this award was filed and was stayed by the Court of Queenôs Bench pending the determination of the constitutionality of the *PSESA* in this matter.

158. On July 13, 2009, the Government implemented the *Regulations* prescribing which government services are required pursuant to clause 2(c)(ii) of the *PSESA* in the event of a labour dispute. In addition to including all of the services designated by Arbitrator/Mediator Taylor in his July 2, 2009 award, the Regulations prescribe additional services including:

a. Within the Ministry of Agriculture - Irrigation Asset Management Unit;

b. Within the Ministry of Corrections, Public Safety and Policing - Licensing and Inspections - Boiler & Pressure Vessels, Licensing and Inspections - Elevators, and Policing Services, Licensing of Private Investigators and Security Guards;

c. Within the Ministry of Energy and Resources - Emergency Response Team;

d. Within the Ministry of Environment - Spill Response Program - Provincial Hazardous Materials Coordinators;

e. Within the Ministry of Government Services - Building Access/Security; Saskatchewan Hospital Power Plant (at which employees are represented by the Canadian Union of Public Employees); Valley View Centre Power Plant (at which employees are represented by the Canadian Union of Public Employees); and ñ[a]ctivities related to the prevention of destruction or serious deterioration of machinery, equipment or premises in support of the services set out in this Table, including the services provided by the Government of Saskatchewan at the facilities, by the organization units or for the purposes of the programs set out in this Tableò;

f. Within the Ministry of Justice and the Attorney General - Court Services Branch, Victim Services Branch, Victim/Witness Services, Public Prosecutions, and Fine Collection Branch; and

g. Within the Ministry of Social Services, Community Living Division (at which employees are represented by the Canadian Union of Public Employees) - Valley View Centre (laundry, food services, resident care, physical therapy,

housekeeping dental clinic, medical equipment repair, drivers) and Community Resources (Northview Home, Southview Home, Crisis Therapy, Community Intervention, Community Service).

[Affidavit of B. Nowoselsky, para 28, Ex T].

159. In addition to prescribing services that may be considered ñessentialò pursuant to section 2(c)(i)(B), (C) and (D) of the *PSESA* (i.e. disruption of the courts, environmental damage, damage to equipment), the Regulations prescribed services that were not considered by Arbitrator Taylor to be necessary to prevent danger to ñlife, health or safetyò but would appear to fall under that category, i.e. licensing of private investigators and security guards (Ministry of Corrections) community resources (Ministry of Social Services). However, according to the Affidavit of former Director of Labour Relations for the Saskatchewan Public Service Commission Donald Zerr, during essential services negotiations in April 2009, the Government expressly represented to SGEU that services ñrelat[ing] to health and safety é were to be determined in accordance with the joint process agreed to by the parties.ò [Affidavit of D. Zerr, para 42].

160. In summary, SGEU was engaged in negotiations respecting essential services with the Government before, after and at the moment the Regulations were enacted [Affidavit of B. Nowoselksy, paras 8,9, 10, 16, 23, 24, 35; Affidavit of D. Zerr, paras 36, 37, 42, 45, 49] in accordance with the terms of their collective bargaining agreement. The enactment of the *PSESA* and its Regulations effectively nullified this agreement, the negotiations, and the process to which the parties had agreed for the determination of essential services. Following the enactment of the Regulations, SGEU filed an Unfair Labour Practice Application with the Saskatchewan Labour Relations Board. In its Reply, the Government acknowledged that negotiations with respect to services, levels of service, and the number of employees to be deemed essential were underway at the time the Regulations were enacted. [Affidavit of B. Nowoselsky, para 32, Exs X, Y; see also Affidavit of D. Zerr, paras 44, 45].

161. Indeed, the Affidavit of Donald Zerr, former Director of Labour Relations at the Public Service Commission, bluntly admits: ñPSC advised SGEU that the *Public Service Essential Services Act* did not require the Government to negotiate with the relevant public sector unions an agreement as to which services would be designated as essential.ò [Affidavit of D. Zerr, para 45]. The PS/GE never did conclude an essential services agreement with the Government [Affidavit of B. Nowoselsky, para 36] for the 2009-10 round of collective bargaining, and a renewal Collective Bargaining Agreement was concluded in March 2010. [Affidavit of B. Nowoselsky, para 37. Ex AA,].

162. Finally, in addition to having explicit terms in their collective agreement dealing with essential services, the SGEU PS/GE collective agreements with the Province have, since at least 1978, contained terms obligating the employer to negotiate with SGEU ñon matters relating to conditions of employment,ò and to refrain from amending or revising the *Saskatchewan Public Service Act* without providing SGEU notice and an opportunity to respond. [Affidavit of B. Nowoselsky, Ex W, para. 31; Affidavit of D. Zerr, Exs. B, C, D, E, F, G, H, I, J, K, L, M, para 7]

**SGEU – Interference with collective bargaining**

163. SGEU commenced negotiations with health care employers in November 2008. [Affidavit of B. Erickson, paras 6, 7]. After nearly two years of bargaining, SGEUôs Health Provider bargaining unit signed a renewal collective agreement with SAHO in October 2010. [Supplementary Affidavit of B. Erickson, Ex Y, para LL]. In bargaining the 2008-2012 collective bargaining agreement with SAHO, which concluded in 2010, SGEU never concluded essential services agreements with any of the three Health Regions whose employees SGEU represents, i.e. Keewatin Yatthé, Mamawetan Churchill River, and Kelsey Trail, despite having spent significant time and resources to meet with representatives of each Health Region on numerous occasions through 2008, 2009, and 2010. [Supplementary Affidavit of B. Erickson, para (c); Affidavit of K. Hine, para 24]. Although SGEU bargaining representatives ñfeltò they had ñmade progress in bargaining essential servicesò with two of the Regions, they were told by employer representatives that they could not conclude agreements with SGEU unless all

three Health Regions signed on, which of course did not happen. [Affidavit of K. Hine, paras 17, 24].

164. In addition, SGEUôs collective bargaining agreement with the Saskatchewan Cancer Agency expired on December 31, 2009 and has not yet been renewed. [Affidavit of H. Gasper, paras 5, 15]. Over 80% of that bargaining unit have been declared essential [Affidavit of H. Gasper, para 9].

165. In the wake of the *PSESA* and *TUAA*, the evidence discloses that SGEU was forced to accept substandard terms in its collective agreements. In the health provider unit, many members expressed disappointment and frustration with SAHOôs bargaining tactics and the content of the agreement. [Supplementary Affidavit of B. Erickson, para (mm)]. Erickson, the Chair of SGEUôs Health Provider Bargaining Unit Negotiating Committee, states in her Supplementary Affidavit: ñ[i]t is my belief that we were forced to accept a substandard collective agreement because the *Public Service Essential Services Act* took away our ability to stage meaningful job action on the one hand, and the employerôs coercive and dishonest media campaign wearied our members and eroded their confidence in the bargaining process, on the other.ò [Supplementary Affidavit of B. Erickson, para (nn)].

166. Similarly, PS/GE Bargaining Unit Negotiating Committee Chairperson Barry Nowoselsky says in his Affidavit: ñ[i]n concluding the PS/GE collective agreement, it was apparent to me that SGEU had an inability to take any form of job action, which weakened our bargaining position significantly. The new collective bargaining agreement provides for minimal wage increases, well below cost-of-living increases, and includes a number of concessions demanded by the employer.ò [Affidavit of B. Nowoselsky, para 38].

167. Within SGEUôs bargaining unit employed by the Saskatchewan Cancer Agency (ñSCAò) over 80% of employees have been declared essential. [Affidavit of H. Gasper, paras 8,9 Ex C] . In addition to full-time employees, part-time, job-share and casual employees were identified throughout the notice deeming them essential; and all of the

members of the SGEU SCA bargaining committee were named in the draft Notice. [Affidavit of H. Gasper, para 9]. SGEU had prepared its own essential services proposal in which only 60% of the bargaining unit were essential [Affidavit of H. Gasper, Ex E, paras11,12].

168. Within SGEUôs health provider bargaining units, an accurate estimate of the percentage of workers is not available. Draft notices received by the union contained a number of flaws including designated employees absent from the workplace on authorized leaves of absence, designated employees who were not currently working in the identified classification and shift, designated shifts that did not exist, and designated members of the SGEU health provider negotiating committee, one of whom had been on union leave for over a year. [Affidavit of B. Erickson, paras 10, 16, Ex G]. Further, the employers expressly reserved the right to add employees to the essential lists if the union did not accept the draft notices.

169. For example, in the section 9(1) draft notice from Kelsey Trail Health Region the employer states: ñ[i]n the event the Kelsey Trail Health Region and the union do not agree to mutually acceptable method of ensuring the necessary coverage of essential services, the Kelsey Trail Health Region will be adding additional names needed for relief or coverage to ensure essential services are maintained.ò [Affidavit of B. Erickson, para 15, Ex G]. SGEU asked the employers to correct these notices, but the employers refused to remove members absent from the workplace on LTD and other leaves [Affidavit of K. Hine, para 10, Ex J]; a member being accommodated in a light duties assignment [Affidavit of K. Hine, para 11, Ex K]; and members of the SGEU negotiating committee [Affidavit of K. Hine, paras 21, 22, 23, Exs Y, Z].

170. Within SGEUôs PS/GE Bargaining Unit, approximately 33% of all PS/GE members have been designated essential. [Affidavit of D. Zerr, para 49].

**RWDSU**

171. RWDSU represents employees working in hospital laundry services in the Regina QuôAppelle Health Region. The Collective Agreement between RWDSU and the Regina

QuôAppelle Regional Health Authority (ñRQRHAò) expired on March 31, 2008 and a new collective agreement has not been reached. [Affidavit of B. Haughey, para 6]

172. In November, 2008, the RQRHA presented a proposed essential services plan which designated 124 out of 125 RWDSU members as essential, 99.2% of the workforce. No managers, out of scope staff, volunteers, or contractors were included in the draft plan to operate the laundry during a strike. The draft plan envisioned that employees would have prior approved vacations cancelled during a strike and that the employer could designate more employees as essential during a strike. [Affidavit of B. Haughey, para 16 -25]

173. The draft plan required all of the employee members of the negotiating committee to work during a strike, which would prohibit them from assisting with, coordinating, or participating in a strike. [Affidavit of B. Haughey, para 26]

174. The RWDSU proposed to the RQRHA that it would establish a voluntary essential services protocol as used in the Manitoba Health care sector. [Affidavit of B. Haughey, para 30, Affidavit of J. Ahrens]

> Under RWDSU proposal the RWDSU and the Employer would negotiate a letter of understanding which would have the following features: duties agreed upon as essential would be identified; the RWDSU would provide employees to perform only those essential duties during a strike; all employees would be able to participate in strike activities; employees would alternate providing the essential duties; any dispute regarding the duties to be agreed upon as essential would be adjudicated pursuant to a binding and expeditious arbitration process, the composition of which would be agreed to by the parties; and the Employer would not seek to have fines or potential jail imposed for strike activity by employees or the RWDSU.
>
> [Affidavit of B. Haughey, para 31]

175. SAHO, bargaining for the RQRHA, refused this proposal. [Affidavit of B. Haughey, para 32-36]

176. As a result of the high designations, the RWDSU have no ability to engage in a strike and no ability to put any pressure on the RQHR to bargain a collective agreement. [Affidavit of B. Haughey, para 46]

**IBEW**

177. IBEW represents employees of SaskPower and its ability to bargain a renewal collective agreement has been effectively eliminated by the *PSESA* which has allowed the employer to designate approximately 80% of IBEW members as essential. IBEW refused to bargain an essential services agreement with SaskPower because reaching an essential services agreement would eliminate the IBEWôs ability to take meaningful job action. The operation of the *PSESA* allows the employer to designate essential services so that the IBEW cannot put any meaningful pressure on SaskPower to conclude a collective agreement. [Affidavit of G. Lewendon, paras 14-18]

*178.* The current round of bargaining has been significantly impacted by the *PSESA.* IBEW is facing a bargaining situation in which up to 80% of its members may be designated essential and prevented from exercising their right to strike. The essential services designation process undertaken by SaskPower included the designation of employees as essential who ceased to work for Sask Power. Two full time business agents, were designated as essential employees on the list provided by the Employer.

[Affidavit of G. Lewendon, para 14, 15, Ex E]

**HSAS**

179. The HSAS experienced an extremely long bargaining period which continued from the expiration of the collective agreement in March 2009 until June 21, 2011 [Cross Examination of C. Driol].

180. The process of negotiating an essential service agreement under the *PSESA* was frustrated by the refusal of the health regions to provide information required under section 9(2) of the *PSESA*. HSAS agreed that discussions of essential services were

important but wanted the information required under the *PSESA* before discussions could begin. [Affidavit of C. Driol, para 61-63]

181. SAHO advised the HSAS that discussion of essential services would take four to eight weeks to discuss region by region, profession by profession, facility by facility to cover all 12 regions and all 27 professions in which HSAS represents members. [Affidavit of C. Driol, para 69]

182. Instead of providing the information directly to the HSAS as requested, SAHO provided notices to HSAS which set out services deemed essential, names of programs, and classifications of employees, but only some names of employees. Further the notices provided by SAHO purported to reserve a right to increase essential service levels during a labour dispute, which is not permitted without serving a new notice under section 9(2). [Affidavit of C. Driol, para 67]

183. HSAS was forced to apply for an order in Court of Queenôs Bench to compel the RQHRA to meet its requirements under the *PSESA*. [Affidavit of C. Driol, para 73, 74, Ex R]

184. During the 2007 strike, the HSAS and Saskatoon Regional Health Authority (ñSRHAò) had agreed that significantly lower levels of HSAS staff were needed to provide essential services than in 2009. An illustration of the impact of the *PSESA* on essential services designations shows the difference between what was negotiated as essential in June 2007 and imposed as essential in February 2009.

185. Comparing the designations for the SRHA at three hospitals in some important services: food and nutrition, pharmacy, physical therapy, and perfusionists, one can see the dramatic increase in the number of employees claimed by the SRHA required to provide essential services under the *PSESA*.

| **Region/ Facility/ Unit** | **Essential service staffing requested by SHA in 2007 under voluntary agreement** [Affidavit of C. Driol, Ex F] | **Essential service staffing imposed by SHA in 2009 under *PSESA*** [Affidavit of C. Driol, Ex P] |
|---|---|---|
| Saskatoon Health Authority<br>Food and Nutrition Services | None required to work<br>2 on-site/on standby for all facilities in the region<br>2 off-site / on call for all facilities in the region | 9 full time required to work<br>1 part time required to work |
| Saskatoon Health Authority<br>Royal University Hospital<br>Pharmacy | 2 required days for drug dist<br>1 required evening for drug dist<br>2 required days for direct patient services | 8 required M-F days<br>1 sr pharm required M-F days<br>4 required weekend days<br>2 required evenings |
| Saskatoon Health Authority<br>Saint Paulôs Hospital Pharmacy | 1 required days for drug dist<br>1 required evenings for drug dist<br>1 required days for direct patient services<br>1 off-site on call for renal transplants | 5 required M-F days<br>1 sr pharm required M-F days<br>2 required weekend days<br>1 required evenings |
| Saskatoon Health Authority<br>Saskatoon City Hospital<br>Pharmacy | 1 required days for drug dist<br>1 required evenings for drug dist<br>1 on call for drug dist after 4th day of strike<br>1 required days for direct patient services for 1-3 days of strike | 3 required M-F days<br>1 required weekend days<br>1 required evenings |
| Saskatoon Health Authority<br>Royal University Hospital<br>Speech Language Pathologist | 1 off site/on call for swallowing assessment<br>1 off site/on call (shared with SPH) emergency larngectomy | 2 required to work |
| Saskatoon Health Authority<br>Royal University Hospital<br>Speech Language Pathologist | 1 off site/on call (shared with SPH) emergency larngectomy | 2 required to work |
| Saskatoon Health Authority<br>Saskatoon City Hospital<br>Speech Language Pathologist | None required | 2 required to work |
| Saskatoon Health Authority<br>Royal University Hospital<br>Perfusionists | 2 off site/ on call days and evening | 4 required to work days<br>2 r on-call evenings |
| Saskatoon Health Authority<br>Royal University Hospital<br>Physical Therapy, cardio respiratory, ventilation | 2 required days<br>1 off site/ on call evenings | 2 required days<br>1 off site/ on call evenings |
| Saskatoon Health Authority<br>Royal University Hospital<br>Physical Therapy, neurological, medical, geriatric, orthopedic | 1 off site/ on call days | 7 required days M-F<br>5 required 4 days/ week<br>3 off site/ on call evenings |
| Saskatoon Health Authority<br>Royal University Hospital<br>Physical Therapy | .5 required days | 6 required days M-F<br>1 required days weekends<br>2 x .5 required days M-F |

| | | |
|---|---|---|
| Saskatoon Health Authority<br>Saint Paulôs Hospital l<br>Physical Therapy | 1 required days | 6 required days<br>1 off site/ on call evenings |

186. The increase in numbers are staggering: The number of members unilaterally designated as essential by the health regions was 40 per cent overall and 100 per cent in some sectors, including part-time and casual employees. As set out above, this was significantly higher than the 2007 essential service agreements which were negotiated between HSAS and SHRA.

187. Significantly, casual employees, who are permitted to decline requests to report to work under the Collective Agreement, were required to report to work when called under the imposed 2009 essential service levels. During an HSAS labour dispute, casual employees could be required to increase their hours of work above their normal working hours. [Affidavit of W. Fischer, para 6, 7]

**CUPE, Local 7**

188. The requirement to negotiate essential services places a financial hardship on smaller unions which must negotiate both the collective agreement and essential services agreement under the *PSESA*. [Affidavit of M. Meickel #1, para 75- 77]

189. Members of CUPE Local 7 perform some union duties on a paid basis, and receive some paid union leave for other union duties. CUPE, Local 7, negotiated a clause in its collective agreement with the City of Regina which allows employer paid union leave to bargain a collective agreement. [Affidavit of M. Meickel #2, para 7-9]

190. The requirement to negotiate essential services without compensation places a hardship on the union. Because commencing essential services negotiations is mandatory under the *PSESA*, CUPE, Local 7, must commit resources to this negotiation process, even though there is no requirement on the part of the employer to conclude a collective agreement. [Affidavit of M. Meickel #2, para 10-13]

191. The City of Reginaôs essential service proposal presented to CUPE, Local 7 included a position which was vacant, and part-time positions, with the ability of the employer to increase essential services during a labour dispute. [Affidavit of M. Meickel #2, para 17-18]

192. The proposed essential service plan left significant uncertainty about how the essential service plan would operate. [Affidavit of M. Meickel #2, para 34-35]

**ATU**

193. The Amalgamated Transit Union, Local 588, represents drivers providing para-transit services to the City of Regina, through First Bus Canada and City of Regina transit operators employed by the City.

194. The ATU and City of Regina achieved a collective agreement in the summer of 2005 following a month long strike in conjunction with CUPE Local 7 and 21. [Affidavit of M. Ehman #2, para 5-9]

195. The strike action consisted of a variety of activity which did not disrupt operations, including not wearing uniforms, not answering radio calls, and not collecting fares. [Affidavit of M. Ehman #2, para13]

196. The ability to strike in this round of bargaining was critical to the ATU in reaching a fair collective agreement. [Affidavit of M. Ehman #2, para 5-9, 11].

197. The ATU exercised its right to strike by restricting strike action until after the Canada summer Games in order to avoid disrupting this event. At no point did the City ask ATU members to provide essential services. [Affidavit of M. Ehman #2, para 10. 15].

198. The strike later escalated to a full scale work stoppage and no public bus services were provided during August of 2005 [Affidavit of M. Ehman #2, para 14].

199. During 2008 collective bargaining negotiations, following the passage of the *PSESA*, First Bus and the ATU did not negotiate an essential services agreement, nor did First Bus designate employees as essential. The ATU and First Bus agreed on a voluntary essential services protocol for passengers, such as providing transportation to dialysis patients to the hospital, but not for other reasons, such as hair appointments. [Âffidavit of M. Ehman #1, para 17, 18].

200. The ability of the Union to threaten this strike activity was critical to achieving a collective agreement. [Âffidavit of M. Ehman #1, para 19].

201. The collective agreement referred to above was set to expire at the end of 2009. In the 2009 round of bargaining, First Bus took the position that the *PSESA* applied and that the ATU needed to negotiate an essential services agreement prior to commencing collective bargaining. [Affidavit of M. Ehman #2, para 12]

202. In October 2009, the City presented the ATU with an essential services plan which included para-transit clerks. During the 2005 strike, this job duty had been performed by excluded managers, not employees. [Affidavit of M. Ehman #4, para 8-10]

**Overbroad designation of "public employer"**

203. The *PSESA* applies to many organizations which do not provide essential services. SIAST is designated as a public employer under the *PSESA*. SIAST has never requested the provision of essential services in its bargaining history with SGEU and has advised that it does not consider any SGEU members essential. [Affidavit of D. McDonald, para.15, 18, 19, Exs. A, B.] In addition the Government may also prescribe ñany other person, agency, or body, or class of persons, agencies, or bodiesò as public employers and therefore covered by the *PSESA*, without the requirement for legislative debate or review.

204. Similarly, two of RWDSU's collective agreements are impacted by the *PSESA.* Those collective agreements cover employees at Casino Moose Jaw in both gaming and food and beverage services; employees at Casino Regina in food and beverage service,

both of which are public employers and covered by the *PSESA*. [Affidavit of P. Guillet, at para 5]

205. While gaming and food service employees must exhibit a high degree of professionalism and take their jobs very seriously, none of the work they do prevents danger to life, health or safety; the provision of their work will not prevent the destruction or serious deterioration of machinery, equipment or premises; their work does not prevent environmental damage and the work has no connection to the courts in Saskatchewan. [Affidavit of P. Guillet, at para 8 14]

206. Likewise, IATSE represents workers at Casino Regina. These workers have never gone on strike and do not provide any services which if removed could result in a danger to life, health, safety, destruction or deterioration of machinery, equipment or premises, serious environmental damage, or disruption to the courts. [Affidavit of B. Haines, para 22-24].

207. Additionally, the Canadian Office and Professional Employees Union (ñCOPEò), Local 397 represents employees at Saskatchewan Government Insurance, a public employer to whom the *PSESA* applies. COPE 397 members and do not provide any services which if removed could result in a danger to life, health, safety, destruction or deterioration of machinery, equipment or premises, serious environmental damage, or disruption to the courts [Affidavit of G. Hamblin, at para 8].

**Lack of definition of "health"**

208. One of the deficiencies of the *PSESA* is the lack of definition of ñhealthò. In the context of the essential services legislation, ñhealthò should be given a restrictive meaning consistent with international law.

209. However, health is not defined in that narrow manner by the employers who have the ability to unilaterally designate what services are required to prevent a danger to health. At a press conference on February 25, 2009, Susan Antosh, President of SAHO, stated that the *PSESA* does not define the word "health". She stated that health care

employers used the definition of "health" as defined by the World Health Organization, in order to determine what services, classifications and numbers were designated essential. [Affidavit of C. Banks, para 16]

210. The World Health Organization defines ñhealthò as: ñA state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.ò [World Health Organization, ñAbout WHOò, accessed 27 July 2011, online: World Health Organization https://apps.who.int/aboutwho/en/definition.html]

## IMPACT OF THE *TUAA* CHANGES

### Barriers to certification

211. The experience of the Plaintiffs under the *TUAA* demonstrates interference with the certification process and a frustration of the certification success rates under the *Trade Union Act* prior to its amendment by the *TUAA*.

#### Overall trend

212. The two year period following the introduction of the *PSESA* saw the union certification success rate, the percentage of applications which resulted in certification , drop from a five year average of 87% to 65%. These numbers are consistent whether one looks at the certification success rate per calendar year, [ Affidavit of F. Bayer, para 18-19] or the reports of the Labour Relations Board (ñLRBò or the ñBoardò) which report statistics on a April to March fiscal year.

| Reporting Year (from Sask LRB Annual Reports) | Certification Applications Filed | # Granted | % success rate |
|---|---|---|---|
| 2003-2004 | 86 | 79 | 92 |
| 2004-2005 | 69 | 62 | 90 |
| 2005-2006 | 59 | 52 | 88 |
| 2006-2007 | 48 | 36 | 75 |
| 2007-2008 | 53 | 47 | 87 |
| 2008-2009 | 35 | 20 | 57 |
| 2009-2010 | 48 | 34 | 71 |

Source: Saskatchewan Labour Relations Board, Annual Reports

213. Similarly, the Plaintiffs have detailed the impact of the *TUAA* changes on their organizing practices and demonstrated that employees have lost the right to join unions through LRB delay in holding certification votes.

#### Plumbers and Pipefitters

214. The experience of the Plaintiff United Association of Journeymen, Fitters, Plumbers, Welders, and Apprentices of the United States and Canada, Local 179

(ñPlumbers and Pipefittersò) has been that the dispatch and certification of Plumbers and Pipefittersô members, which includes pipefitters, plumbers, welders, steamfitters, sprinkler fitters, refrigeration technicians, and apprentices, has been interfered with. [Affidavit of R. Nichols #2, para 15].

215. Organizing is more difficult and therefore more costly since the introduction of the *TUAA*. Prior to the introduction of the *TUAA*, certifications took approximately two weeks and were issued without a vote when certification cards were produced. [Affidavit of W. Steeves, para. 19].

216. The experience of the Plaintiff Plumbers and Pipefitters has been that organizing under the *TUAA* has become more difficult and therefore more costly. The LRB has refused to certify Plumbers and Pipefitters to represent employees of employers on short-term, project-based work.

217. In December 2008, Plumbers and Pipefitters sought a certification for workers at Taj Industrial (TMIJ) Ltd; a mechanical contractor based in Manitoba, which performs some work in Saskatchewan. In November 2008, Taj Industrial Ltd. was contracted to complete a small project in McLean Lake. For this job Taj Industrial Ltd. contacted the Plumbers and Pipefittersô hiring hall and asked for four tradespeople. Workers dispatched for this one week job had all signed a certification card for Plumber and Pipefitters. [Affidavit of R. Nichols #2, paras 16-19].

218. On December 2, 2008, along with an application for certification, Plumbers and Pipefitters submitted membership cards dated November 24, 2008 and signed by all of the employees dispatched to work at Taj Industrial Ltd. Three days later, on December 5, 2008, the LRB advised Plumbers and Pipefitters, that the Board was investigating the application and a hearing had been scheduled for December 23, 2008. [Affidavit of R. Nichols #2, paras 20-22].

219. On December 18, 2008, Plumbers and Pipefitters received a copy of the Employer Reply and Statement of Employment completed by Taj Industrial Ltd, stating that no employees were working at the job site on the date of the application. On December 23,

2008, the LRB wrote to Plumbers and Pipefitters and advised that the application for certification was dismissed and there would be no hearing. [Affidavit of R. Nichols #2, paras 23-25].

220. If Taj Industrial Ltd wishes to work in Saskatchewan again, Plumbers and Pipefitters will not be certified to provide tradespeople for future jobs. Prior to the changes to the *Trade Union Act* in the *TUAA*, the LRB would have awarded Plumbers and Pipefitters an automatic certification based on the signed cards without the requirement for a vote. Such a certification would continue to cover future work. [Affidavit of R. Nichols #2, paras 27-28].

221. The Plumbers and Pipefitters have found that both procedural and administrative delays by the LRB pose real and substantial barriers to certification. The Plumbers and Pipefitters attempted to certify employees of Pace Industrial Inc. while working on the construction of a refrigeration plant in June of 2009. The two effected employees signed certification cards and Plumbers and Pipefitters submitted an application for certification on June 9, 2009. As the certification was uncontested, the hearing was cancelled, but a vote was not held. On October 22, 2009, four months after the date of application, the LRB advised Plumbers and Pipefitters that the certification application would be dismissed without a vote. [Affidavit of W. Steeves, paras 6-18].

222. Not having a certification for Pace Industrial Inc. means that the workers have lost the benefit of union representation and the collective agreement during the time in which they worked. Plumbers and Pipefitters does not know if Pace Industrial Inc. made pension contributions or paid health and welfare benefits for these workers. The failure of the Board to hold a timely vote or certify the bargaining unit means that Plumbers and Pipefitters will have to apply for certification again for Pace Industrial Inc., if and when it sets up operations in Saskatchewan. This unnecessarily drains the union of the scarce funds and resources required to organize employees. [Affidavit of W. Steeves, paras 20-21].

223. In October 2008, the Plumbers and Pipefitters applied to certify Kamtech Services Inc. It took the LRB approximately seven weeks to conduct a vote and issue a certification order.

224. The experience of the Plumbers and Pipefitters is that the protracted certification process provides employers with a far greater opportunity to improperly influence their employees. Employers have access to all employees from the time they learn of an application for certification to the time a vote is ordered. The Plumbers and Pipefitters can only try to communicate with employees once they have left the job site. The Plumbers and Pipefitters do not have enough resources to refute or counter misleading or anti-union claims made by an employer over an extended period of time.

225. The experience of the Plumbers and Pipefitters has been that employers opposed to unionization target employees who support the union. In the construction industry, where there are often only a few employees at a given job site, employers can more easily interfere with the certification process by targeting employees.

**Carpenters, Local 1985**

226. The Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers represents carpenters, millwrights and allied building trades, including the Plaintiff United Brotherhood of Carpenters and Joiners of America, Local 1985 (ñCarpenters 1985").

227. Prior to the introduction of the *TUAA,* the Carpenters 1985 would organize by having employees sign certification cards if they wished to join the union, then making an application to the Labour Relations Board for certification when 70 to 75% of the employees had signed union cards. Certifications were issued without a vote, and Carpenters 1985 certification applications were almost never challenged. Certification applications typically took approximately two weeks from application to certification. [Affidavit of B. Holma #1, para 4-7].

228. On August 18, 2008, the Carpenters 1985 applied to certify a bargaining unit of three employees at Raven Construction. All three employees had signed membership cards. The Carpenters did not receive a notice of vote until one month later, on September 17, 2008. Between the date of certification and date of the vote, on October 3, 2008, two of the employees were laid off, leaving only one to vote. [Affidavit of B. Holma #1, para 9-15].

229. During this delay, the Carpenters 1985, was concerned about employer interference in the certification process. In the particular case of building trades, there are small bargaining units and employees move from job to job frequently. Union supporters may be targeted by employers and do not enjoy the protections of quick certification and the protection that certification brings. [Affidavit of B. Holma #1, para 16-17, 39].

230. On August 11, 2008, the Carpenters 1985 applied for certification of a unit of three scaffolders at Thyssen Krupp Safeway, with all three employees signing union cards. Thyssen did not contest the certification of the Carpenters 1985. The Carpenters 1985 did not receive a notice of vote until over five weeks later, on September 17, 2008. As a result of this delay, and due to the short term nature of construction projects, there was a concern that the employees would no longer be present for a certification vote. The Carpenters 1985 reluctantly agreed to a mail ballot which went out with a return date of November 19, 2008, over three months after application for certification. [Affidavit of B. Holma #1, para 20-36].

231. Despite all employees in the bargaining unit agreeing to have the Carpenters 1985 represent them, and with no opposition from the employer, the Board was unable to certify the employees within three months, compared to the normal two week period prior to the *TUAA*. [Affidavit of B. Holma #1, para 37, 38].

232. On October 30, 2008, the Carpenters 1985 applied for certification for a unit of two employees at Kamtech Services, Inc, both of whom had signed certification cards. The vote was scheduled for December 10, 2008 and the union received notice of

certification on December 22, 2008, some eight weeks after application. [Affidavit of B. Holma #2, para 1-5]

233. During the certification process, the delay between filing an application for certification and voting provides the opportunity for the employer to campaign against the union and influence employees. In the construction industry, unions do not have the resources to attend the work site to counter anti-union campaigns. [Affidavit of B. Holma #2, para 6-7].

234. The ability of workers to have quick certification in the construction industry is important as unions also play a role in promoting safety:

> The Union provides a voice on many matters, including occupational health and safety issues. In a dangerous industry like construction, with a high incidence of serious workplace accidents the Union plays an important role speaking for employees and their families. Because employees do move around, they may not have the opportunity to have longer discussions with their employer about safety concerns. With a union present there is the chance to have on-going oversight and discussion about necessary safety matters so that employees can have a greater assurance when they arrive at a job site that the work will be safely done.
>
> [Affidavit of B. Holma #1, para 40].

**Ironworkers**

235. The experience of the Plaintiff Ironworkers 771 is that card-based certification in the construction industry was a highly effective method for allowing employees to freely express their choice to join or not join a trade union. The construction industry tends to have a transient workforce. Delaying the certification process can result in an employee being out of province or generally unreachable for organizing a vote to join a union, meaning that the union may lose the right to represent workers of a particular employer through LRB delay. [Affidavit of B. Royer #1, para 8,10 ]

> While some Ironworkers will stay with one company for a long time, others will move from employer to employer, working off the union's dispatch list. However, even Ironworkers with same company move from job to job frequently, with the company. Thus, if the company is based outside of Saskatchewan, they could easily move in and out of the province with those employees on very short notice.

> Even companies based in Saskatchewan move around the province, depending on where they obtain a contract. Even if they stay with one company, it is very unusual for an Ironworker to be working in the same location for an extended period of time.
>
> [Affidavit of B. Royer #3, para 8]

236. In December 2008, the Ironworkers 771 attempted to seek a certification for six ironworkers with Les Structures De Beauce Inc., working in Humboldt, who were regular employees of De Beauce. The employees were French speaking ironworkers from the Montreal local of the Ironworkers and cleared by Ironworkers 771 to work in Saskatchewan. All six workers signed memberships cards and De Beauce signed a voluntary recognition agreement with Ironworkers 771. [Affidavit of B. Royer #2, para 2-7 ]

237. On December 4, 2008, the Ironworkers 771 filed their application for certification and advised the Labour Relations Board that the application was urgent since the project was almost complete, the workers would soon be assigned elsewhere in Canada, and the workers had limited English. The Board suggested that the Ironworkers 771 not complete the certification process, given these challenges. [Affidavit of B. Royer #2, para 9-14 ]

238. The Board advised the Ironworkers 771 by letter on December 16, 2008, that the Board needed employment information and specimen signatures from employees. Obtaining specimen signatures for employees was difficult and costly for the union as the employees worked at other worksites. [Affidavit of B. Royer #2, para 15-16].

239. The Board advised the Ironworkers 771 that although De Beauce was not contesting the application for certification, as it did not respond, the Board was holding an in camera hearing. Six weeks after applying for certification, there was no indication to the Ironworkers 771 as to when or if the vote would be held. [Affidavit of B. Royer #2, para 17-20].

240. On February 4, 2009, the Board advised the Ironworkers 771 that it would proceed with a mail in vote. The Board referred to the use of a mail out ballot as

ñextraordinaryò because there were difficulties with a ñnormalò vote that were not addressed in the *TUAA*. [Affidavit of B. Royer #3, para 6-14].

241. By February 18, 2009, the Board had added a seventh name to the employee list, whom the Ironworkers 771 did not know about when the application for certification was made. There was no way for the Ironworkers 771 to contact this employee as he was not on the job site and his address was not provided by the Board. [Affidavit of B. Royer #3, para 16-17].

242. The vote was not counted until April 20, 2009, after which the Board issued two reports: that six votes were cast with four in favour of the union and two against; and that seven votes were cast with four in favour of the union and two against and one spoilt. However, there were no specimen signatures to verify the votes and no certainty of how the ballots were provided to employees. [Affidavit of B. Royer #3, para 20-22].

243. The Ironworkers 771 explained the impact of the certification process under the revisions brought by the *TUAA*:

> Before the introduction of the requirement to have a vote to organize an employer, (notwithstanding that all employees signed cards indicating 100% support for joining the union), upon obtaining signed cards from 50% plus one of the membership, certification was automatic. If the employees left the province the next day, they left having joined the Union. Whenever the Employer returns and works in the province it will be subject to the Union collective agreement. The inability to deal with certifications in a timely fashion and the requirement to hold a vote imposes a severe hardship in my Union's industry. Organizing transient trade workers is not at all like organizing workers at a fixed location like a grocery store or a factory. The grocery store or factory will not move and the employees can be expected to attend their regularly. Contractors move with the work; they do not have a fixed place of employment. The reality of organizing employees of contractors is that the process needs to be very quick for certification to succeed.
>
> [Affidavit of B. Royer #2, para 21]

**Steelworkers**

244. The experience of the Plaintiff Steelworkers is that following the introduction of the *TUAA*, organizing became more difficult in Saskatchewan. In 2008, the Steelworkers

began an organizing campaign at Sears in Regina. Following the start of the campaign, Sears started to interfere with the organizing campaign, including holding captive audience meetings and allowing anti-union employees to organize anti-union campaigns during working hours, and bringing in outside consultants to interview employees regarding workplace concerns. The combined effect of the uncertainty surrounding the availability of automatic certification and the possibility of voting when the *TUAA* passed coupled with Searsô intimidation interfered with the organizing campaign such that the Steelworkers were forced to abandon the certification drive. [Affidavit of S. Rioux, paras 14-23].

245. The experience of the Steelworkers organizing in British Columbia is that requiring a vote for certification has a chilling effect on organizing. Prior to 2001, British Columbia had a system of automatic certification, which was then eliminated in 2001. Under the mandatory vote system in BC, Steelworker organizers experienced that employees were less likely to sign membership cards. Steelworker organizers encountered employee reluctance to sign certification cards because employees stated they were concerned that when votes are held on employer premises with management in attendance voters may be identified as union supporters. [Affidavit of S. Rioux, paras 8-12].

246. The experience of the Plaintiff Steelworkers organizing in British Columbia is that even during a 10-day period between the application for certification and a vote, employer interference can and does occur. Steelworker organizers have experienced that any delay prior to a vote increases the risk of interference by the employer and corresponding erosion of support from employees. [Affidavit of S. Rioux, paras 11-13].

247. The experience of the Plaintiff Steelworkers organizing in Manitoba, where automatic majority card certification exists, is that certification is faster and there is less opportunity for employer interference and intimidation with organizing campaigns. As a result, the unionization rate in Manitoba is higher than in other jurisdictions without automatic majority card certification. [Affidavit of S. Rioux, para 24].

**IATSE**

248. The experience of the Plaintiff IATSE and its Locals is that mandatory certification votes and delays in the certification process have made organizing in the film and television industries more difficult. [Affidavit of B. Haines, para 8-10, Affidavit of D. Sawarin].

249. Projects in the television and film industries are short-term. Even a slight delay in production may jeopardize the certification of a production company, and cause labour disruption and uncertainty in the industry. [Affidavit of B. Haines, para 10, 14-18].

250. The labour stability offered by card certification and skilled tradespeople is necessary for Saskatchewan to remain competitive in an industry which can stimulate $75 million to the economy of the province each year. Having a stable base of trained film industry tradespeople dispatched out of a hiring hall minimizes labour disruptions and downtime. [Affidavit of D. Sawarin, para 9-14].

251. Presently, production costs may exceed one thousand dollars per minute and any distractions during the filming process, such as a supervised, on-site certification vote, can be both disruptive and incredibly costly. [Affidavit of D Sawarin, para 17-18].

252. Prior to the *TUAA*, all certification applications by IATSE were successful. Following the passage of the *TUAA,* two certification applications have failed. [Affidavit of B. Haines, para 16-17] .

253. After Lullaby Productions Incorporated agreed to abide by the IATSE Local 295 collective agreement on a voluntary basis, IATSE filed a certification application on March 20, 2009. Included in this application was the schedule for the production, which indicated work would cease on April 22, 2009. The LRB scheduled a hearing on April 14, 2009. The hearing was cancelled because the application was not opposed by the Employer. The LRB issued a Direction for Vote Order on April 23, 2009, one day after the production had completed. On May 4, 2009, the LRB contacted IATSE Local 295 to schedule a vote, at which point the LRB was reminded that the work had finished.

Consequently, the LRB dismissed the application and IATSE lost the certification. [Affidavit of D. Sawarin, para 34-44].

254. The Plaintiff IATSE Local 295 also conducted a certification drive for the employees of the television production *Little Mosque on the Prairie*. IATSE dispatched members from its hiring hall and the employer agreed to honour the terms of the IATSE collective agreement. One hundred per cent of the employees of this production signed union cards. After IATSE Local 295 filed an application, the LRB sent two letters to IATSE Local 295 on the same day: one stating that a hearing was going to be scheduled and another stating the hearing was cancelled. Although the letter cancelling the hearing was written before the letter scheduling the hearing, the letter cancelling the hearing arrived at IATSE 295s offices last. As a result, IATSE Local 295 did not attend the hearing. The LRB held an in-camera meeting and summarily dismissed the application for certification. [Affidavit of D. Sawarin, para 22-33].

**COPE, Local 397**

255. The experience of the Plaintiff COPE Local 397 is that where employers strongly oppose union certification, timely votes for certification are vital to union organizing. Employers can use their position of authority to intimidate employees and terminate known supporters of the union. [Affidavit of M. Dalrymple, para 6].

256. The experience of COPE Local 397 in Alberta has been that holding certification votes within a short period following the filing of a certification application gives employers little opportunity to intimidate employees and generally interfere with organizing campaigns. Further, increased delay in holding a certification vote may decrease union support in the face of widespread anti-union tactics on the part of the employer. [Affidavit of M. Dalrymple, paras 7-8, 10-11, 13].

257. The experience of COPE Local 397 is that broadening the scope of permissible communication between employers and their employees relating to unionization increases employer interference. [Affidavit of M. Dalrymple, para 10].

**HSAS**

258. In or about 2009, HSAS attempted to organize employees of Gravelbourg EMS. The employees were concerned that their employer would learn of the unionôs organizing drive prior to the certification vote and they would have to vote in front of the employer. [Affidavit of C. Driol, paras 55-58].

**UFCW**

259. United Food & Commercial Workers (UFCW) Local 1400 is the largest UFCW local in Saskatchewan. Its membership varies, but tends to be between 4500 and 5500 members. This makes it one of the larger private sector locals in Saskatchewan. In addition to representing members in a number of the enumerated industries of the international union, Local 1400 also has sizable membership working for credit unions in the province of Saskatchewan. The local also represents workers in Salvation Army stores, hotels, bottlers, the brewing industry, and security guards working for a number of employers in the province. UFCW Local 1400 is a composite local representing members in approximately 61 units with approximately 57 collective bargaining agreements.[Affidavit of N. Neault, para 5 and 6]

260. From 2000 to May of 2008 the UFCW filed a total of approximately 43 certification applications, 7 were withdrawn and one remains open. Of the remaining applications, 32 were granted and 3 were dismissed after an unsuccessful vote. This produces a success rate of approximately 91% of those applications that proceeded to hearing. [Affidavit of N. Neault, para 12]

261. Between May 2008 and December 2010, the local union filed a total of 13 certification applications. Of the total remaining applications, 6 were granted, 4 were withdrawn and 3 were dismissed after an unsuccessful vote. This leaves a total of 13 completed applications, of which the union was successful in 6, being a success rate of approximately 46%. In all cases where application for certification was made after the Act was amended,, support was filed in excess of 45% of the employees in the proposed collective bargaining unit and, in all cases but for one, the support filed exceeded 50%.

Barring very unusual circumstances under the pre*TUAA* regime, the union would have been successful in all applications where more than 50% support was shown. In this case, the union would have been successful without the necessity of a vote in 12 of 13 of the certification applications filed, or approximately a 92% success rate. Further, the size of bargaining units successfully organized prior to the amendments tended to be considerably larger than those organized afterwards. [Affidavit of N. Neault, paras 15-16, 18]

262. Employers quite often become aware of an organizing effort being made in the workplace prior to an application being filed and in any event are notified of the filing of an application by the LRB shortly after the application is filed. Employees are especially susceptible to influence prior to a vote being held in the workplace. Between the time of filing the application and the time of the vote being held, the union often does not have much access to employees. The employer, on the other hand, generally has a captive audience at the workplace and has frequent and liberal access to employees. [Affidavit of N. Neault, para 20]

263. It is not uncommon for the union to receive information that employers have communicated with employees prior to a vote in an effort to dissuade them from supporting the union. In many instances, however, employees are reluctant to step forward and testify for fear of reprisals by their employers and as such the union is frequently not in a position to make an application to the LRB to deal with the issue by way of unfair labour practice applications or otherwise.[Affidavit of N. Neault, para 21]

**Changed Labour Relations Climate**

264. In addition to the difficulties to certification posed by elimination of card certification, unions have experienced a changed environment which is decidedly anti-union and in which employers have increased their involvement in communications in union matters such as bargaining and organizing.

**SGEU**

265. There is compelling evidence that the passage of amendments to the *Trade Union Act* expanding the employerôs ability to communicate with union members, compounded with the enactment of the *PSESA,* led to a change in the labour relations climate and increased interference in bargaining. The evidence of the Plaintiff SGEU and the Interveners further indicates that employers have exploited the *TUAA* employer communication changes to bargain directly with employees with respect to renewal collective agreements ï effectively interfering with the unionôs representation of members, and undermining and discrediting union leaders, while refusing to bargain with their elected representatives.

266. According to Bonnie Erickson, the Chair of SGEUôs Health Provider Bargaining Unit Negotiating Committee, collective bargaining for this renewal agreement (with Health Regions) was dramatically different from previous rounds in a number of respects. In the past the SGEU Health Provider Negotiating Committee ñhad always enjoyed a courteous and professional relationship with management of the Health Regions whose employees we represent, and bargaining had for the most part been productive and respectful.ò In this round of collective bargaining, however, SAHO adopted a strategy that made it difficult to have productive negotiations. It refused to disclose its position respecting wage increases and other monetary matters at the outset of bargaining whereas in the past, monetary information was shared when necessary and relevant to the discussion. [Supplementary Affidavit of B. Erickson, paras (g), (h)].

267. In addition, SAHO simultaneously published its bargaining proposals, publicized information about bargaining in the media, and directed bargaining-related communications to SGEU members at the same time these bargaining proposals were presented to SGEU negotiators, even though SGEU had asked them not to do this. [Supplementary Affidavit of B. Erickson, paras (l)(m),(n)]. Little or no progress was made at the bargaining table due to these tactics. [Supplementary Affidavit of B. Erickson, paras (o),(p)].

268. According to Ericksonôs evidence, ñé our efforts at bargaining with the employerôs negotiating team were effectively undermined by a sustained and coordinated media campaign through which SAHO eroded both public and member confidence in SGEU and the members of the Tri-Union by (1) repeating and amplifying the threat to withhold retroactive pay increases if the unions continued to attempt to bargain a better deal, and (2) calling on members to demand that their unions submit the employersô final offer to a vote.ò [Supplementary Affidavit of B. Erickson, para (t)]. Erickson concludes that ñwe were forced to accept a substandard collective agreement because the *Public Service Essential Services Act* took away our ability to stage meaningful job action on the one hand, and the employerôs coercive and dishonest media campaign wearied our members and eroded their confidence in the bargaining process, on the other.ò [Supplementary Affidavit of B. Erickson, para.(nn)].

269. There is further evidence that the employers made no real effort to bargain or conclude essential services agreements under the *PSESA*. When bargaining the 2008-2012 collective bargaining agreement with SAHO, which began in October 2008 and concluded in summer 2010, SGEU never concluded essential services agreements with any of the three Health Regions whose employees SGEU represents, , despite having spent significant time and resources to meet with representatives of each Health Region on numerous occasions throughout 2008, 2009, and 2010. [Supplementary Affidavit of B. Erickson, para. (c); Affidavit of K. Hine, para 24]. Although SGEU bargaining representatives ñfeltò they had ñmade progress in bargaining essential servicesò with two of the Regions, they were told by employer representatives that they could not conclude agreements with SGEU unless all three Health Regions signed on, which did not happen. [Affidavit of K. Hine, paras 17, 24].

270. There is some evidence that non-designated employers attempted to force unions to bargain essential services agreements, even though they were not covered by the law. [Affidavit of K. Barrett,].

271. Within SGEUôs Health Provider Bargaining Unit, the employers interfered with the unionôs conduct of a strike vote by distributing essential services notices to

employees while the union was conducting the strike vote. [Affidavit of K. Hine, Ex T, paras 14, 18].

**HSAS**

272. It is the experience of the HSAS that employers, in their unique position of authority over employees, have a special ability to interfere with the unionôs administration of the bargaining unit. For example, shortly after HSAS filed an application for a first collective agreement with the employer Canadian Blood Services, on April 18, 2008, the director of human resource operations sent a letter to each of the employees that suggested employees within the union would not receive any beneficial terms and conditions of employment, while those employees outside of the union, who did not support the union, would receive a pay raise. [Affidavit of C. Driol, para. 52].

273. During the province wide labour dispute between HSAS and the regional health authorities represented by SAHO, SAHO published advertisements and issued press releases relating to collective bargaining of essential services and revisions to the collective agreement in an effort to communicate directly with the public and HSAS members. Prior to the introduction of the *PSESA* and *TUAA*, SAHO had not engaged in this type of communication. [Affidavit of W. Fischer, para, 3, Ex A].

**Steelworkers**

274. Since the introduction of the *TUAA*, the labour relations environment has deteriorated in the experience of the Steelworkers. During the PotashCorp. strike in the Fall of 2008, the employer attempted to undermine the exclusive bargaining agent role of the union by communicating directly with the union's members, sending them letters which were misleading, inaccurate and incomplete regarding the partiesô collective bargaining process. This level of employer interference in collective bargaining was unusual prior to the introduction of the *TUAA* and increases the cost of administering the trade union during a work stoppage.

275. The Plaintiff Steelworkers also encountered employer interference during an organizing campaign at Sears in Regina during the Spring of 2008. This level of employer interference in an organizing campaign was unusual prior to the introduction of the *TUAA* and increases the cost of administering the trade union during organizing campaigns. [Affidavit of S. Rioux, paras 14-23].

276. The experience of the Plaintiff Steelworkers is that employers can severely undermine a unionôs administration of its affairs through direct communication with members, particularly during organizing and negotiating a collective agreement. [Affidavit of C. Edwards, para 14].

277. The experience of the Plaintiff Steelworkers organizing throughout Western Canada is that employers often interfere with organizing campaigns in an attempt to dissuade employees from joining unions, or in the case of votes, from voting to join unions. [Affidavit of S. Rioux, paras 9-12].

278. The experience of the Plaintiff Steelworkers in negotiating collective agreements is that employers can undermine a unionôs administration of the collective bargaining process through direct communication to union members. [Affidavit of C. Edwards, para 6].

279. While the Plaintiff Steelworkers were negotiating to renew a collective agreement with the employer PotashCorp. in 2008, PotashCorp undermined the unionôs administration of the collective bargaining process through direct communication with the unionôs members. After the union commenced a strike, PotashCorp. sent misleading letters directly to union members that contained selective and incomplete information on the progress of negotiations. Because of the incomplete picture offered by PotashCorp., many employees were left wondering why they were undergoing considerable financial hardship during the strike and took the position that the union had misled them. The Steelworkers had to spend considerable time, resources and energy responding to inquiries following PotashCorpôs direct communication with union members. [Affidavit of C. Edwards, paras 13-14].

**CEP**

280. The experience of the Plaintiff CEP is that since the introduction of the *TUAA* the labour relations environment has deteriorated. CEP, Local 721-G experienced violence on picket lines at the Mercury Graphics work stoppage in September 2008. A CEP member, Elaine Mann, was assaulted by a manager, who struck her with his vehicle four times on September 9, 2008. Mercury Graphics has engaged in other intimidation tactics, including threatening, staring at, photographing and insulting picketers. This behaviour increases the cost of addressing a work stoppage. This level of intimidation at a lawful picket line was not common prior to the introduction of the *TUAA*. [Affidavit of R. Cossar, para. 20-22; Affidavit of E. Mann. para. 8-12]

281. The experience of the Plaintiff CEP is that employers are emboldened by their broadened ability to communicate directly to employees under the *TUAA* and will use this ability to mislead, threaten and intimidate CEP locals and their members. When negotiating with the employer Mercury Graphics in early 2008, Mercury Graphics threatened to shut down its business, intimidated union members and sent letters to individual members that were not tabled during negotiations. [Affidavit of R. Cossar, paras 8, 13-16, 22-23].

282. When the Plaintiff CEP Local 911 bargained with the employer ISM Canada, ISM Canada communicated incomplete and misleading information about the process of negotiations to the unionôs members. This fuelled speculation and rumour among the unionôs members that the negotiating committee was somehow hiding information or acting in a manner inconsistent with its collective bargaining role. [Affidavit of G. Schoenfeld, paras 22-27].

**UNITE/HERE**

283. The experience of the Plaintiff UNITE/HERE is that since the introduction of the *TUAA*, the maintenance of collective bargaining relationships with employers has become more difficult. For example, UNITE/HERE maintained a good working relationship with the employer, Super 8 Motel in Moose Jaw. After the introduction of

the *TUAA*, UNITE/HERE members have experienced harassment and bullying by this employer, increasing the cost of administering the trade union. [Affidavit of G. Whalen, para 22].

**THE ILO COMPLAINT**

284. Saskatchewanôs labour legislation as amended by the *PSESA* and *TUAA* was determined by the CFA to violate international law.

285. In June 2008, the Plaintiff SGEU, with its national affiliate the National Union of Public and General Employees (ñNUPGEò), filed a complaint [the ñILO Complaint SFLò] with the CFA. [Affidavit of L. Hubich #2, para 3, Ex A]

286. In August 2008, the Plaintiff SFL, together with other provincial, national, and international unions, filed a statement of evidence detailing some of the impact of the *PSESA* and the *TUAA* in support of the ILO Complaint SFL. [Affidavit of L. Hubich #2, para 4, Ex B]

287. On September 8, 2008, the Plaintiff SFL and supporting unions provided additional evidence to the CFA, setting out further evidence on the impact of the *PSESA* and the *TUAA* on unions and workers. The CFA accepted the SFL as a separate complainant, in addition to the SGEU/NUPGE. [Affidavit of L. Hubich #2, para 6, Ex D]

288. The CFA rendered a decision regarding the ILO Complaint SFL, finding that the Government breached international law in March 2010, in Case No. 2654, (Canada/Saskatchewan), Report No. 356, ILO Official Bulletin, Vol. XCIII, 2010, Series B, No. 1, 313-384,[ñ*ILO Decision SFL"*]. The conclusions and recommendations of the CFA are discussed below, in Part I of the argument.

## OUTLINE OF ARGUMENT

### PART I – Violation of International Law

289. The changes to labour legislation brought by the *PSESA* and *TUAA* violate international law and as such are contrary to the *Charter*. The Supreme Court of Canada has confirmed that Canadaôs domestic laws must meet the standard of the international laws which it supports.

### PART II – Interference with the freedom to strike and organize

290. Restrictions on the freedom of unions and workers to strike and organize imposed by the *PSESA* and *TUAA* violate the fundamental freedoms of expression, assembly, and association guaranteed under section two of the *Charter*. Government action which has the effect of placing obstacles to unionization and interfering with strike action infringes these fundamental rights. Any evaluation of the scope of the infringement or the measure of harm, or any justification for the infringement must be demonstrated by the Defendant under section one of the *Charter*.

### PART III – Interference with the freedom collectively bargain

291. The combined impact of the *PSESA* and *TUAA* violate the freedoms of expression and association by substantially interfering with the ability of workers to organize into unions and engage in collective bargaining. The manner in which the *PSESA* and *TUAA* were introduced and operate do not preserve the principles of good faith consultation and negotiation required in collective bargaining.

### PART IV – Interference with individual liberty

292. The impact of the *PSESA* in preventing individual workers who have been designated as essential from withdrawing their labour as a matter of personal choice or autonomy violates section seven guarantees of liberty and security of the person.

**PART V – Interference with equality rights**

293. The *PSESA* and *TUAA* adversely impact historically disadvantaged groups, contrary to the equality guarantee in section 15 of the *Charter,* by making it harder to unionize and bargain collective agreements with fair terms.

## PART I – VIOLATION OF INTERNATIONAL LAW

### Canada's International Law Obligations

294. The ILO is a specialised agency of the United Nations responsible for drawing up and overseeing international labour standards. Membership in the ILO remains a voluntary procedure whereby a State ratifies accession to the Constitution and communicates the ratification to the ILO. Canada has been a member of the ILO since 1919. As such, Canada accepts the aims, purposes and principles embodied in the ILO Constitution and the Declaration of Philadelphia, including the fundamental principle of freedom of association.

*Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed., (Geneva: ILO, 2006) [the "CFA Digest"] at para 15; Case No. 2177 (Japan), Report No. 329, ILO Official Bulletin, Vol. LXXXV, 2002, Series B, No. 3 at para 630.

295. One of the standing tripartite committees of the ILO's Governing Body is the CFA. The CFA hears, and decides on, complaints alleging a state's breach of the rights of freedom of association and applies the principles and standards of the ILO Constitution, Declaration of Philadelphia, other Declarations, Recommendations and Conventions. The CFA makes conclusions and recommendations to governments in order to rectify any breach of the rights of freedom of association and conclusions and recommendations of a general nature.

296. The decisions of the CFA are adopted by the ILO's Governing Body and, in addition to binding the Member governments, give rise to the legal precedents which form part of international labour law. The CFA has made clear that membership of a State in the ILO carries with it the obligation and responsibility of the Government to ensure that all State authorities respect freedom of association principles in the Conventions which the State has freely ratified and judicial authorities from the CFA in all national legislation.

CFA Digest at para 16; Case No. 1793 (Nigeria), Report No. 300, ILO Official Bulletin, Vol. LXXVIII, 1995, Series B, No. 3 at para 263; Case No. 1952 (Venezuela), Report No. 313, ILO Official Bulletin Vol. LXXXII, 1999, Series B, No. 1 at para 300.

297. Accordingly, the Defendant has an obligation to apply international labour law standards and principles pursuant to the ILO Constitution, the Declaration of Philadelphia, principles of freedom of association, Conventions and other instruments that constitute international labour law. The *ILO Declaration on Fundamental Principles and Rights at Work*, ILO, 86th Session, Geneva, June 1998, [the ñ*Declaration on Rights at Work*ò] reinforces the fundamental principle of freedom of association and further emphasises the obligations of the Defendant.

**Convention No. 87**

298. Convention No. 87 is a principle source of substantive international labour law. Governments of Member States who have ratified Convention No. 87, also known as the Association Convention, undertake to apply the terms of it. On March 23, 1972, Canada ratified Convention No. 87.

299. Convention No. 87 sets out rights for workers and employers that each ILO Member undertakes to give effect to. Importantly, Article 2 stipulates that workers and employers, without distinction whatsoever, have the right to establish and join organizations of their own choosing without previous authorisation. Article 11 reinforces that the Member must take all necessary and appropriate measures to ensure that workers and employers exercise freely the right to organize.

300. Workers' and employers' organisations also have the right to draw up their constitutions and rules, elect their representatives, organise their administration and activities and formulate their programmes free from interference from public authorities which would restrict or impede this right [Article 3]. The CFA routinely applies these principles and standards to all Member States and develops them in relation to other instruments.

**Convention No. 98**

301. *Convention No. 98 (Right to Organise and Collective Bargaining Convention), 1949*, ILO 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) [ñConvention No. 98ò] provides workers and employer organizations with adequate protection from interference. The Defendantôs obligation to respect, promote, and realise the obligations of Convention No. 98 arises from its constitutional duty as a member of the ILO.

[Affidavit of R. Adams, Exhibit B at para 5(d) and (e)]

Case No. 2227, 332nd Report, para. 600.

**Other International Labour Law Instruments**

302. Canada has endorsed three other international instruments that extend protection to the functioning and administration of unions and workers' rights to freedom of association and collective bargaining: the *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [the "*Declaration of Human Rights*"], the *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976, signed by Canada 19 May 1976) ["ICESCR"] and the *International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966 (entered into force 23 march 1976, signed by Canada on 19 May 1976) ["ICCPR"].

303. The *Declaration of Human Rights* states the following freedoms and rights applicable to the Defendantôs enactment of the *PSESA* and the *TUAA*:

Article 19:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

*Declaration of Human Rights* at Articles 19, 20, and 23.

304. Article 8 of the ICESCR contains the following explicit provisions relating to freedom of association and unions:

Article 8

1. The State Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion of his economic and social interest. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;...

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. ... Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice , or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

ICESCR, at Article 8.

See also *ICCPR, at* Article 22.

**International Law and the *Charter***

305. In *Health Services* the Supreme Court of Canada held that section 2(d) of the *Charter* could be infringed by both legislation and by conduct which amounted to bargaining in bad faith. In that case, the Government of British Columbia enacted legislation with virtually no prior consultation or notice. The Court also noted that the *ICESCR*, the *ICCPR*, and Convention No. 87 recognized the rights of employees to form

unions and to engage in collective bargaining and that ñthese documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.ò

*Health Services*, at para 71.

306. Regarding the *ICESCR*, the *ICCPR* and Convention No. 87, the Supreme Court of Canada said:

> ... they extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d).

*Health Services*, at para. 72.

307. The Supreme Court of Canada affirmed Chief Justice Dickson's interpretation of Article 8 of the *ICESCR* in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, [1987] SCJ No. 10, [*Alberta Reference*] that it "... allows the free functioning of trade unions to be regulated, but not legislatively abrogated." The Supreme Court of Canada also supported that Article 22 of the *ICCPR* may encompass both the right to form a union and the right to collective bargaining.

*Health Services*, at para 74-75.

308. Reviewing Convention No. 87 and the decisions of the CFA, the Supreme Court of Canada stated that Convention No. 87 is understood to protect collective bargaining as a principle of freedom of association. In addition, the Supreme Court of Canada stated that the decisions of the CFA are seen as the "cornerstone of the international law on trade union freedom and collective bargainingò, and in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016, [*Dunmore]* stated that the CFA decisions shed light on the scope of s. 2(d) of the *Charter* as it is intended to apply to collective bargaining. The Supreme Court of Canada summarised Canada's international commitments and the protections they grant as follows:

> 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.*
>
> *Health Services*, at para. 79.

309. In *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, 331 DLR (4th) 64, [*Fraser*] the Supreme Court of Canada reaffirmed the importance of international law in interpreting the *Charter*:

> *Charter* rights *must* be interpreted in light of Canadian values and Canadaôs international and human rights commitments. In *Dunmore*, Bastarache J. emphasized the relevance of these in interpreting s. 2(d) in the context.
>
> *Fraser*, at para. 92.

310. Dr. Roy Adams, in his unchallenged expert evidence submitted in this proceeding on the application of international freedom of association standards and the constitutionality of ILO member states, set out the following:

> Member States of the ILO [including Canada], along with their subgovernments such as provinces, have an obligation to institute a labour relations regime with the following minimum characteristics. The obligations are both negative - that is States have a responsibility to refrain from certain actions, and positive - States have a responsibility to take positive steps with regard to certain issues.
>
> [Affidavit of R. Adams, Ex B, para 7a].
>
> All Member States of the ILO have a constitutional responsibility to ñpromoteò collective bargaining which, in my opinion, means that they are charged with encouraging employees to exercise their right to engage in collective bargaining.
>
> [Affidavit of R. Adams, Ex B, para 7b].
>
> Another positive government obligation is to protect the right to organize according to international principles.
>
> [Affidavit of R. Adams, Ex B, para 7c].
>
> Another positive obligation on States is to protect the right to strike. With certain exceptions, to be discussed below, under international law all workers have a right to strike without putting their jobs in jeopardy. The strike right is considered an

essential element of collective bargaining. According to the Digest of decisions and principles of the ILOôs Freedom of Association Committee, the right to strike is ñan intrinsic corollary to the right to organize protected by Convention No. 87.17.ò The international standards recognize that States may reasonably regulate that right but it should not be unreasonably withheld. It is reasonable, for example, for a State to require that a union provide the employer with advanced notice of a strike. It is not reasonable for a strike to be delayed for an inordinate amount of time.

[Affidavit of R. Adams, Ex B, para 7e].

With the exception of police and the military all workers prohibited from striking must be provided with an independent, credible dispute resolution procedure such as compulsory arbitration.

[Affidavit of R. Adams, Ex B, para 7f].

**_PSESA_ and _TUAA_ Infringe the Freedom of Association Principles of International Law**

**_PSESA_ - Right to Strike**

311. The *PSESA* makes strikes totally ineffective. In doing so, it takes away the right to strike for almost all public service workers in the province of Saskatchewan. The CFA has reaffirmed its basic position that the right to strike is a fundamental right of workers and their organizations that is intrinsically corollary of the right to organise protected by the Association Convention.

CFA Digest, at para. 523; Case No. 1954 (Cote dôIvoire), Report No. 311, ILO Official Bulletin, Vol. LXXXI, 1998, Series B, No. 3, 306-411, at para. 405..

CFA Digest, at para. 520; Case No. 2324 (Canada/British Columbia), Report No. 336, ILO Official Bulletin, Vol. LXXXVIII, 2005, Series B, No. 1, 233-284, at para. 282; and Case No. 2407 (Benin), Report No. 338, ILO Official Bulletin, Vol. LXXXVIII, 2005, Series B, No. 3, 471-493, at para. 491.

312. For public service employees, the CFA has recognised that the right to strike can be prohibited or limited for reasons of serious hardship to the community only if such prohibitions or limitations are accompanied by compensatory guarantees. The CFA has restricted the applicability of prohibiting the right to strike to only those public servants exercising authority in the name of the State or for essential services in the strict sense of the term.

CFA Digest, at paras. 573, 576.

313. The Defendantôs enactment of the *PSESA* has severely limited the right to strike for public service workers. Such prohibition or limitation violates the decisions of the CFA regarding the right to strike:

> Where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services.
>
> As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.
>
> CFA Digest, at paras. 595 and 596.

314. The *PSESA* also violates principles of freedom of association stated by the CFA regarding the determination of essential services:

> The determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services.
>
> CFA Digest at para 612; Case No. 1782, Report No. 299 (Portugal), ILO Official Bulletin, Vol. LXXVIII, 1995, Series B, No. 2, 285-328, atpara. 325.
>
> 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 enterprises and establishments concerned and of the real impact of the strike action.
>
> CFA Digest at para 613; Case No. 1923, Report No. 308 (Croatia), ILO Official Bulletin, Vol. LXXX, 1997, Series B, No. 3, 207-224, at para. 222.

315. The CFA further notes that provisions which allow unilateral requests for intervention of the labour authority to resolve such a dispute effectively undermine the right to strike and restricts voluntary collective bargaining

> CFA Digest at para. 566; Case No. 1839 (Brazil), Report No. 300, ILO Official Bulletin, Vol. LXXVIII, 1995, Series B, No. 3, 74-90, at para. 86.

**_TUAA_ - Elimination of CardCertification and Legalizing Employer Interference**

316. Prior to the *TUAA*, once unions demonstrated they had received signed union cards from a majority of workers in a bargaining unit, the union was quickly certified to represent those employees following processing of the certification application by the LRB. The *TUAA* eliminated card certification and instead imposes a secret ballot supervised by the LRB before a certification is issued. The union must present at least forty-five percent union cards signed within ninety days to start the certification process. If the union achieves forty-five percent of the cards, the certification vote requires a majority of a majority of the employees eligible to vote. Previous to the *TUAA*, certification by vote where there was less than majority card support required a majority of those voting, and a vote was triggered by demonstrating support of twenty-five to fifty percent of members. In effect, the *TUAA* creates a majoritarian exclusivity principle whereby a union must show more support in order for the secret ballot to be conducted then would ultimately be required to be certified.

317. Further, there is no guarantee of a timely certification vote in the *TUAA*. Such provisions create an excessively difficult certification procedure that reduces the ability of workers to freely choose a union as per Article 2 of Convention 87:

> The free choice of workers to establish and join organizations is so fundamental to freedom of association as a whole that it cannot be compromised by delays.
>
> Case No. 1865 (Republic of Korea), Report No. 306, ILO Official Bulletin, Vol. LXXX, 1997, Series B, No. 1, 295-346, at para. 329.
>
> The formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations. Any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No.87.

(CFA Digest, para. 279); Case No. 1894 (Mauritania), Report No. 308, ILO Official Bulletin, Vol. LXXX, 1997, Series B, No.3, 526-540, at para.536; Case No. 1773 (Indonesia), Report No. 316, ILO Official Bulletin, Vol. LXXXII, 1999, Series B, No. 2, 570-617, at para.615; Case No. 2053 (Bosnia and Herzegovina), Report No. 324, ILO Official Bulletin, Vol. LXXXIV, 2001, Series B, No. 1, 219-234, at para.231; Case No. 2225 (Bosnia and Herzegovina), Report No. 332, ILO Official Bulletin, Vol. LXXXVI, 2003, Series B, No. 3, 363-381, at para. 377; and Case No. 2282 (Mexico), Report No. 334, ILO Official Bulletin, Vol. LXXXVII, 2004, Series B, No. 2, 623-639, at para.638.)

**The ILO Decision SFL**

318. As set out above, several unions in Saskatchewan, including some of the Plaintiffs, made a complaint to the CFA regarding the *PSESA* and *TUAA*. The CFA found that the *PSESA* and *TUAA* violated international law in many aspects.

**Findings**

**On the failure to consult**:
é The Committee expects that the provincial Government will hold full and specific consultations with the relevant workersô and employersô organizations in the future at the early stage of considering the adoption of any legislation in this regard so as to restore the confidence of the parties in the process and truly permit the attainment of mutually acceptable solutions where possible.

ILO Decision SFL, at para 362

**On the breadth of designations:**
é With regard to the list contained in the Regulations, the Committee considers that certain services, such as licensing of boiler and pressure vessels, licensing of private investigators and security guards, laundry and drivers in community living division ï Valley View Centre should not be unilaterally declared as ñessentialò where minimum services must be maintained. é The complainants allege that the Regulations contain a longer list of essential services than the list included in the award. It therefore requests that this list be amended in consultation with the social partners and to be kept informed of developments in this respecté .

ILO Decision SFL, at para 371

**On the ability of employer to designation essential services**:
The Committee further recalls that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employersô and workersô organizations.

LO Decision SFL, at para 372

**On the limited ability of the LRB to review essential service matters**
é The Committee further recalls that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employersô and workersô organizations é 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 that 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..

ILO Decision SFL, at para 375

**On the elimination of the right to strike without compensatory guarantees:**
é The Committee recalls that, where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned have confidence and can take part at every stage and in which the awards, once made, are fully and promptly implementedé

ILO Decision SFL, at para 376

**On the elimination of card certification:**
é While representativity may be determined by the number of members or by a secret ballot, the Committee considers that a secret ballot supervised by the LRB may be consistent with the principles of freedom of association as long as it has the confidence of the parties.

ILO Decision SFL, at para 378

**On increasing application threshold from 25 to 45 %:**
However, the Committee is of the opinion that, in the particular circumstances of the case, the law stipulating that a trade union must receive the support of 45 per cent of employees before the procedure for recognition as a collective bargaining agent may well be excessively difficult to achieve. ..

ILO Decision SFL, at para 378

319. The CFA made requests and recommendations of the Government to correct the *PSESA* and *TUAA* to meet international law standards in the same decisions, which have not been complied with by the Defendant.

**Recommendations**

In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

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

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

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

(d) The Committee requests the Government to ensure that the provincial authorities take the necessary measures to amend the Trade Union Act so as to lower the requirement, set at 45 per cent, for the minimum number of employees expressing support for a trade union in order to begin the process of a certification election. It requests the Government to keep it informed in this respect.

(e) The Committee requests the Government to encourage the provincial authorities to endeavour, in consultation with the social partners, to find an appropriate means of ensuring that the LRB enjoys the confidence of all the parties concerned.

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

ILO Decision SFL, at para 384

320. The Governing Body approved the recommendations of the CFA. The Government has ignored the request and recommendations of the Governing Body of the ILO and has refused to meet with the Plaintiffs, as was requested. In fact, six months after the Government was found to have violated international law, the Governmentôs revised Statement of Defence pled that they had not breach international law.

321. To the extent that many of the provisions of the *PSESA* and *TUAA* have been found to violate international law, they must also be found to violate the *Charte*r.

## PART II – INTERFERENCE WITH THE FREEDOM TO STRIKE AND ORGANIZE

## THE APPLICABILITY OF THE *CHARTER*

322. Section 32(1) of the *Charter* provides as follows:

> 32(1) This *Charter* appliesé
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

323. The *Charter* applies to state action. A clear form of state action is the passage of legislation. Legislation that does not conform to the *Charter* will be void under section 52 of the *Constitution Act, 1982*, unless it is saved by section 1 of the *Charter*.

324. It is well recognized that *Charter* rights are to be given a purposive interpretation. Indeed, the purposive approach has come to form the basis of all *Charter* interpretation.

*Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam, Inc.*, [1984] 2 SCR 145, 1984 CanLII 33.*Health Services,* at para. 30., *Dunmore*, at para. 18.

325. The courts have repeatedly held that rights and freedoms under the *Charter* must be interpreted generously in order to secure the full benefit of the *Charter's* protection.

*R. v. Big M Drug Mart,* [1985] 1 SCR 295, [1985] SCJ No. 17, at paras. 116-17.

*United Food & Commercial Workers, Local 1518 v. KMart Canada Ltd.*, [1999] 2 SCR 1083, [1999] SCJ No. 44, [*Kmart*], at paras. 21-22.

326. It is consistent with *Charter* jurisprudence to give a large, liberal and generous interpretation to the fundamental freedoms enshrined in section 2 of the *Charter*, which is designed to protect Canadian citizens from a potential abuse of state power. The large, liberal and generous interpretation is counterbalanced by the fact that the state has the ability to justify its legislation pursuant to section 1 of the *Charter*. That interpretive approach to the *Charter* ensures that ñright holders enjoy the full benefit and protection of the *Charter*ò.

*Doucet-Boudreau v. Nova Scotia (Minister of Education*), 2003 SCC 62, [2003] 3 SCR 3, at para. 23.

327. The Supreme Court of Canada has reflected upon the history of collective bargaining in Canada, as raised by Rothstein J. in dissent in *Fraser*, in which judicial and legislative opposition to and interference with labour rights had been noted. The majority held that the appropriate focus for labour rights was not past treatment by the courts, but societyôs understanding of the freedom of association:

> Rothstein J. takes issue with the discussion of Canadian labour history in *Health Services*, pointing out that hostility to collective bargaining is part of Canadian labour law history. We agree with this obvious fact, which was largely true until the Second World War, which is indeed referred to in the majority reasons in *Health Services*.
>
> The relevant question from the perspective of interpreting s. 2(d) of the *Charter* is not whether courts in the past have undermined collective bargaining, but rather whether Canadian societyôs *understanding* of freedom of association, viewed broadly, includes the right to collective bargaining in the minimal sense of good faith exchanges affirmed in *Health Services*. Whether that right has been consistently guaranteed by the legal system does not resolve the issue before us, the content of the s. 2(d) guarantee. *Charter* guarantees must be given a generous and purposive interpretation. While the practice of courts pre-*Charter* may assist in interpreting *Charter* guarantees, it does not freeze them forever in a pre-*Charter* vice.
>
> *Fraser*, at paras. 89, 90.

328. For this reason, the Plaintiffs have included the history of collective bargaining and trade unionism in Saskatchewan as part of its evidentiary record following the Courtôs direction in *Fraser,* that the Court should focus on social values instead of prior judicial and legislative treatment in determining the scope of *Charter* protection. The social values of trade unionism in Saskatchewan support the rights asserted by the Plaintiffs and the values of free collective bargaining.

**The *PSESA* violates *Charte*r Rights and Freedoms**

329. The *Trade Union Act* model has been accepted by unions in Saskatchewan since 1944. However, the *PSESA* represents a significant change to that balance. The *PSESA,* by limiting the availability and effectiveness of strikes, places a limitation on the fundamental freedoms of assembly, expression, and association and the ability of workers to achieve collective bargaining goals. Establishing an essential services regime which requires unions to commence bargaining, but not conclude, an essential services agreement as a pre-condition to striking but which permits an employer to unilaterally determine the essential services, job duties, and classifications without review, limits the scope and effectiveness of strikes, reduces the participation of workers in strikes and job actions, and constitutes a violation of the *Charter*.

330. The Plaintiffs assert that the imposition of legislation, which provides for the ability of an employer to impose essential services designations which remove the freedom of individual workers to restrict and infringe upon unionsô ability to take meaningful job action, is harm in and of itself. The following sections of the *PSESA* violate one or more of section 2(b), (c) and (d), section 7, or section 15 of the *Charter*.

331. ñPublic employerò is broadly defined in section 2 of the *PSESA* to include, for example, universities, Crown Corporations, casinos, liquor stores, and insurance services, which overreaches the organizations necessary to ensure the stated objectives of the *PSESA*.

332. ñEssential servicesò are broadly defined in section 2(c)(i) of the *PSESA*; interfering with sections 2(b), (c) and (d) and 7 of the *Charter*. The definition of "essential services" in the *PSESA* goes beyond what is reasonably required to ensure that truly essential services are provided to the public during any public sector work stoppage. The general definition under the *PSESA* provides that a service is "essential" if it is "necessary to enable a public employer to prevent (a) danger to life, health or safety; (b) the destruction or serious deterioration of machinery, equipment or premises; (c)

serious environmental damage; or (d) disruption of any of the courts of Saskatchewan." Employer organizations, such have SAHO, have given the definition of ñhealthò a much broader interpretation than the *PSESA* can bear.

333. The definition of ñessential servicesò significantly overreaches what has been accepted by both international and domestic authorities as being "essential" during job action. See, for example, Case No. 2277 (Canada/Alberta), Report No. 337 ILO Official Bulletin, Vol. LXXXVIII, 2005, Series B, No. 2, 343-360: Complaint against the Government of Canada concerning the Province of Alberta presented by the Alberta Union of Provincial Employees (ñILO Decision AUPEò)

> Noting that the right to strike was taken away from some workers, the Committee recalls its previous recommendation that only workers providing essential services in the strict sense of the term may be deprived of the right to strike, provided furthermore that they enjoy adequate, impartial and speedy conciliation and arbitration proceedings, in accordance with freedom of association principles.
>
> ILO Decision AUPE, at para 359

334. Section 4 of the *PSESA* provides that it specifically overrides other ñlaws, collective bargaining agreements, arbitral or other awards or decisions, or any obligation, right, claim, agreements or arrangements of any kindò; interfering with section 2(d) of the *Charter*. This includes collective agreement provisions regarding essential services, and prohibits bargaining voluntary protocols and agreements about essential services in the future, such as those voluntary protocols and agreements negotiated by the HSAS.

335. Section 6(2) of the *PSESA* states that an employer will advise the union of services which are essential. There is no recourse in the *PSESA* for a union to challenge an employerôs designation and/or definition of essential services; interfering with section 2(b), (c) and (d) and 7 of the *Charter*.

336. Section 6(3) of the *PSESA* states that ñprescribedò services are the essential services for the purpose of an essential services agreement. The definition of ñprescribedò in section 2 of the *PSESA* is those services prescribed by Regulation.

ñPrescribedò services were and may therefore be included in the *PSESA* without the requirement for public, union, or legislative debate or review. Prescribed services cannot be bargained and the imposition of the Regulations overrides existing collective agreements; which prevents meaningful bargaining in addition to cancelling negotiated collective bargaining agreements and other agreements, interfering with section 2 (b) and (d) of the *Charter*. This has had a direct impact on SGEU, which had historically negotiated essential service protocols and agreements and had addressed these matters in two collective agreements. .

337. Section 7(1) sets out the mandatory requirements of an essential services agreement, including a requirement to name individual employees who must work during the work stoppage and prohibiting their involvement in participate in strike activities; interfering with section 2(b) and (d), section 7 of the *Charter*. As noted in the case of the HSAS collective agreement, this could increase a casual employeeôs hours of work and remove their freedom to decline work.

338. Section 7(1)(a) creates an exclusion from the essential services negotiation process for the largest employer in Saskatchewan, the Government, which does not have to negotiate the terms of an essential services agreement with the unions representing its employees; interfering with section 2(b) and (d) of the *Charter*.

339. Sections 7(1)(d) and 9(2)(c) of the *PSESA* permit employers to name specific workers required within classifications to work during work stoppages. These provisions permit employers to target union stewards, union leaders or executive members and require them to work, which restricts the ability of the unions to manage job actions and work stoppages; interfering with section 2(b), (c) and (d) and section 7 of the *Charter*.

340. Section 7(2) of the *PSESA* states that the number of essential services employees in each classification is to be made without regard to the availability of others to perform those tasks, limiting the ability of unions to engage in job actions; interfering with section 2(b), (c) and (d), section 7 of the *Charter*. Prior to the *PSESA*, employers used

out of scope staff, volunteers, and other workers to provide essential services during strikes.

341. Section 9(2) of the *PSESA* permits a public employer to issue an essential service notice if an essential services agreement is not reached, that includes classifications and number of employees required to provide essential services. Section 9(2) also permits a public employer to designate specific employees as essential. This provision removes any incentive for employers to negotiate fair essential services agreements or to bargain in good faith; interfering with section 2(b), (c) and (d) of the *Charter*.

342. Sections 9(4), 9(5) and 9(6) of the *PSESA* permit a public employer to serve a further essential service notice, if the public employer determines that more employees are required to maintain essential service levels. Such additional notice must also name employees who are obligated to work. This notice provision furthers the ability of employers to target union leaders and organizers as essential services employees, requiring them to work, instead of managing a job action or work stoppage. These sections not only violate individual workersô right to strike, but also infringe the ability of unions to collectively bargain and manage job actions; interfering with sections 2(b), (c), (d) and 7 of the *Charter*.

343. Section 10 of the *PSESA* permits unions to apply to the LRB to vary the number of essential services employees in each classification in order to maintain essential services, but does not guarantee unions a hearing, or a timely decision, nor does it permit unions to challenge the designation of particular services and classifications as essential services; interfering with sections 2(b), (c), (d) and 7 of the *Charter*.

344. Section 11 of the *PSESA* permits an employer or trade union to apply to vary an order made under section 10, meaning that no order under section 10 is final and thus reviewable; interfering with sections 2(b), (c), (d) and 7 of the *Charter*.

345. Section 12 (2) of the *PSESA* authorizes the LRB, at the unilateral request of an employer, to issue an order increasing the number and names of individual employees

who must work during any work stoppage; interfering with sections 2(b), (c), (d) and 7 of the *Charter*

346. Section 14 of the *PSESA* provides that no essential services employee shall participate in a ñwork stoppageò, which is defined as a ñstrikeò within the meaning of section 2 (k.1) of the *Trade Union Act.* Essential service employees cannot take even limited job action, such as refusing to work overtime, as section 14 prohibits even limited work stoppages, thus impacting the ability of employees and unions to engage in work stoppages or threatened work stoppages as part of the collective bargaining process; interfering with section 2(b), (c) and (d) of the *Charter*. As evidenced from ATU experience, ñstrikesò can include actions which do not stop production or interrupt the provision of services such as refusing to wear uniforms.

347. Under section 15 of the *PSESA*, unions are prohibited from authorizing, declaring or causing a work stoppage of essential services employees; interfering with section 2(b), (c) and (d) of the *Charter*, even if essential services continue to be provided.

348. Section 16 of the *PSESA* states that no person or trade union shall impede or attempt to impede any essential services employee from complying with the *PSESA*, which limits the ability of unions to engage in lawful picketing if essential service employees are even delayed in crossing picket lines; interfering with section 2(b), (c) and (d) of the *Charter*.

349. Section 17 of the *PSESA* imposes restrictions on individuals and unions from communicating with workers about work stoppages, including strikes and job actions, interfering with section 2(b), (c) and (d) of the *Charter*.

350. Section 18 of the *PSESA* requires essential service employees to perform the duties of his or her employment, including providing non-essential services, which violates individual workersô freedom to strike and infringes on unionsô ability to engage in job actions or work stoppages; interfering with section 2(b), (c) and (d) and section 7 of the *Charter*. Even if only 1% of an employeeôs job is essential, the employee must perform the remaining 99% of job duties during a strike.

351. Section 21 of the *PSESA* permits the Defendant to further restrict or remove the rights of employees and unions, already restricted or removed by the *PPESA*, without notice, discussion or consultation with unions through the ability to define, enlarge or restrict meanings under the *PSESA* by Regulation, and thus without legislative debate or review; interfering with section 2(b), (c) and (d) and 7 of the *Charter*.

352. Finally, the *PSESA* violates international law because it does not provide workers with access to a mechanism to conclude a collective agreement, in light of the fact that it removes their right to strike as individuals and infringes the ability of unions to collectively bargain. The ILO has ruled that when strikes are to be restricted or even prohibited because employees are providing an essential service, compensatory guarantees must be provided.

> As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.
>
> CFA Digest, at para. 570

**The *TUAA* violates *Charter* Rights and Freedoms**

353. The changes to the *TUAA* cumulatively impact unions, their members, and individuals who are not unionized. The changes impact different aspects of key associational and expressive activities of unions, including organizing, bargaining and collective agreement administration. Because each provision impacts different, and in many cases, multiple activities, the Plaintiffs discuss how the changes to the *Trade Union Act* impact organizing, bargaining and administration, as set out below.

| **Change to *Trade Union Act*** | **Impact on Organizing** | **Impact on Bargaining** | **Impact on CA Administration** |
|---|---|---|---|
| Increased threshold for certification applications section 3(1) | Yes | | |

| | | | |
|---|---|---|---|
| Decreased card validity period section3(2) | Yes | | |
| Mandatory certification vote section 3(2) | Yes | | |
| Removal of LRB discretion to refuse to certify when there is an incumbent union section 3(3) | Yes | | Yes |
| Increased Employer Communication section 6 | Yes | Yes | Yes |
| Time limit on unfair labour practice complaints section 7 | Yes | Yes | Yes |
| Removal of three year CA length limit section 11 | | Yes | Yes |

354. Cumulatively and individually, the above-noted changes brought by the *TUAA* greatly hinder the ability of workers to organize and for unions to defend workersô rights. The imposition of legislation, which eliminates rights enacted to promote activities integral to enjoying the freedom of expression, association and assembly, such as organizing, is harm in and of itself. The following sections of the *TUAA* violate one or more of sections 2(b), (c), and/or (d) of the *Charter*.

355. Section 3(1) of the *TUAA* requires mandatory secret ballot votes when a union applies for the certification of a bargaining unit with the support of at least 45% of eligible employees. Even if a union can demonstrate that all workers support a union, there must still be a vote, replacing card certification with mandatory votes. The *TUAA* does not set any time limit by which a representation vote must be held; interfering with section 2(b) and (d) of the *Charter*.

356. Section 3(2) of the *TUAA* increases the required level of demonstrated support before a certification application can be filed from 25% to 45%, making it more difficult for unions to organize workers; interfering with section 2(b) and (d) of the *Charter*.

357. Section 3(2) of the *TUAA* decreases the length of time that union membership cards are valid from six months to 90 days, making it more difficult for unions to organize workers; interfering with section 2(b) and (d) of the *Charter*

358. Section 6 of the *TUAA* increases the scope of permissible employer communication in the workplace, including the critical periods of organizing and collective bargaining. This provision expands the ability of employers to interfere with union efforts to persuade employees to join or participate in the activities of trade unions; interfering with section 2(b) and (d) of the *Charter*.

359. The deletion of section 6(2)(c) of the *Trade Union Act*, which provides that the board may deny an application for certification if it ñis satisfied that another trade union represents a clear majority of the employees in the appropriate unitò, permits the LRB to ignore the already certified union of choice of the workers and interferes with their rights under the *Trade Union Act*; interfering with section 2(b) and (d) of the *Charter*.

360. Section 7 of the *TUAA* introduces a 90-day time limit on filing unfair labour practice complaints under the *Trade Union Act*. This new time limit restricts the ability of unions and workers to bring complaints forward; interfering with section 2(b) and (d) of the *Charter*.

361. Section 11 of the *TUAA* repeals section 33.3 of the *Trade Union Act*, which limits collective agreement terms to three years. The removal of this restraint permits employers to seek lengthy collective agreements, thus preventing unions and workers from changing the terms and conditions of employment for years and in response to social, economic and legislative changes; interfering with section 2(d) of the *Charter*.

## *CHARTER* SECTION 2

362. Section 2 of the *Charter* sets out a broad category of freedoms recognized by the Government of Canada as fundamental to every Canadian.

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

363. The fundamental freedoms guaranteed under section 2(b), (c), and (d) are interrelated. The freedoms of association, expression, and assembly guaranteed under section 2 of the *Charter* are all exercised in a complementary manner when workers join collectively to form trade unions and exercise their freedoms to associate, assemble, and express themselves to pursue joint goals.

364. Historically, in Saskatchewan that includes workers associating as unions and exercising their fundamental freedoms to:

- Organize: joining together to form unions and associations for the purposes workers choose;
- Bargain Collectively: seeking to negotiate and set terms and conditions of employment;
- Take job action: taking steps, including strikes, to force employers to change terms and conditions of employment;
- Practice social unionism and enjoy the freedom of expression: acting collectively through unions and with other groups to change our economic, social and political life for all society; and
- Assemble: participate in legal strikes, informational pickets, demonstrations, rallies, marches, memorials, and other public and community events

**Characterizing rights and freedoms protected by the *Charter***

365. Prior to discussing the fundamental freedoms set out in section 2 of the *Charter*, it is important to consider the difference between rights and freedoms as set out in one of the first *Charter* cases in the labour context. In *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home and two other applications*, (1983) 44 OR (2d) 392, 4 DLR (4th) 231, [*SEIU 204*] (affirmed by the Court of Appeal on non-*Charter* grounds in [2004] OJ 3360 (QL)), the Ontario Divisional Court examined whether the provision of section 13(b) of the *Inflation Restraint Act*, which froze wages in public sector collective agreements by extending the terms of the collective agreements and prevented members from changing bargaining agents, infringed the freedom of association under section 2(d) of the *Charter*. In evaluating the content of the freedom of association in the labour context, the Court focussed on the nature of the ability of workers to strike as a freedom, not a right.

> In the many cases that have been concerned with whether or not at common law a strike was unlawful conduct (and of course the burden of them is that it was not) it was not necessary for judges to direct their minds to the issue of whether the workers had the right to strike or whether they had the freedom to do so. I am of the view that at common law the workers were free to strike in that there was no legal constraint which prevented them from doing so. They did not have a right to strike because there was no law which conferred a power to strike or which acknowledged or supported it.

*SEIU 204*, at para 15.

366. Finding that the *Charter* did not guarantee certain rights to organize, bargain and strike, although recognizing that the *Labour Relations Act* of Ontario did, the Court held that it was not necessary to find a right to strike in the *Charter* in order to find such a restriction infringed the freedom of association.

> 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 workersô

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.

*SEIU 204*, at para. 16-17.

367. At international law, the distinction between a right and freedom is further discussed:

> Legal regulation of strikes comes in many forms, depending on the country and the times. Sometimes there is only a freedom to strike, in that no criminal sanctions in the form of fines or imprisonment are imposed, though the possibility of contractual liability remains. Today, however, there is more often than not a right to strike, with the result that in certain circumstances, the employer cannot invoke a strike as a legal basis for breaking off an employment contract or for taking other reprisals. Strikes may be a means of action only open to trade union (as in Sweden) or they may be recognized as a right of individual workers (as in France). Sometime they are treated as an exceptional measure that workers can invoke when the employer does not fulfil its obligations. Sometimes strikes are allowed only in their classic form, and at other times the right to strike may extend to slow-downs, rotating stoppages, work-to-rule, boycotts and other kinds of direct action.

Jean-Michel Servais, ñILO Law and the Right to Strikeò 15 CLELJ 158 at 148.

368. The *PSESA* violates the freedoms of association and expression by infringing the freedom to strike, an integral element of collective bargaining. The *PSESA* creates further restrictions on the ability of unions to strike in addition to those imposed by the *Trade Union Act,* which prohibits strikes during the term of a collective agreement. The Plaintiffs claim a *Charter* breach because of the interference with their freedom to bargain, organize, and strike, not because of a breach of a particular guarantee of a right to strike within a statutory framework. That is, the Plaintiffs do not assert a right to strike created by a labour relations scheme that balances a prohibition on strikes during the term of a collective agreement and mid-term contract arbitration, with permitted strikes between contracts. Rather the freedom to strike exists independent of, and prior to, any legislative labour relations framework..

369. For the purposes of the *PSESA* the Plaintiffs are concerned with the freedom to strike, as it impacts the freedoms of association, assembly and expression. In

Saskatchewan, the fundamental freedom of association protects the limited abilities of employees to withdraw their services without sanction during limited periods, such as after the term of the collective agreement has expired. The *Trade Union Act* facilitates the freedom to strike as an exercise of the freedoms of expression and association by providing certain parameters restricting the freedom to strike and regulating it as a right to strike. To the extent however, that the *PSESA* further restricts the already limited right to strike, it infringes the freedoms of association and expression.

370. For the purposes of the *TUAA*, the Plaintiffs are concerned with the freedoms of association and expression in the context of a complex framework which has been established by the Legislature. The *Trade Union Act* was created to recognize rights and expanded in consultation with labour and management groups to establish rights to promote the exercise of the freedom of association.

371. Under this challenge to the *PSESA* and *TUAA*, the Plaintiffs are not asserting a claim for the Defendant to recognize or create new rights for Unions; rather the Plaintiffs are challenging the removal of existing rights which infringe their fundamental freedoms. The Supreme Court of Canada has observed that in the discussion of *Charter* rights generally, and in labour particularly, there is no bright line between freedoms and rights, and that the ability to meaningfully exercise freedoms may require the state to guarantee those freedoms through the establishment of certain rights.

> Our colleague argues that by requiring a process that allows for meaningful dialogue on workplace matters, *Health Services* wrongly converts a negative freedom into a positive right. This bright line between freedoms and rights, seems to us impossible to maintain. Just as freedom of expression implies correlative rights, so may freedom of association. The freedom to do a thing, when guaranteed by the Constitution interpreted purposively, implies a right to do it. The *Charter* cannot be subdivided into two kinds of guarantees -- freedoms and rights.
>
> The majority in both *Dunmore* and *Health Services* held that freedom to associate may require the state to take positive steps. Bastarache J. in *Dunmore* underlined that ñit may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relationsò (para 20). He further noted that history has shown, and Canadaôs legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations

> will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraint of trade... . In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(d) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups.

*Fraser,* at paras. 67, 68.

372. A rigid analysis of rights and freedoms, and denial of the former due to a focus on the later, was expressly rejected by the Supreme Court of Canada. In discussing the application and recognition of fundamental freedoms, it is important to recognize that this dialogue is an underlying theme throughout the case law and that rights cannot be separated from freedoms as one may impact the other.

> A purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities.

*Fraser* at para 70.

## *CHARTER* SECTION 2(B)

373. The fundamental freedom of expression protects the rights of workers to communicate with themselves, employers, other unions, and the public. The very act of workers joining together and using the word ñunionò to describe themselves is expressive activity which conveys meaning about the organization, its goals and values. The statements that unions and workers make and actions they take during job actions, particularly in striking, leafletting and picketing, are significant and convey content and meaning. An image of workers with picket signs on a line outside an employerôs operation sends to others a powerful message of what is occurring.

374. Additionally, the ability of unions and workers to organize and form trade unions is an exercise of the freedom of expression. Unions are both a means for workers to achieve workplace goals and a means by which they can engage in political discourse, including but not limited to striking and picketing. Legislation, which adds additional hurdles to the formation and recognition of trade unions under a statutory scheme, further restricts the freedom of expression.

375. Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. The *Charte*r protects not only ñgoodò and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests upon the conviction that the best route to truth, individual flourishing, and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs, lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it, as expressed by the Supreme Court of Canada.

> From these cases, it is clear that in characterizing the right to free expression under s. 2(b), the Court has developed a two-pronged test. Initially, courts must determine whether the activity in question is expression for the purposes of s. 2(b). It is incumbent upon the person alleging a violation to prove that the activity

> conveys or attempts to convey meaning. The Court has stressed that the content of the expression is irrelevant; provided that there is an attempt to convey meaning, s. 2(b) is engaged; see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, supra,*; *Butler, supra; Zundel, supra,* at p 753. The exception to this general principle is that s. 2(b) does not protect activity which conveys a meaning but does so in a violent form. The Court has indeed recognized that expression consists of both content and form, two distinct expressive elements that are inextricably connected; see *Keegstra, supra*, at p 729; *Irwin Toy, supra*, at p 968.
>
> Once it is established that the activity in question conveys or attempts to convey meaning in a non-violent form, courts must turn to the second stage of the analysis. This involves a determination of whether the law or government action actually restricts expression. Determining whether expression is restricted is distinct from the first step of deciding whether any particular activity constitutes expression; see *Ford, supra*. While individual self-fulfilment, the attainment of truth, and participation in a democratic society are important considerations in the s. 1 analysis, the ambit of the interests protected is not dependent on them; see *Zundel, supra*, at pp 752-53, where McLachlin J. (as she then was) confirmed that any content which conveys meaning is protected if it does not take a violent form.
>
> *R. v. Sharpe,* 2001 SCC 2, [2001] 1 SCR 45, at paras. 147 and 148.

376. Unquestionably, the activity of striking or engaging in job action conveys meaning in a non-violent form. It conveys meaning to an employer and the public when workers are withdrawing their labour. The activity involved in picketing during a labour dispute conveys meaning to the employer and others that the workers have a dispute with their employer.

377. Equally, the *PSESA* infringes upon that collective expressive activity because it restricts the availability of picketing to unions and reduces the number of individual workers who can participate in that expressive activity. The *PSESA* restricts the effectiveness and the content of the expressive activity when only certain employees can participate in it, harming the freedom of expression of the collective. Furthermore, the *PSESA* eliminates the ability of individual named employees to participate in expressive activity when they are prohibited by the state from participation in any strike activity by virtue of their designation as essential employees.

378. In *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 SCR 156, [*Pepsi*], the Court held

that picketing constituted freedom of expression enshrined in section 2(b) of the *Charter*.

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

*Pepsi*, at para 32

379. The *PSESA* interferes with the freedom of employees to express themselves at the worksite regarding their employmentt, and as workers in a collective voice to seek improvements in working conditions and social conditions . The *TUAA* interferes with the ability of workers to join and organize unions to collectively advocate for change with a unified voice.

380. The Supreme Court of Canada held that the definition of ñpicketingò in the BC *Labour Relations Code* wrongfully interfered with the rights of unionized employees to freedom of expression because it prohibited leafleting. In striking down the definition of ñpicketingò, the Court emphasized the importance of work to individuals and the importance of expression in relationship to work.

> The importance of work for individuals has been consistently recognized and stressed. Dickson C.J. in *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, observed at p 368: ñA personôs employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a personôs dignity and self respect.ò ... It follows that workers,

> particularly those who are vulnerable, must be able to speak freely on matters that relate to their working conditions. For employees, freedom of expression becomes not only an important but an essential component of labour relations. It is through free expression that vulnerable workers are able to enlist the support of the public in their quest for better conditions of work. Thus their expression can often function as a means of achieving their goals.

*KMart,* at para 25.

381. The Court then concluded that a statute which restricts the distribution of information by members of a trade union in the labour context infringed upon freedom of expression:

> It is obvious that freedom of expression in the labour relations context is fundamentally important and essential for workers. In any labour dispute it is important that the public be aware of the issues. Furthermore, leafleting is an activity which conveys meaning. In light of the very broad interpretation that has been given to freedom of expression, it clearly falls within the purview of s. 2(b) of the *Charter*. In *Libman, supra*, at para 31, it was said: ñUnless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian *Charter*ò.

*KMart,* at para 30.

382. The recognition that the ability to exercise free expression in the labour context is a fundamental freedom for trade unions and their members was endorsed by the Supreme Court of Canada in *Pepsi*. The union, one of the Plaintiffs in this action, was involved in a labour dispute with Pepsi at a manufacturing plant and picketed retail stores which sold Pepsi products. Pepsi sought, and was granted, a court injunction preventing picketing at those retail stores. The Supreme Court of Canada considered whether such picketing was illegal *per se* at common law. In its analysis, the Court considered how the *Charter* affected the development of the common law in the labour context.

383. The Supreme Court of Canada expressly recognized that picketing could be an element of political demonstration (*Pepsi,* at para. 30). It also expressly recognized that picketing involved expressive action which engaged one of the highest constitutional values: freedom of expression (*Pepsi,* at para. 32). The Supreme Court of Court

recognized the unparalleled significance which freedom of expression plays in a democratic society.

> The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on oneôs circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving oneôs life and perhaps the wider social, political, and economic environment.

*Pepsi,* at para. 32.

384. The Court explained the critical importance of expression to trade unions and their members:

> Free expression in the labour context benefits not only individual workers and unions, but also society as a whole. .... As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the debate on labour conditions into the public realm.

*Pepsi,* at para. 35.

385. The Court also recognized the requirement that labour and non-labour expression be treated in a consistent manner and found ñno persuasive reason to deprive union members of an expressive right at common law that is available to all members of the public. *Pepsi,* at para. 80.

386. The rights at issue are among the most vital for the functioning of a democratic society. In *Pepsi* and *KMart*, the Court noted that freedom of expression is fundamental to Canadian society and that freedom of expression in the labour context benefits society as a whole, and not just workers. However, the freedom of expression for unions and workers is not restricted to discourse on the terms and conditions of their own employment.

387. More recently, the British Columbia Court of Appeal considered specifically whether strike activity was protected as a fundamental freedom under section 2(b) of the *Charter* when the British Columbia Teachersô Federation (ñBCTFò) and the Hospital

Employeesô Union (ñHEUò) left work for a day during the term of their collective agreement to engage in a protest strike. The teachersô protest lasted for one day when they left work to attend rallies away from the worksite to express their dissatisfaction with government legislation which prevented teachers from bargaining class size issues and removed those provisions from collective agreements. The HEU protest lasted for one day on the one-year anniversary of the enactment of legislation which removed important collective agreement terms. The HEU protest included picket lines and rallies and a withdrawal of services to pre-determined essential services levels. The Court dealt with the issue of whether the definition of strike, in conjunction with section 57 of the *Labour Relations Code* RSBC 1996, c 244 (the ñ*Code*ò), infringed the appellantsô right to freedom of expression under s. 2(b) of the *Charter*. BCTF also raised the issue of infringement of the rights of freedom of peaceful assembly and freedom of association under section 2(c) and 2(d) of the *Charter*.

388. The BCCA focussed on the effect of the definition of strike, and not its purpose, and found that the effect, which precluded mid-contract withdrawal of labour by workers for any reasons, did interfere with the freedom of expression. The BCCA explained its reasons in the unique context of public sector strikes.

> Public sector unions have been given the right to strike for collective bargaining purposes, apart from essential services staffing requirements, and the political dimension of such strikes cannot be ignored. Unlike the private sector, the primary target of the strike weapon is the government and public opinion; the strike is in that sense political. Theoretically a protest strike could be directed at a political issue unrelated to employment but the instances where unions mobilize their strike forces for a purely altruistic objective are likely to be rare. Certainly it was not the case with the work stoppages at issue here. I accept that the objectives were not restricted solely to the economic interests of union members. No doubt teachers are genuinely interested in the effects of class size on the quality of education as well as the personal burden of the teaching load. Health care workers are properly concerned about the quality of patient care as well as their job security and other directly-related employment conditions. Motivations are mixed and strike objectives in the public sector cannot be conveniently divided into political protest and collective bargaining categories. In both cases, the strike exerts pressure directed beyond the formal public sector employers to the governments that are their masters. It is a form of effective expression that is curtailed by its inclusion within the strike definition. In my view, the effect of the mid-contract strike prohibition is a restriction on an effective means of expressive

action and for that reason alone, it trenches on the s. 2(b) guarantee of free expression.

*British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2009 BCCA 39, 306 DLR (4th) 144, [*BCTF 2009*], at para. 37.

389. The BCCA declined to deal with the arguments under section 2(c) and 2(d) due to another constitutional challenge raising section 2(d), which will be discussed below in *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469. [2011] BCJ No. 675, [*BCTF 2011*], and its view the section 2(c) freedoms in this context were subsumed under section 2(b).

**Application of 2(b) to the *PSESA***

390. The Plaintiffs submit that it is clear the effect of the *PSESA* is to limit the circumstances in which individuals and unions can strike, set up additional pre-conditions to striking beyond the *Trade Union Act*, reduce the number of individual workers who may strike, and thereby reduce the effectiveness of the strike and the ability of individuals and unions to strike to express goals.

391. Public service strikes, where the employer is the Government or agencies and organizations working closely with the Government and fulfilling a public service, have an additional social component. The capacity in which the expressive activity occurs, whether as a strike regulated by the *Trade Union Act* or the *PSESA,* is not a determination under section 2(b). Justifications on the extent of restrictions are dealt with under section 1 of the *Charter*.

The capacity within which you express yourself does not limit the right you have pursuant to s. 2(b), whether you are carrying out that expression as an aspect of your employment, livelihood, or just for fun. Such capacity may provide the framework for a justification on your free expression right under s. 1, but that is a different matter.

*Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board*, 2002 PESCAD 9, [2002] PEIJ No. 36, at para. 111.

392. It is well established that limitations on expression, such as restricting the right of an employee to engage in a strike as under the *PSESA* are appropriately evaluated under section 1.

> Undoubtedly, the balancing of competing values of public employees and of the government employing them raises very difficult problems, particularly when those employees wish to exercise their expression rights during the course of their employment. However, the authorities establish beyond doubt that questions about limits on expression based on status should be considered under s. 1, not by narrowing the scope of the right. The authorities are not as clear about whether and how limits based on the location of the expression should be considered under s. 2(b). As I noted earlier, in Commonwealth, both Lamer C.J. and McLachlin J. provided room for consideration of the question at the definitional stage to which McLachlin J. referred at para. 239:
>
> > The task at [the s. 2(b)] stage should be primarily definitional rather than one of balancing, and the test should be sufficiently generous to ensure that valid claims are not excluded for want of proof. Once it has been determined that the expression in question at the location in question falls within the scope of s. 2(b) thus defined, the further question arises of whether the government's limitation on the property's use for the expression in question is justified under s. 1. At this stage the concern should be primarily one of weighing and balancing the conflicting interests-the individual's interest in using the forum in question for his or her expressive purposes against the state's interest in limiting the expression on the particular property.
>
> *British Columbia Public Employers' Association* v. *British Columbia Teachers' Federation*, 2005 BCCA 393, [2005] BCJ No. 1719, at para. 32.

**Application of 2(b) to the *TUAA***

393. To the extent that joining a trade union is an expressive activity, the effect of the changes in the *TUAA* which make organizing more difficult also constitute a restriction on the freedom of expression. The changes to the *Trade Union Act* create additional hurdles for a group of workers to become certified as a union. The act of forming a union is both expressive and associational. Adopting the name, conventions, rights and obligations of a union certified by the LRB signifies a set of values and solidarity that other forms of workersô associations may not have. The restrictions on the ability to

organize are a restriction on the freedom of expression. The Plaintiffs submit that activity which makes forming trade unions harder violates section 2(b) of the *Charter*.

394. Allowing employers greater freedom to communicate in organizing campaigns, shortening the validity period of union membership cards, increasing the threshold for certification applications, requiring a mandatory certification vote, and imposing time limits to bring unfair labour practices all make the task of organizing a union more difficult. Even the act of union certification based on a majoritarian expression of membership in the union has been eliminated, and replaced with the requirement that members must submit to secret ballot vote. Barriers to joining and organizing unions renders the exercise of labour speech more difficult. Additionally, greater employer freedom to interfere in a unionôs organization campaign interferes with a unionôs freedom of expression.

395. The provisions of the *TUAA* encumber the certification process, thereby interfering with employeesô expression and free choice regarding their intention to join or refuse to join a union and impose significant procedural delays and increased cost in the certification process. Dr. Roy Adams describes the dynamics of an organizing campaign and ñcard-checkò automatic certification based on verification by the Labour Relations Board that the unionôs membership cards were valid and represented a majority of workers, versus mandatory secret ballot voting.

> Prior to the passage of Bill 6 unions could demonstrate majority support through a so-called ñcard-checkò procedure in which they would produce evidence that a majority of the relevant workers had become members of the union. With the passage of the Bill, the Labour Relations Board is no longer permitted to certify a union unless it first holds a vote of the relevant workers. Research evidence indicates that a shift from card-check to voting makes it more difficult for workers to organize. The most likely cause of this effect is that employers commonly attempt to dissuade their workers from ñunionizingò in the Canadian sense - that is from certifying an exclusive agent. Although Canadian and Saskatchewan law forbid employers from openly intimidating or coercing workers to decide against unionization or to promise benefit for making a ñno unionò decision, employers are permitted to express their opinion that union organizing is not in the employeesô best interest. Employees generally want to get along with their employer and thus have a tendency to conform to the employerôs wishes. These dynamics mean that a shift from card-check to voting reduces the likelihood that

workers will engage in collective bargaining. In short, in introducing the new legislation the Saskatchewan Government is discouraging rather than promoting collective bargaining as it is duty-bound to do under international human rights standards.

[Affidavit of R. Adams, Ex B, para 8b].

**Employer communication**

396. During a campaigning period, pre-*TUAA*, employers were prevented from communicating opinions to employees which interfered with an organizing campaign. By removing this restriction, employers are now encouraged to enter the discussion between unions and employees about the merits of joining a union. The participation of an employer in such a discussion can have a chilling effect and restrict what should be a choice made by workers without intervention of the employer. The freedom of expression in the context of a union drive includes the freedom of a union to have a discussion without the involvement of an employer, who may have a vested interest in dissuading employees from organizing.

397. The *TUAA* changed the restrictions on employer communications. Reading the changes to the *Trade Union Act* reveals an invitation for employers to involve themselves in union organizing campaigns.

| ***Trade Union Act* pre *TUAA*** | ***Trade Union Act* post *TUAA*** |
|---|---|
| **11**(1) It shall be an unfair labour practice for an employer, employerôs agent or any other person acting on behalf of the employer:<br><br>(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act; | 11(1) It shall be an unfair labour practice for an employer, employerôs agent or any other person acting on behalf of the employer:<br><br>(a) ~~in any manner, including by communication,~~ to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees; |

398. The intent of this change to the *Trade Union Act* is to give more voice to employers to participate in the workings of the union and to influence workersô

certification campaigns under the guise of ñcompetitivenessò. As submitted, above, the vast majority of successful prosecutions of employers under the *Trade Union Act* are based upon the elements of section 11(1)(a) as they existed prior to the *TUAA*. On a regular basis employers are already guilty of coercing and intimidating employees, including the firing of union organizers and threatening workers with the potential closing down of the business if a union forms. [Affidavit of L. Hubich #1, Ex Q, page 11].

399. The section 11 amendment describes the rights of employers to communicate facts and opinions, but does not specify that these rights only apply during organizing drives and decertification drives. Section 11 may therefore include the right of the employer to communicate its opinions to an employee or group of employees about: whether they should be trying to get rid of the union; stop a union organizing drive; refuse to file a grievance or support the union filing a grievance; oppose a bargaining position or proposal of the union; vote against a strike or to end a strike; organize to defeat or elect certain employees to union positions; support a raid by another union; or vote against dues increases and assessments or fines for scabs ; ratify a collective agreement; vote on a final offer; participate in a strike vote; participate in legal job action; support a particular issue or stance in collective bargaining; or participate in any union activities at all.

400. In reviewing the sequence of the words in the Section 11 amendment, it states that it is an unfair labour practice ñto interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employeesò. By placing ñnothing in this Act precludes an employerò *after* the description of the unfair, it could be interpreted that the employerôs communication can in fact be intimidating or coercive without being deemed an unfair labour practice. In the few other jurisdictions in which employers are permitted to communicate their views or opinions, it is conditional upon that communication not being coercive, intimidating or interfering. The section 11 amendment could in effect result in an invitation for employers to intimidate and coerce their workers.

401. Indeed, as noted by Dr. Muthu in his paper on the *TUAA*, employer communication to employees is inherently coercive, given the relationship of power between employer and employee. Quoting from Learned Hand J.ôs influential decision in *NLRB v. Federbush Co*., 121 F.2d 954, 957 (2 Cir. 1941), he writes:

> Language may serve to enlighten a hearer, though it also betrays the speakerôs feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and protanto the privilege of ñfree speechò protects them: but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. é Words are not pebbles in é juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.ò [emphasis added]
>
> Muthu, S ñRestoring the Bargain: Contesting the Constitutionality of the Amendments to the Saskatchewan Trade Union Act, Bill 6ò (CCPA: April 2010, at p.30)

402. Certainly this amendment gives much broader latitude for employers to enter the discussion about unionization during a certification campaign. The change to the employer communication provision however, must be read in conjunction with the elimination of a right to card certification to appreciate how employers may use a certification campaign to interfere with employeesô expressive activity to join a union.

403. The Plaintiffs submit that given the statutory scheme of certification under the *Trade Union Act*, the freedom of expression enjoyed by unions and their members to discuss the means by which they will represent themselves requires the Government to maintain the exclusion of employers from such conversations. The Government had previously recognized that employers could interfere with union and worker discussions about unionization and chose to exclude employers from those conversations. The Plaintiffs submit that eliminating this protection of a unionôs freedom of expression has the purpose and effect of inviting employers into a private discussion among workers. A

workerôs decision to express support for a union should not be influenced by the opinions of the employer.

**Elimination of card certification**

404. The requirement for mandatory certification votes, along with the lack of any mandatory timeline for holding a vote and increased employer communication, impacts the freedom of expression directly by changing the dynamic of certification discussions and indirectly by making it more difficult to acquire the voice of labour speech, a union. The effect of allowing employers to join this discussion infringes the freedom of expression due to the chilling impact that it has.

405. Already, the highest number of employer unfair labour practices in the shortest period of time occurs during union organizing drives [*Restoring the Balance,* at p.50].

406. The impact of employer communications during certification campaigns was reviewed in detail by a panel consisting of a neutral party, an employer representative, and a labour representative considering changes to the *Code* in British Columbia in 1992, similar to the 1993 *Trade Union Act* Review Committee.

> The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will inevitably follow. The statistical profile in British Columbia since the introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employeeôs basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign. A shorter time framework will not deter an employer intent on ñgetting the messageò to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to

> introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process.
>
> Vince Ready, John. Baigent & Tom Roper, *Recommendations for Labour Law Reform* (Victoria: Queenôs Printer for British Columbia, September 1992), at 26.

407. The Plaintiffs submit that the combined effects of the *TUAA*, which allows for increased employer anti-union communication in organizing drives, interfere with the freedom of expression of employees to express themselves by joining unions, contrary to section 2(b) of the *Charter*. The restrictions on employer interference in worker expression which were established under the *Trade Union Act* and diluted by the *TUAA* are necessary to allow unions and workers to enjoy their freedom of expression in the workplace.

## *CHARTER* SECTION 2(C)

408. The Plaintiffs recognize that the Courts have tended to subsume the freedom of assembly under the freedom of expression or association in a labour context. This is understandable, particularly when considering that strike action includes the expressive act of picketing and the employeesô physical presence at the employerôs worksite. An integral component of the expressive message of strike action is the image of workers standing or walking together in solidarity in a public location. The freedom of workers to assemble peacefully at the entrance to an employerôs worksite to picket, provided there is no unlawful action, is recognized at common law. (See *Pepsi*).

409. For example, in *BCTF 2009*, the BCCA found that the freedom of expression was infringed by a prohibition on mid-contract strikes, but did not see the need to make a determination on whether the definition of strike independently violated the freedom of assembly.

> The BCTF submission under this heading is linked to the rallies scheduled by the BCTF to protest Bills 27 and 28. The BCTF contends that the strike prohibition infringes the right of teachers to peacefully assemble at protest rallies. The chambers judge agreed with Vice-Chair Saunders that there was no s. 2(c) infringement because there was no restriction on the right to peacefully assemble away from the workplace outside of working hours. In my view, in the context of the BCTF protest, any s. 2(c) issue of infringement is subsumed under the issues related to the right of free expression under s. 2(b). The fact that teachers went to rallies when they withdrew their services is a means of expression but in this case the withdrawal of services to engage in free expression is the central fact rather than the means of expression at rallies or otherwise. I do not think that the infringement issues are advanced by characterizing them as issues of freedom of assembly as an alternative or in addition to infringement of freedom of expression.
>
> *BCTF 2009,* at para. 39.

410. However, the position of the chambers judge set out in the BCCA decision above ï that there was no restriction on the freedom of assembly by prohibiting workers from striking mid-contract because they could assemble outside of working hours ï ignores the context of the action. It is akin to the false logic of arguing that restricting striking

does not restrict the freedom of expression because unions can express themselves away from the employerôs workplace. Placing restrictions on the ability of essential services workers to leave work to join a picket line during a lawful strike interferes with their freedom of assembly based on the context of the purpose, place and timing of the assembly. Like the freedom of expression, the freedom of assembly must be appreciated in the particular labour context in which it arises. Freedom of assembly in the labour context for unionized workers includes the freedom to assemble on a picket line during a strike or lockout.

411. The freedom of assembly must include the freedom of all workers to assemble at a time and lawful place of the assemblersô choosing. By requiring employees who are designated essential to remain at work during a legal strike, these employees are prevented from assembling when they choose: on a picket line during working hours. Arguably, any action of workers in supporting a work stoppage, including contributing financial or human resources to the support of a union even during non-working hours is restricted by the *PSESA*:

> 14 No essential services employee shall participate in a work stoppage against his or her public employer.
>
> 1(k) ñwork stoppageò means a lock-out or strike within the meaning of the *Trade Union Act.*

*PSESA,* section 14, section 1

2(k.1) ñstrikeò means any of the following actions taken by employees:

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

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

*Trade Union Act,* section 2

412. The *PSESA* precludes essential services employee participation in a work stoppage, which includes strike activity. On a broad reading, this could include any

support that an essential services employee takes in concert with her co-workers, as concerted activity designed to increase the effectiveness of the strike. Arguably this may serve to prevent employees from attending meetings related to the strike or attending a picket line, interfering with their freedom of assembly during non-working hours. Certainly the evidence tendered by some unions, such as the intervenor CUPE, illustrates the profound impact of confusion that receiving an individual notice of essential services may have on an employee.

413. Section 16 of the *PSESA* prevents workers from, in any manner, impeding or attempting to impede, any essential services employee from reporting to work as required. Such a broad prohibition severely restricts the freedom of union members to assemble in a lawful manner by forming picket lines and requiring essential services employees to receive picket line passes or to check in. If an individual is prohibited from impeding an essential services employee in any manner, even for the purpose of confirming that they are an essential services employee required to work, this destroys the integrity of the peaceful and regulated picket line, which is the essential manner in which a trade union exercises its freedom of assembly during a strike.

414. While the *TUAA* does not expressly prevent workers from assembling, both the *PSESA* and *TUAA* have resulted in a changed labour climate in Saskatchewan, which has had a direct impact on the picket line. For example, in 2008, the employees of Mercury Graphics went on a lawful strike and were physically assaulted and harassed on the picket line when a manager deliberately ran into employees on the picket line in a truck. The change in the labour relations climate, post-introduction of the *PSESA* and *TUAA* had a direct impact on the abilities of workers to peacefully assemble. [Affidavit of R. Cossar, para. 20-22; Affidavit of E. Mann,. para. 8-12]

415. While this situation did not directly result from an express change to the laws on picketing, it serves as an example of how changes to the labour climate can impact the ability of workers to assemble on picket lines, contrary to their freedom of peaceful assembly under the *Charter*.

416. The Plaintiffs submit that any interference with the right of unions to assemble lawfully to picket must be treated as a breach of section 2 ( c) with any evaluation of the harm occurring at the section one analysis stage, in the same manner as the case law on section 2(b) rights.

## *CHARTER* SECTION 2(D)

417. The combined effects of the *PSESA* and *TUAA* infringe on the freedom of association by making collective bargaining and organizing difficult, if not impossible. Under the *PSESA*, the employerôs ability to use unilateral essential services designations to limit the ability of the unions to bargain effectively interferes with the Plaintiffsô ability to exercise rights integral to the freedoms of expression and association. Under the changes to the *Trade Union Act* in the *TUAA* , it is more difficult for the union to organize, pursue bargaining and administer the collective agreement and fully enjoy the freedom of association.

418. The Defendantôs actions in passing the *PSESA* voided bargained essential services protocols, and agreements, including provisions directly from the SGEU collective agreement and had the effect of preventing negotiation of essential services agreements outside of the statutory framework of the *PSESA*. The Defendantôs actions seriously infringed on the already limited freedoms of the Plaintiffs. It did so without consultation, and in a manner which interfered with the Plaintiffsô ability to collectively bargain.

419. The Plaintiffs submit that the appropriate approach in evaluating a section 2(d) breach is to determine whether the Defendantôs actions interfered with the freedom of association of individuals and if so, to evaluate the extent of that harm and of any justification under section 1, in the same manner as evaluating an infringement of section 2(b).

### Pre *Health Services*

420. The Supreme Court of Canada in *Health Services* built upon its earlier decision in *Dunmore*, where it began questioning its earlier jurisprudence, which failed to recognize collective bargaining as included in the freedom of association guarantee. Section 2(d) of the *Charter* provides that everyone in Canada has the freedom of association. Prior to 2007, several majorities of the Court had not found that the freedom of association included recognition of a right to strike.

**The Labour Trilogy**

421. As explained by the Court, the ñLabour Trilogyò in the first years after the *Charter* was introduced, did not recognize the freedom to bargain collectively under the *Charter:*

> The first cases dealing squarely with the issue of whether collective bargaining is protected under s. 2(d) of the *Charter* were a group of three concurrently released appeals known as the labour ñtrilogyò: *Reference re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313 (ñ*Alberta Reference*ò), *PSAC v Canada*, 1987 CanLII 89 (SCC), [1987] 1 SCR 424, and *RWDSU v Saskatchewan*, 1987 CanLII 90 (SCC), [1987] 1 SCR 460. The main reasons were delivered in the *Alberta Reference*, a case involving compulsory arbitration to resolve impasses in collective bargaining and a prohibition on strikes. Of the six justices participating in the case, three held that collective bargaining was not protected by s. 2(d); four held that strike activity was not protected. The next case to deal with the issue was *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, 1990 CanLII 72 (SCC), [1990] 2 SCR 367 (ñ*PIPSC*ò), in which the government of the Northwest Territories refused to enact legislation required in order for the PIPSC union to bargain collectively on behalf of nurses. A majority of four held that collective bargaining was not protected by s. 2(d).

*Health Services*, at para. 23.

422. The rejection of the inclusion of collective bargaining in section 2(d) in the strongest terms came from three of the six judges in the *Alberta Reference* decision, who relied on the following reasons for excluding collective bargaining and the right to strike from *Charter* protection:

- section 2(d) protects only activities which could be performed by an individual;
- strike activity and collective bargaining is only focussed on the ñobjectsò of a union or association, and does not represent the goals of the individual;
- protecting the right to collective bargaining and striking would go against the principle of judicial restraint; and
- as ñmodern rightsò, involving correlative duties or obligations on employers, the right to strike and the right to bargain collectively are not fundamental rights or freedoms.

*Alberta Reference,* at paras. 140-42

***RWDSU v. Saskatchewan***

423. The Supreme Court of Canada decision in *Health Services*, as upheld in *Fraser*, which the Plaintiffs submit is binding authority on this Court, follows the reasoning of the Saskatchewan Court of Appeal in *Retail, Wholesale and Department Store Union v. Saskatchewan* (1985), 19 DLR (4th) 609, [1985] 5 WWR 97, 39 Sask R 193, [*RWDSU SKCA*], which found that freedom of association guaranteed in section 2(d) of the *Charter* included a right of dairy workers to strike.

424. As briefly mentioned above, during a dairy workersô labour dispute in 1983, unionized dairy workers threatened to strike against two dairies. Under the threat of an imminent rotating strike by the unions, the serving of lockout notices by the companies, and the futile attempts at settlement giving the dispute some earmarks of one that would take some time to settle, the Government imposed the *Dairy Workers (Maintenance of Operations) Act*, with prohibited strikes or lockouts, extended the collective agreement, and imposed a binding arbitration mechanism. The unions applied to the Court of Queenôs Bench to have the law struck as *ultra vires* on the grounds that it infringed the *Charter*. The Court of Queenôs Bench dismissed the action and the unions appealed.

425. The Court of Appeal was asked to find that legislation, which removed the ability of the unions to strike and imposed a collective agreement with a mechanism for binding arbitration, violated the freedom of association under the *Charter*. In a thorough review of the freedom of association and the right to strike, the Court found that the portion of the legislation which removed the ability of dairy workers to strike violated section 2(d) and was not saved by section 1.. Although the freedom of association necessarily has limits, there is a duty on the Government not to interfere with the exercise of freedom within that sphere of activity.

> Before I proceed to define the regulated area respecting the freedom of association, that is, the inherent limits of the freedom of association, I think it appropriate to discuss the effect of a freedom being *guaranteed* by s. 1 of the *Charter*. Where a freedom is guaranteed, the freedom acquires a new and important dimension. The boundaries of the unregulated area -- the sphere of activity within which the freedom reigns unfettered -- once defined, are

> entrenched. In effect, from the standpoint of imposing a duty, the guarantee of a freedom is a conferring of a *right* to the freedom. Thus, to guarantee the freedom of association is to confer a right of the freedom to act in association. It is vital to a proper understanding of the imposition of a duty not to confuse the right of the freedom of association with a right (in the strict sense) of association. The first imposes a duty on the state not to interfere in a sphere of activity residual in nature, a sphere of unpredictable activity in which everything is permitted (what is inherently prohibited or limited is outside the sphere). ... And, of course, we are not here concerned with a right of association.
>
> *RWDSU SKCA*, at 13-14.

426. The Court found that the freedom of association allowed workers to engage in any activity in a particular sphere of unregulated activity, which included any lawful activity that could be performed by individuals, such as the ability to withdraw oneôs labour; or if the activity could not be performed individually, any activity in concert which was not criminal or directed to physical harm. This is the same approach that the Supreme Court of Canada has taken to evaluating infringements on the freedom of expression under 2(b) as set out in *R. v. Sharpe*.

> ...a person asserting the freedom of association under paragraph 2(d) is free (apart from Section I of the *Charter*) to perform in association without governmental interference any act that he is free to perform alone. Where an act by definition is incapable of individual performance, he is free to perform the act in association provided the mental component of the act is not to inflict harm. Such then is the ñunregulated areaò (to use Professor Ledermanôs expression) relative to the freedom of association. Such is the ñsphere of activity within which the law [has guaranteed] to leave me aloneò to use the words of the author of *Salmond on Jurisprudence* with an interpolation from s. 1 of the *Charter*.
>
> Does The *Dairy Workers (Maintenance of Operations) Act*, and particularly clause 7(c) thereof, impinge upon the freedom of association of the appellants accorded to them under paragraph 2(d) of the *Charter*? Clause 7(c), as noted, provides that during the period mentioned no employee shall participate in a work stoppage, that is, a strike, against the employer. If a strike is an act in association which does not fall within either of the two prohibited classes referred to in the foregoing analysis (and thus falls within the ñunregulated areaò or the sphere of activity mentioned above), then clause 7(c) impinges on the freedom of association of the appellants, each of whom, it is conceded, is an employee. If a strike is not an act in association, or if it is but falls within either of the two inherently prohibited classes, then there is no impingement and the matter ends there.

*RWDSU SKCA,* at 16-17.

427. In that case, there was no justification under section 1 as the Government had not demonstrated a need for the legislation, as evidence existed that milk capacity in Saskatchewan would only be reduced to 85% of pre-strike capacity by the unionsô activity.

428. On appeal at the Supreme Court of Canada, a seven judge panel, allowed the appeal:

(i) three of the judges allowed the appeal and found that there was no violation of the section 2(d), based on *Alberta Reference* and the finding that section 2(d) did not include the a right to bargain collectively (since overturned in *Health Services*) or the right to strike.

(ii) one judge allowed the appeal because 2(d) did not include a right to strike;

(iii) one judge allowed the appeal without reasons;

(iv) one judge dismissed the appeal, finding a right to strike is included in section 2(d) but no section 1 violation, due to the fact that the back-to-work legislation included binding arbitration, and

(v) one judge dismissed the appeal because there was no evidence to support the allegation that dairy production was an essential service.

429. While, as is discussed below, the Plaintiffs submit that *Health Services* is the leading and binding Canadian authority, it is worth examining the Saskatchewan Court of Appeal experience in dealing with designated essential services and these issues. The Saskatchewan courts have not revisited the issue of essential services and restrictions on strikes post-*Health Services,* and this challenge to the *PSESA* and *TUAA* raises the first opportunity.

430. The Plaintiffs submit that the approach of the Saskatchewan Court of Appeal, although overturned by the Supreme Court of Canada at the time, is now correct in light of *Health Services*. The focus of the courtôs inquiry should be on determining whether Government action infringes the freedom of association at all, in the same manner as it

would with respect to the freedom of expression, and weighing the impact and seriousness of the impact should be left to a section one analysis.

***Dunmore***

431. Following the Labour Trilogy, the next case to deal with section 2(d) rights was *Dunmore. Dunmore* dealt with the exclusion of agricultural workers in Ontario from the *Labour Relations Act*. In *Dunmore,* at para. 69*,* the Supreme Court of Canada concluded that agricultural workers were unable to exercise their freedom to associate in the absence of statutory protection. In coming to this conclusion, the majority held that inherently collective activities may well fall within section 2(d) protection. Whether any activity will be protected will be determined by reference to the purpose of section 2(d) of the *Charter*.

432. *Dunmore* rejected the reasoning applied by the Supreme Court of Canada in prior decisions, which held that the freedom of association applies only to activities that are capable of being performed by individuals.

***Health Services***

433. In *Health Services*, and the challenge to the companion legislation as detailed in BCTF 2011, the BC Government introduced legislation with virtually no advance notice to unions and debated and then passed over the course of a weekend legislation, which stripped collective agreements, eliminated protections regarding contracting out and successorship, and prohibited further bargaining on a range of issues that were of central importance to unions.

434. McLachlin C.J. and LeBel J., speaking for the majority in *Health Services*, completed the task the Court had begun in *Dunmore,* and significantly expanded the scope of section 2(d) of the *Charter*. The majority held that the guarantee in s. 2(d) protected not only the right to associate, but also a process of good faith bargaining. In *Health Services*, the Supreme Court of Canada overturned twenty years of jurisprudence by holding that ñthe grounds advanced in the earlier decisions for the exclusion of

collective bargaining from the *Charter's* protection of freedom of association do not withstand principled scrutiny and should be rejected.ò The Court expressly overruled the Labour Trilogy, including *RDWSU SCC,* and succinctly stated:

> We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.

*Health Services*, at para. 19.

435. As in *Dunmore*, the Court in *Health Services* was concerned with the decontextualized approach taken in previous decisions when defining the scope of the freedom to associate. The Court held that one needs to look at the context of the activity to determine whether it falls within the protections of section 2(d). In its review to determine whether collective bargaining fell within the scope of section 2(d) of the *Charter*, the majority extensively reviewed the history of collective bargaining. One aspect of that consideration was the review of parliamentary proceedings leading to the *Charter* where it was assumed by the Minister of Justice that the freedom to organize and engage in collective bargaining was implicitly included in section 2(d).

*Health Services*, at paras. 31-33, 67-68

436. Another aspect was Canadaôs historic recognition of the importance of collective bargaining. The Court recognized that historically, collective bargaining emerged ñas the most significant collective activity through which freedom of association is expressed in the labour context.ò

*Health Services*, at para. 66.

437. The Court cited what it described as ñsome of the most relevant principles in international lawò, including the voluntary nature of collective bargaining and the principle of good faith negotiations. It also noted that ñannulling or modifying the content of freely concluded collective agreementsò is contrary to the international law principle of ñvoluntary collective bargainingò, as is restricting the ñcontent of future collective agreementsò.

*Health Services*, at para. 77.

438. In addition to relying on the parliamentary proceedings, the historical significance of collective bargaining, and the international recognition of collective bargaining as a fundamental aspect of freedom of association, the Court relied on the concept that collective bargaining promotes other *Charter* rights, freedoms and values. The majority held that the *Charter* values of equality and democracy were enhanced by collective bargaining, as were the ñhuman dignity, liberty and autonomy of workersò.

*Health Services*, at paras. 80-86.

439. The Court summarized its conclusion on this issue as follows:

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

*Health Services*, at para. 86.

440. The Court concluded that section 2(d) enshrines the freedom to organize and to bargain collectively, and that collective bargaining is an integral component of freedom of association. However, the Court expressly refused to consider whether section 2(d) included a right to strike as it did not arise in that case and was being litigated in related actions, described in *BCTF 2009* in which the HEU and BCTF, impacted by similar legislation, engaged in protest action, characterized as strikes (the BC Court of Appeal had found that a restriction on protests as prohibited strikes violated the freedom of expression guarantee, but declined to determine when a prohibition on strikes offended section 2(c) or 2(d) of the *Charter*.)

441. It is important to note that the decision in *Health Services* was affirmed by the majority of the Court in *Fraser*, after a lengthy debate with other justices:

> Notwithstanding the comprehensive reasons of our colleague, we conclude that *Health Services* is grounded in precedent, consistent with Canadian values, consistent with Canadaôs international commitments and consistent with this

> Courtôs purposive and generous interpretation of other *Charter* guarantees. In our view, it should not be overturned.
>
> *Fraser,* at para. 97.

## *CHARTER* SECTION 2(D) PROTECTS THE FREEDOM TO STRIKE

442. Neither *Fraser* not *Health Services* dealt with the freedom to strike. The Plaintiffs submit that a determination of an infringement of the freedom to strike under section 2(d) must be treated the same as an infringement under section 2(b). If there is any interference with the ability of unions to engage in non-violent withdrawal of labour, then there is an infringement of the fundamental freedom of association in the same manner that interference with the ability of unions to engage in expression is an infringement of the fundamental freedom of expression.

### Proof of harm not required

443. The test for finding a section 2(d) infringement in the context of Government action placing restrictions on a right to strike should mirror the test for finding a section 2(b) infringement in the context of Government action placing restrictions on a right to strike. That is, if the Plaintiffs can demonstrate any infringement, then the justification of that infringement and evaluation of any harm must occur during a section 1 analysis.

444. Certain *Charter* rights and freedoms are presumed to be so fundamental that any breach of those rights and freedoms becomes a violation of that *Charter* guarantee, as in the case of section 14, which provides that a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter. The Supreme Court of Canada commented that at the stage of determining a violation of an accusedôs s. 14 rights, once an accused demonstrates a breach of their *Charter* right, the amount of prejudice that the accused suffers is a matter of remedy:

> Section 14 expressly guarantees the right to the assistance of an interpreter when certain conditions precedent are met. Nowhere does it require or suggest that an ex post facto assessment of prejudice to an accused's right to full answer and defence be carried out before a violation of the right can be found. Furthermore, the right under s. 14 of the Charter is one held not only by accused persons, but also by parties in civil actions and administrative proceedings and by witnesses. If the right to interpreter assistance were based exclusively on the right to make full

> answer and defence and on avoiding prejudice to that right, there would be no reason for parties in non-criminal proceedings as well as witnesses to be separately guaranteed the right.
>
> Section 14 guarantees the right to interpreter assistance without qualification. Therefore, it would be wrong to introduce into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights. The *Charter* in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial and is a violation of s. 14. Actual resulting prejudice is a matter to be assessed and accommodated under s. 24(1) of the *Charter* when fashioning an appropriate and just remedy for the violation in question. In other words, the "prejudice" is in being denied the right to which one is entitled, nothing more.
>
> *R. v. Tran*, [1994] 2 SCR 951, [1994] SCJ No. 16, at paras. 73, 74.

445. Relying on *Tran*, Justice Sopinka stated the following for the majority in a subsequent decision:

> This Court has consistently taken the position that the question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive *Charter* right has been breached. The extent to which the *Charter* violation caused prejudice to the accused falls to be considered only at the remedy stage of a *Charter* analysis (para. 27).

446. *R. v. Carosella* [1997] 1 SCR 80, [1997] SCJ No. 12, at para 27.

447. From these cases, the Plaintiffs submit that the passage of any legislation which interferes with the freedoms to bargain and strike which are integral to the fundamental freedom of association is a violation of section 2(d). The amount of prejudice does not determine whether there has been a *Charter* breach.

## APPLICATION OF 2(D) TO THE *PSESA*

448. The effect of the *PSESA* was to interfere with the ability to strike by creating pre-conditions to collective bargaining and placing restrictions on the scope of strike activity which is necessarily integral to the ability of the unions to achieve fair collective agreements. The ability to take job actions, or to threaten a strike, is fundamental for unions in compelling employers to reach collective agreements, as explained by the Supreme Court of Canada which expressly recognizes strike activity as a means to inflict economic harm to achieve the end of a fair collective agreement:

> Workers have the right to be represented by a union, and when a union supported by a majority of the workers is in place, employers are obliged to negotiate in good faith with the union. Good faith negotiation is the primary engine of industrial peace and economic efficiency. Occasionally, however, negotiations stall and disputes threaten labour peace. When this happens, it has come to be accepted that, within limits, unions and employers may legitimately exert economic pressure on each other to the end of resolving their dispute. Thus, employees are entitled to withdraw their services, inflicting economic harm directly on their employer and indirectly on third parties which do business with their employer.

*Pespi,* at para. 24.

449. The Plaintiffs submit that the evidence of the union as detailed above is clear: the *PSESA* has restricted their right to strike, which impacts their ability to engage in effective collective bargaining. Any restriction on the right to strike must be justified under section one not under section 2(d) . The Plaintiffs have set out in detail how their ability to strike and bargain has been infringed by the *PSESA* above. Additional affidavit evidence of the importance of the ability to strike to free collective bargaining prior to the PSESA is also provided.

450. The experience of the Plaintiff CUPE, Local 7 is that the ability to strike is critical to achieving fair collective agreements. Even limited job actions, such as one day walkouts of municipal workers and refusing overtime, can be effective job action. [Affidavit of M. Meickel, para 54, 68]

451. The experience of the Plaintiff CEP is that during the period between 1986 and 2004, the CEP bargained six collective agreements, four of which were concluded without job action. On two occasions, the CEP resorted to job action to put pressure on SaskTel to conclude a fair collective agreement. Any restriction on the ability of the CEP to engage in job action would have increased the length of the job action or reduced the CEPôs ability to negotiate a fair collective agreement. [Affidavit of R. Carlson, paras 14-17].

## APPLICATION OF 2(D) TO THE *TUAA*

452. The cumulative effect of the *TUAA* was to interfere with the freedom of association and the key activities of organizing into a trade union, bargaining collective agreements, and administering collective agreements. The *TUAA* removed several key rights from unions and workers. As set out, the Plaintiffs have grouped rights under the *Trade Union Act* into three major areas in which *TUAA* impacts key associational activities of unions, in bargaining, organizing, and collective agreement administration.

| ***TUAA* impact** | **Impact on Organizing** | **Impact on Bargaining** | **Impact on CA Administration** |
|---|---|---|---|
| Increased threshold for application section 3(1) | raising the threshold from 25% to 45% makes it more difficult to organize | | |
| Decreased Card Validity Length section 3(2) | shortening the length of time that cards are valid makes it more difficult run an organizing campaign | | |
| Mandatory certification vote section 3(2) | having a mandatory vote may be intimidating to workers and increase the opportunity for employer interference | | |
| Removal of discretion on refusal to certify section 3(3) | removing discretion from the board to refuse to certify a new union in place of an existing one makes it easier for established unions to be replaced | | removing discretion from the board to refuse to certify a new union in place of an existing one makes it easier for established unions to be replaced |

| ***TUAA* impact** | **Impact on Organizing** | **Impact on Bargaining** | **Impact on CA Administration** |
|---|---|---|---|
| Increased Employer Communication section 6 | increased employer communication allows for employer insertion in organizing campaigns to dissuade employees from joining unions | increased employer communication during collective bargaining or labour disputes undermines the exclusive bargaining agency of unions | increased employer communication during a collective agreement undermines the exclusive bargaining agency of unions |
| Time limit on unfair labour practice complaints section7 | A time limit on unfairs makes it more difficult to bring complaints during organizing campaigns in which employees are vulnerable | A time limit on unfairs makes it more difficult to bring complaints during bargaining which may last for years | A time limit on unfairs makes it more difficult to administer the collective agreement and fight against employer attempts to circumvent the union |
| Removal of CA length limit section11 | | removing maximum time limits for collective agreements allows for employer abuses in seeking long collective agreement terms which may prevent unions from responding to changing social or economic conditions | |

453. The *Trade Union Act* sets out certain rights and restrictions for unions and employers to allow them to meaningfully enjoy the freedom of association. The Government through 1944 onwards, chose to recognize establish rights that give effect to the freedom of association as set out in the *Trade Union Act*:

> Rights of employees
> Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the

exclusive representative of all employees in that unit for the purpose of bargaining collectively.

*Trade Union Act*, section 3.

454. These rights were modified through a consultation process (such as the 1993 *Trade Union* Act Review Committee) to expressly allow for employees to organize and bargain collectively. To take action which curtails or limits these rights, especially without full and complete consultation, infringes the Plaintiffsô *Charter* freedom of association.

455. Dr. Roy Adams briefly describes the Saskatchewan model of labour relations under the *Trade Union Act* as consistent with other North American models in his expert report:

> Like other Canadian jurisdictions, Saskatchewanôs labour legislation contains the principle characteristics of the *Wagner Act* Model. It provides for unions representing the interests of workers in discrete bargaining units to become the exclusive certified agent of all of the workers in that unit contingent upon its attracting majority support of workers in that unit.

[Affidavit of R. Adams, Ex B, para 8a].

456. Of central importance to the labour relations regime under the *Wagner Act* model is the method by which unions are certified as exclusive bargaining agents. Under the statutory regime in Saskatchewan, which is based on the *Wagner Act* model, the process by which workers may form unions and the procedural protections which insulate that activity from employer interference are positive rights which are necessary to enjoy the freedom to associate and organize.

**Loss of card certification is a barrier to unionization**

457. The observations of Dr. Adams of the impact of loss of card based certification are echoed by Professor Lynk in his studies of certification regimes in Canada.

> Prior to 1984, the federal jurisdiction and nine of the ten provinces utilized the card-check system in their labour legislation. Since 1984, five provinces have set aside the card-check system and turned to the mandatory secret ballot process:

> British Columbia (which adopted the mandatory certification election process in 1984; reverted to the card-check process in 1992, and returned to mandatory elections in 2002); Alberta (1988); Newfoundland (1994); Ontario (1995); and Saskatchewan (2008). In each case, the legislative changes were driven not by any evidence-based studies which found that the card-check system was functionally deficient in measuring majority employee support, nor by a rational selection from among different rights-enhancing industrial relations models. Rather, the most likely explanation is that these changes were the ideological preference of provincial governments led by parties with an antipathy towards collective workplace rights and other equalizing institutions. The unspoken expectation of these governments was that a mandatory election process for union certification would result in lowered unionization rates. And these expectations have been borne out. In 2004, the five provinces that required mandatory certification elections at that time had a combined unionization rate of 20.5 percent, which was over 14 percent lower than the 34.7 percent average unionization rate for the five provinces that did employ the card-check process.
>
> Michael Lynk, ñLabour law and the new equalityò (2009) 15 Just Labour: A Canadian Journal of Work and Society 125, at 135 [*Labour law*].

458. Similarly, Professor Riddell notes in a study of the British Columbia experience with mandatory votes versus card certification, that the introduction of mandatory votes for certification led to a 20% reduction in success rates for unionization. He attributes this decline to the greater opportunities for employer resistance to unionization.

> A voting regime may increase the effectiveness of employer tactics for two reasons. The amount of time employers have to influence the organizing drive is unambiguously greater in the voting system than in the card-check system.
>
> The secret ballot vote itself is a second reason management opposition is likely to be more effective in a voting regime. Under card-checks, if the employer coerces employees into refusing to sign cards, union organizers and pro-union colleagues can counteract the coercion tactics. In a secret ballot vote, the opportunity to counteract employer threats is likely diminished.
>
> Elections may also increase the incidence of management opposition. If the effectiveness of management opposition is greater in a voting regime-and assuming employers know this-then a cost-benefit calculation implies that employers will adopt such tactics more frequently, given that the chances of defeating the bid are greater while the costs remain the same. As well, there is simply more time available to the employer under elections. Thus, whereas employers in a card-check system may not realize organizing activity is occurring until after the cards had been collected, under a voting system they will have an opportunity to oppose the union.

Chris Riddell, ñUnion Certification Success under Voting versus Card-Check Procedures: Evidence from British Columbia,1978-1998ò 57:4 Indus & Lab Rel Rev 493, at 497-498.

459. The Plaintiffs submit there is sufficient and compelling authority, both academic and expert evidence in these proceedings, that the elimination of automatic certification and introduction of mandatory voting decreases the likelihood of certification success and thus interferes with the freedom of association.

460. Indeed Dr. Boyer, the expert witness for the Defendant in this proceeding, confirmed that making unionization more difficult by creating barriers to unionization such as those in the *TUAA* ñlevels the playing fieldò and allows a province to be more competitive.

Q: .. What we understand your opinion to be is that making it harder to unionize and lowering the unionization rate in Saskatchewan is accomplished by the change in this law and that there is a benefit to that by making us competitive with the other provinces?

Boyer: Yeah, that's my point.

[Cross examination of M. Boyer, page 58]

461. Although it is submitted that the elimination of card certification violates section 2(d) of the *Charter*, the Plaintiffs recognize that whether the elimination of card certification violates international law, depends upon whether the procedural guarantees afforded by the certification process have confidence of the parties. The CFA, in respect of the *TUAA*, offered the following comments.

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

ILO Decision SFL, at para 378.

**Delay in holding certification votes is an additional barrier to unionization**

462. The system of mandatory voting without procedural guarantees of timely votes without employer interference established by the *TUAA* does not enjoy the confidence of the Plaintiffs. Introduction of mandatory voting, coupled with a lack of procedural guarantees for timely votes, can lead to increased employer interference and negatively impact certification success rates. Indeed the Plaintiffs have detailed several examples of campaigns which have failed due to lack of timely votes, in particular IATSE and the Building Trades, and this is reflected in academic literature.

> Factors not necessarily related to employer responses also play an important role in determining certification outcomes. Delay between the initial filing of the application for certification and its resolution detrimentally affects certification success (Prosten 1979; Roomkin and Block 1981; Roomkin and Juris 1979; Scott, Simpson and Oswald 1993; Thomason 1994a). While some delays are due to unavoidable hold-ups, delay is often the result of employer stalling tactics. Certainly US employers are cognizant that delaying the certification vote affords greater opportunity to dissuade employees from supporting the union. Thomason (1994a) pointed out that increased employer resistance associated with certification votes may not only be a function of opportunity but also of greater expected payoff. The expected effectiveness of resistance is far greater when incremental changes in union support can affect the certification outcome (see also Koeller 1992). In Canadian jurisdictions where certification is granted based upon membership card evidence, certification votes are, by definition, close contests since they are only held where the union is able to assemble an initial threshold level of support but not a clear majority. Thus, we would expect delay, and other factors that increase uncertainty such as holding a vote or a hearing, to be associated with more employer resistance and lower certification success rates.
>
> Karen J. Bentham, ñEmployer Resistance to Union Certification: A Study of Eight Canadian Jurisdictionsò (2002) 57:1 Relations industrielles / Industrial Relations 159, at 163.

463. In the first years of the *TUAA*, workers have lost the right to join unions through delay and organizing has become more difficult, consistent with the experience of other jurisdictions. The procedural delay in the certification process allows for increased intimidation and coercive involvement by employers in the certification process, thereby interfering with employeesô rights to express their democratic decision over unionization

and associational rights to join a union. Administrative and procedural expediency are crucial at the certification stage of collective bargaining as employees are most vulnerable to employer reprisal prior to certification. Impediments to timely voting procedures obstruct employees from accessing their collective bargaining rights. Dr. Adams discusses the necessary guarantee that must accompany a mandatory voting process: a guarantee of timely certification votes.

> To minimize the possibility that employers will engage in illegal activity during a unionization campaign, most Canadian provinces that have introduced a voting process require that a vote be held shortly after the Labour Board receives an application. The new Saskatchewan legislation does not follow that precedent but rather apparently allows for the employer to engage in legal manoeuvring to delay the vote while it campaigns against certification. Experience from the United States where a similar system exists at the federal level indicates that long campaigns make certification even more difficult. In short, by instituting this version of the *Wagner-Act* Model the Saskatchewan Government is more strongly discouraging workers from making use of their human and constitutional right to organize and bargain collectively.
>
> [Affidavit of R. Adams, Ex B, para 8c].

464. Professor Slinn has noted that the issue of mandatory votes, statutory voting times, and increased employer communications are interlinked.

> First, several provinces have adopted mandatory representation elections in recent years. Canadian adoption of a ñquickò vote procedure, incorporating relatively short statutory time limits for holding elections (generally five to 10 days, varying by jurisdiction) was based on the belief that this period would be too brief for employers to engage in effective antiunion campaigns or unfair labour practices (ñULPsò) (Weiler, 1983: 1812). Such ñquickò votes contrasted with the situation in the US, where 50 days is the approximate median period between petition and election, with about 20 per cent of votes occurring more than 60 days after the petition is filed (US Department of Labor and Commerce, 1994: 68).
>
> However, it is evident that even ñquickò votes allow employers to engage in effective union avoidance efforts before the election. For instance, Riddell found that union avoidance tactics during the 1984 to 1992 period of mandatory vote in BC were highly effectiveð rivalling that of such tactics in the US (Riddell, 2001), and estimated that these tactics were twice as effective under the mandatory vote regime than under card-based certification (Riddell, 2004). Therefore even a few days between application and election is sufficient for effective employer anti-union conduct to occur.

> The second important change in Canadian labour legislation is that some provinces have recently introduced or strengthened explicit statements of employersô free speech rights in labour legislation. In one province at least, BC, it is clear these changes have greatly expanded the scope of permissible employer communications. This legislative encouragement may lead to greater use of anti-union communications by employers, including captive meetings.
>
> Sara Slinn, ñCaptive Audience Meetings and Forced Listening: Lessons for Canada from the American Experienceò (2008) 63:4 Relations industrielles / Industrial Relations 694, at 695.

**Increased Employer Communication further interferes with rights of workers**

465. Dr. Adams reviewed the changes to the unfair labour practice provisions of the *Trade Union Act* and the removal of restrictions on employer communication, and found that the effect of the amendment was to increase employer involvement in the process.

> Bill 6 states that ñnothing in this Act precludes an employer from communicating facts and opinions to its employees.ò While superficially benign this provision, in my opinion, encourages employers to engage in activity that is contrary to respect for international human rights standards. The phrase apparently is intended to condone employer statements intended to dissuade employees from ñunionizing.ò In short, the phrase encourages activity designed to persuade workers to refrain from exercising a basic human right.
>
> [Affidavit of R. Adams, Ex B, para 8f].

466. Employers have a significant influence on employees' working lives, through control of their work and daily duties, payment of wages, and access to personal information. Removing restrictions on employers from exploiting this unique position to deter, intimidate and confuse employees seeking to bargain collectively, substantially interferes with employeesô rights to organize and administer their trade union.

***Pre-*TUAA *Employer communications cases***

467. Seemingly benign expressions of ñopinionsò by employers may have profound effects on a vulnerable group of workers who are not unionized, such as a statement that an employer does not want a union, or that it cannot afford one. While pre-*TUAA*, such a communication would clearly have been prohibited as threatening, now there is much greater latitude.

468. In *Yorkton Credit Union Ltd. (Re)*, [1997] SLRBD No. 43 [*Yorkton Credit Union*], the union alleged that a memorandum distributed to members by the employer during collective bargaining violated section 11(1)(a) of the *TUA*. At that time, section 11(1)(a) contained the limiting phrase, ñbut nothing in this Act precludes an employer from communicating with his employees.ò The union argued that statements in the memorandum significantly misrepresented the conduct of the union negotiating committee, and that this constituted interference with the relationship between the employees and their bargaining representatives.

469. The Labour Relations Board agreed that the employer's statements did violate section 11(1)(a). The Court said that the employer could not convey the impression that the Union had not altered their position on bargaining issues in any way. However, the changes to this section by the *TUAA* means that such conduct is now unlikely to be an unfair labour practice if the employer characterizes their statements as their opinion of the union's position during bargaining. The Board cautioned employers that a decision to communicate with employees concerning matters which are the subject of bargaining with the trade union represents a risky strategy, and that an employer can easily go too far in such communications:

> We have often stressed, however, that for an employer to decide to communicate with employees concerning matters which are the subject of bargaining with the trade union representing those employees is to enter on a course which entails significant risks. As we have indicated, the Board has not prohibited employers from presenting accurate information to their employees, stating their position on bargaining issues, or describing the status of collective bargaining. On the other hand, the Board has made it clear that communications from an employer cannot be regarded in the same benign and uncoloured light as ordinary exchanges. An assessment of whether there is something objectionable about a communication from an employer must take into account the vulnerability of employees to the incalculable and often unacknowledged influence which such an utterance may have upon persons whose working conditions or employment may depend on the character of their relationship with the employer. In some situations, as the Board suggested in the United Food and Commercial Workers v. F.W. Woolworth Co. Ltd. [1993] 1st Quarter Sask. Labour Rep. 62, LRB File No. 148-93 decision, there may be no room for any communication from the employer which does not have a coercive implication.

*Yorkton Credit Union*, at para. 19.

470. In *Saskatchewan Power Corp. (Re)*, [2000] SLRBD No. 3, 60 CLRBR (2d) 161, [*SaskPower*], the employer began a media campaign using its internal communication bulletin, ñOn-Lineò, to communicate its views on the labour dispute. The employer used On-Line throughout the labour dispute to comment on its disappointment of the union and its leadership, its upcoming plans and commitments, and its opinion on what the unionôs actions meant to the employees and the public. Further into the labour dispute and media campaign, the employer issued a press release on its opinion of the unionôs proposals. The union viewed the press release as having a negative impact on the union. The union alleged that the employerôs media campaign not only constituted direct bargaining with the employees, but also misrepresented the unionôs conduct and proposal and used a tone designed to divide the union membership and leadership.

471. The Board reiterated their general approach to employer communication with employees as stated in *Yorkton Credit Union*, and held that the employerôs communication did violate s. 11(1)(a) and (b) of the *TUAA*:

> In the present case, the On-Line communications emanating from SaskPower did, in our view, cross the line into impermissible communication. First, the communications were disparaging of the Union's leadership and their proposals. The communications were worded in such a fashion so as to draw a distinction between the membership of the Union and its leadership and to suggest that the leadership of the Union lacked support from its members. SaskPower used the On-Line communication to suggest to the Union's membership that they reject their Union's position. In so doing, SaskPower undermined the role of the Union as the exclusive representative of its members. The Employer was clearly attempting to convince members of the Union that its leadership was acting against their interests. Such communications are improper and constitute violations of s. 11(1)(a) and (b) of the Act.
>
> Secondly, some of the On-Line communications conveyed inaccurate information, such as the claim that the Union was seeking a 12.4% wage increase and the claim that the Union had instructed employees to engage in a work-to-rule. Both of these claims misrepresented the state of collective bargaining.

*Saskpower*, at para. 86-87.

472. In *Wallace (Municipality) (Re)*, [2003] SLRBD No. 36, 98 CLRBR (2d) 61, [*Wallace (Municipality)*], the parties had unsuccessfully attempted to collectively

bargaining their first collective agreement. Seven months after certification the union took a strike vote but no job action occurred. One year after certification, and still without a collective agreement, the employer placed an advertisement in the local newspaper inviting proposals for summer road grading. The union alleged that the employer's conduct violated s. 11(1)(a) because it had an intimidating effect on the union's new members with respect to their relationship with the union, and it had a threatening, chilling and coercive effect on the employees.

473. The employer did not challenge the assertion that the advertisement had a threatening effect on the employees, but they contended that they placed the advertisement to get information relating to wage costs which they could then use in bargaining. The Board found that the advertisement did breach s. 11(1)(a) by threatening to interfere with concluding a collective agreement. The Board's comments on the employer's motivation in placing the advertisement indicate that under the *TUAA* the employer's intimidating conduct may be considered as its opinion on how to obtain information to assist it in collective bargaining:

> One could easily conclude that the sole purpose of the ad was to intimidate the employees who had yet to obtain their first collective agreement. However, the determination of the Employer's motivation in placing the ads is not necessary for the Board's finding that the Employer has breached s. 11(1)(a) of the Act by placing the ad. So long as the Board concludes, utilizing an objective test, that the ad interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by the Act, the Employer has breached s. 11(1)(a) of the Act.

*Wallace (Municipality)*, at para. 35.

474. In *Biggar School Division No. 50 (Re)*, [2002] SLRBD No. 49, [*Biggar School Division*], the parties were engaged in bargaining when the union took job action. The bargaining unit consisted of teacher assistants, school secretaries, library assistants, caretakers and maintenance staff. Before showing its final offer to the union, the employer placed an advertisement in the local newspaper setting forth its bargaining position on various issues and inviting the public to obtain copies of the employer's "final offer" from the Board offices, along with a list of employees who possess post-

secondary qualifications sufficient to entitle them to additional pay under the employer's proposal. The list included the names and the proposed pay for each qualified employee. The employer then sent a letter to union members, with a copy to the union, prior to the final vote on the offer containing a detailed explanation of significant changes the Board of Education was proposing in its final offer.

475. The employer asserted that the opinions contained in the advertisement were the honestly held views of the employer and that the personal information on each employee's pay was important information that the public should know. The Board held that the employer violated s. 11(1)(c) by disseminating the information of their final offer to the public before bringing it to the bargaining table. The Board stated:

> We find that the Employer violated s. 11(1)(c) by making the final offer and the related materials available to the public before it was brought to the bargaining table. There are two objectionable aspects to this conduct. First, it demonstrates a lack of respect for the role of the union. Through the certification process, employees have signalled their desire to be represented in negotiations with the employer exclusively by a union. By making direct appeals to the membership of a union, the employer is directly challenging the statutory role of the union and rendering it less effective as a bargaining agent for employees in the bargaining unit.
>
> Second, by engaging in such conduct, the employer does not display an intention to negotiate with the union with a view to concluding a collective agreement. When an employer takes its proposals directly to union members, the employer is skirting its obligation to engage in a rational discussion and debate at the bargaining table. It is also placing the union in an unfair position with respect to its members by not disclosing its entire bargaining position to the union at the bargaining table and, as a result, not providing the union with an opportunity to consider and make an informed response to the employer's proposal.

*Biggar School Division No. 50, at* paras. 16, 17.

***Post* TUAA *changed environment and increased employer communication***

476. The *TUAA* appears to permit an employer to communicate facts and opinions at any time, including during critical periods of organizing and bargaining. It is likely that if such information were disseminated under the revised section 11, it would not amount to a violation of any right, including s. 11(1)(c), conferred by the *TUAA.* In other words,

the *TUAA* allows employers to inform employees of the facts and their opinions before informing the union. Such conduct prior to the *TUAA* would have been characterized as direct bargaining with the employees and found to be an unfair labour practice.

*477.* The increased scope for communications given to employers under the *TUAA* diminishes the protections that unions and employees have against anti-union activities and coercive communications or intimidating conduct by employers. Removing limits on employer communications encourages employer interference with the administration of trade unions, including interference with representation votes and organizing drives and therefore prevents employees from attaining the full benefit of their rights to freedom of expression and free collective bargaining under sections 2 (b) and 2(d) of the *Charter.* As detailed above, several unions have experienced increased employer involvement in organizing campaigns and in collective bargaining.

**Increased requirement from 25% to 45% to file an application for certification**

478. Dr. Adams notes that the increased threshold requirement for a certification application makes organizing more difficult.

> Bill 6 requires unions to sign up 45% of the relevant employees before they are able to qualify for an election. Prior to Bill 6, the union could qualify for a vote if it had signed up 25% of the relevant workers. The increase clearly makes it more difficult for employees to certify an exclusive agent and thus discourages rather than encourages the practice of collective bargaining.
>
> [Affidavit of R. Adams, Ex B, para 8d].

479. The ILO reviewed these provisions and came to the same conclusion as Dr. Adams.

> With regard to the *Act to Amend the Trade Union Act*, the Committee notes that the complainants allege that the new amendments weaken freedom of association and collective bargaining rights in Saskatchewan. In particular, the complainants point out that under the amended Act, automatic certification of the union as the most representative has now been eliminated in cases even where a union has demonstrated to have signed union cards from a majority of workers in a bargaining unit. Instead, regardless of how many workers sign union cards, a secret ballot supervised by the LRB is required before certification can occur. A

> minimum of 45 per cent cards signed within 90 days before a certification vote can take place is also required (previously 25 per cent of cards signed within six months was sufficient to trigger a secret ballot vote)é
>
> *ILO Decision SFL,* at para. 377.
>
> However, the Committee is of the opinion that, in the particular circumstances of the case, the law stipulating that a trade union must receive the support of 45 per cent of employees before the procedure for recognition as a collective bargaining agent may well be excessively difficult to achieve. In this regard, the Committee observes that section 8 of the Trade Union Act, currently as in the past, provides that ña majority of the employees eligible to vote shall constitute a quorum and, if a majority of those eligible to vote actually votes, the majority of those voting shall determine the trade union that represents the majority of employees for the purpose of bargaining collectivelyò. The change as to the support for a union necessary in order to conduct a requisite secret ballot actually means that the union needs to demonstrate more support in order for a ballot to be conducted then it will need ultimately to be certified on the basis of the vote (i.e., 50 per cent of 50 per cent (the necessary quorum) is only 25 per cent of all employees). The Committee requests the Government to ensure that the provincial authorities take the necessary measures to amend the *Trade Union Act* so as to lower the 45 per cent support requirement for beginning the process of a certification election. It requests the Government to keep it informed in this respect.
>
> *ILO Decsion SFL,* at para 379.

**90 Day Validity of Union membership Cards and interferes with organizing**

480. Shorter periods of union card validity make organizing more difficult and costly. Unions spend a great deal of resources tracking down people and providing information about the process of unionization to interested employees. Unnecessary impediments detract organizers from this task and in some instances may deprive employees of their fundamental right to choose whether or not to join a trade union.

481. The experience of the Plaintiff COPE Local 397 is that having union membership cards that are only valid for 90 days instead of six months makes organizing more difficult and therefore more costly. The expiration of union cards after 90 days unnecessarily impedes the process of unionization and expends valuable union resources trying to track down employees to re-sign cards. [Affidavit of M. Dalrymple, paras 7, 12].

482. On a whole, the changes to the *TUAA*, which eliminate existing rights, serve to interfere with the freedom of association of the Plaintiffs, especially the freedom to organize. Any interference with such action is a violation of the *Charte*r, section 2(d). The Plaintiffs have submitted evidence from various unions, including IATSE, Plumbers and Piperfitters, the Steelworkers, Carpenters, Ironworkers, and UFCW which demonstrates that their ability to organize has been impaired by the TUAA. As argued under section 2(b) and in the application of 2(d) to the *PSESA,* this is sufficient to establish as breach of section 2.

## PART III – INTERFERENCE WITH THE FREEDOM TO COLLECTIVELY BARGAIN

### The *Health Services* Test

483. The test articulated by the Supreme Court of Canada in *Health Services* applies to Government action which directly interferes with the collective bargaining process. As set out above, the Plaintiffs submit that this is not a one size fits all test to all infringements of associational rights under section 2(d). The *Health Services* test is a different test than Plaintiffs assert govern action which expressly imposes legislative restrictions on the freedoms to strike and organize, which should follow the test for a section 2(b) infringement.

484. The *Health Services* test applies to Government action which removes or interferes with the ability of unions to negotiate collective agreement terms or diminishes those negotiated collective agreements provisions. In *Health Services*, those collective agreement provisions eliminated included the protection of seniority and restrictions on contracting out. In the case of the companion BCTF 2011 case, those collective agreement terms eliminated included important working conditions such as workload, class size and class composition limit.

485. While the Plaintiffs submit that the actions of the Defendant in passing the *PSESA* and *TUAA* are contrary to section 2(d) under the *Health Services* test, it is further argued that the restriction on the freedom to strike and barriers placed to organizing through changed legislation violate the fundamental freedoms under section 2, and the Plaintiffs are not required to demonstrate substantial interference, specific harm, or a balancing of interests at this stage of the argument.

486. Under the *Health Services* test, to determine what constitutes a breach of section 2(d) in the context of interference with collective bargaining requires two inquiries. The first inquiry is whether the Government action or conduct interfered with collective bargaining in purpose or effect. If so, the second inquiry is whether the action or conduct

*substantially* interfered with collective bargaining so as to constitute a breach of section 2(d) of the *Charter*.

*Health Services*, at para. 93.

487. The Court in *Health Services* articulated the test for evaluating state interference in collective bargaining as follows:

> 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?

*Health Services*, at para. 112.

**_Health Services_ Test Q1 - Did the government action interfere with collective bargaining in purpose or effect?**

488. The Supreme Court of Canada held that section 2(d) protects the process of collective bargaining, not substantive outcomes. It does not guarantee access to any particular statutory scheme of collective bargaining. Rather, section 2(d) protects ñthe right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining.ò

*Health Services*, at para. 87.

489. The Court held that section 2(d) not only imposes duties on government employers, but also put ñconstraints on the exercise of legislation powers in respect of the right to collective bargaining.ò That is, legislation that affects collective bargaining will be subject to s. 2(d) of the *Charter*.

*Health Services*, at para. 89.

490. Examples of state action, which may violate the procedural right to collective bargaining include, the ñfailure to consult, refusal to bargain in good faith, taking important matters off the table and unilaterally nullifying negotiated terms.ò

*Health Services*, at para. 111.

491. The Court held that legislation that either disregards past processes of collective bargaining or pre-emptively undermines future collective bargaining interferes with the process of collective bargaining.

*Health Services*, at para. 128.

492. However, the Court held that not all interference with collective bargaining constituted an infringement of section 2(d) rights; to constitute a *Charter* violation, there must be a ñsubstantialò interference with the employeesô 2(d) associational rights.

*Health Services,* at paras. 90-92.

**<u>*Health Services* Test Q2 Did the government action interfere with collective bargaining, so as to constitute a breach of freedom of association?</u>**

493. Even if there is an interference with the process of collective bargaining, in purpose or effect, the interference with collective bargaining must be ñso substantial that it interferes not only with the attainment of the union membersô objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.ò

*Health Services*, at para. 91.

494. The Court established two inquiries to assess whether a government measure amounts to a substantial interference in collective bargaining:

(1) the importance of the matter affected to the collective bargaining process; and

(2) the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

**Health Services *Test Q2 A Interference - The importance of the matter affected to the process of collective bargaining***

495. The Court described the first inquiry as follows:

> Turning to the first inquiry, the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively. ... [I]f the subject matter is of lesser importance to the union, then it is less likely that the s. 2(d) right to bargain collectively is infringed. The importance of an issue to the union and its members is not itself determinative, but will bear on the ñsingle inquiryò prescribed in *Dunmore* as it applies in the particular context of collective bargaining: does interference with collective bargaining over certain subject matter affect the ability of the union members to come together and pursue common goals?

*Health Services*, at para. 95.

496. With respect to this first inquiry, the question revolves around the subject matter being affected by the state action. We emphasize that the test is whether the subject matter is of importance to the union and its members ð not to the employer or government. Although importance in itself may not be determinative, it is a crucial factor. As the Court states ñ[t]he more important the matter, the more likely that there is substantial interference with the s. 2(d) right.ò

*Health Services*, at para. 95.

**Health Services *Test Q2 B Interference - Does the government action preserve the process of consultation and good faith negotiation?***

497. The Court stated that even if the first inquiry was answered in the affirmative, and the legislative changes substantially touched on collective bargaining, those changes ñwill still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation.ò

*Health Services*, at para. 94.

498. This second inquiry involves an analysis of whether the legislation respects the core aspect of collective bargaining: the duty to consult and negotiate in good faith. Components of this duty include the obligation on the parties to meet, commit time to the process, engage in meaningful dialogue, and be willing to exchange ideas and discuss positions. In addition, the parties must make a reasonable effort to reach an acceptable collective agreement through collective bargaining.

*Health Services*, paras 100-01.

499. The Court succinctly described how it determines whether a legislative measure in issue respected the ñfundamental precept of collective bargaining.ò The analysis in every case is contextual, but the question remains the same: ñwhether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.ò

*Health Services*, at paras. 97, 92.

500. The Court stated that while it must consider the circumstances in each case, ñthere subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.ò

*Health Services*, at para. 107.

501. We emphasize that the majority does not state that consultation is sufficient to interfere with fundamental freedoms. Instead, the requirement is a ñprocess of good faith consultation fundamental to collective bargaining.ò It is that requirement that is the ñbottom lineò.

*Health Services*, at para. 107.

502. The Court summarized the general principles as follows:

> In summary, s. 2(d) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(d) be breached.

*Health Services*, at para. 109.

## POST-*HEALTH SERVICES* DECISIONS

503. Various courts across Canada have subsequently applied the principles of *Health Services* to find on several occasions that Government action has violated the *Charter,* as set out below.

***Confédération des syndicats nationaux c Québec (Procureur général) 2008 (employee status)***

504. In this case, the Court declared unconstitutional legislation which statutorily eliminated the status of certain home care and child care workers as employees, redefining them as independent service providers. The consequence of the legislation was that the workers lost their ability to enter into collective bargaining, and also lost the benefits contained in existing collective agreements. The Government argued that the individuals still had the right to form associations, and to pursue common goals with the Government, although not unions.

505. The Court rejected that argument, finding that the legislation eliminated benefits, that the ability to consult with the Government through a non-union bargaining agent was not sufficient, and that these actions substantially interfered with collective bargaining.

> À la lumière de la jurisprudence récente de la Cour suprême du Canada, cette position, qui fait fi des acquis des demanderesses, ne peut être retenue. Les arrêts *Dunmore* et *Health Services* nous enseignent que lôal. 2d) offre une protection contre lôingérence substantielle dans la négociation collective qui compromet lôintégrité fondamentale du processus de négociation collective. Plus la mesure affecte des sujets dôune importance capitale pour la liberté d'association, plus vraisemblablement on se retrouvera devant une situation dôingérence substantielle.
>
> *Confédération des syndicats nationaux c. Québec (Procureur général)*, 2008 QCCS 5076, [2008] JQ no. 10735, [*Confédération (employee status)*] at para 239.

506. In addition, the Court also found that the legislation discriminated on the basis of sex contrary to section 15 of the *Charter*, as 95% of the at home child care workers affected by the legislation were women,.

***Mounted Police Association of Ontario v Canada (AG)***

507. In this case, the Ontario Superior Court of Justice applied *Health Services* and declared that legislation, which interfered with the freedom of RCMP members to associate for the purpose of collective bargaining, was constitutionally invalid. The legislation established a separate employee relations scheme for members of the RCMP. This scheme ñwas meant to be a mechanism for consultation in relation to workplace conditions and policies, not a vehicle for bargaining.ò

*Mounted Police Association of Ontario v. Canada (Attorney General)*, (2009) 96 OR (3d) 20, 2009 CanLII 15149 (ON SC), [*Mounted Police*] at para. 30.

508. The Court rejected the argument that the right to freedom of association recognized in *Health Services* merely required a process of consultation. Referring to the *Health Services* decision, MacDonnell J. stated:

> [W]hile the majority in *BC Health Services* described the process variously as one of ñconsultationò, ñdiscussionò and ñdialogue|, their reasons as a whole make it clear that it encompasses more than simple consultation. For example, they stated that the process cannot be reduced to a mere right to make representations, and that ñthe duty to consult and negotiate in good faithò is ñthe fundamental precept of collective bargaining.ò[emphasis added]. It is difficult to conceive of as a negotiation, let alone as bargaining, a process in which employees can make no offer to management of a *quid pro quo* because management can have the *quid* regardless of whether it surrenders the *quo*.

*Mounted Police*, at para. 47.

509. MacDonnell J. went on to say:

> It is instructive that the majority adopted the definition of collective bargaining offered by Professor Bora 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 employees on the basis of a comparative equality of bargaining strength. [emphasis added]

> While the first sentence of that definition might describe a process of consultation, the second demonstrates that something more is required. If one side can unilaterally determine the outcome of the ónegotiationsô, it can hardly be said that there is a comparative equality of bargaining strength.

*Mounted Police*, at paras. 48-49.

510. The Court concluded that the statutory scheme substantially interfered with collective bargaining by completely precluding it, violating section 2(d). The *PSESA* alters the bargaining strength between employers and unions in a similar manner.

***Canadian Union of Public Employees v New Brunswick***

511. In this case, the New Brunswick Court of Queenôs Bench held that a provision in the *Public Service Labour Relations Act* that contained a definition of employee which excluded casual or temporary employees unless they had been employed for a continuous period of six months or more infringed section 2(d) *Charter* rights. The argument of the Government of New Brunswick ï that the exclusion of casuals did not prevent them from forming an employee association or exercising the right to make collective representations to their employer ï did not succeed.

*Canadian Union of Public Employees v New Brunswick*, 2009 NBQB 164, [2009] NBJ No. 185,[CUPE], at paras. 6 and 28.

512. The Court also rejected the Governmentôs argument that casual employees enjoyed the protection of other legislation such as the *Employment Standards Act* in place of the right to bargain collectively, and concluded that the legislation breached section 2(d) of the *Charter* and was not saved by section 1.

*CUPE,* at para. 53.

***BCTF 2011***

513. In 2002, the newly elected British Columbia Liberal Government passed three controversial pieces of legislation which sought to save costs by taking benefits away from public sector unions: Bills 27, 28 and 29. These bills were introduced, debated, and

proclaimed over the course of a weekend without any consultation with unions. Bill 27, the *Public Education Flexibility and Choice Act*, prohibited the inclusion of certain items in teacher collective agreements, including staffing, class size and composition limits, and provided an arbitration process to strip those provisions out of existing collective agreements.

514. Legal challenges against all three bills were launched in 2002, although the challenges to Bills 27 and 28 were held in abeyance pending the determination of the Bill 29 case, was *Health Services,* in which the Supreme Court of Canada established that section 2(d) of the *Charter* included protections on the right to engage in collective bargaining as part of the freedom of association guarantee.

515. In *BCTF 2011*, the BCTF asserted that class size and composition issues (the number of, and supports for, students with special needs in classes), which were removed by the legislation from collective agreements, were significant terms and conditions of employment for teachers. In response, the Government argued that class size and composition issues were matters of public policy which were within the mandate of a government to set and exclude from bargaining to control expenditures in public education. The evidence of the BCTF was that prior to 2002, teachers had collectively bargained class size and composition, had treated them as priority items, and had gone on strike for these issues.

516. The evidence revealed that the Government held discussions with employer representatives about removing class sizes from collective agreements in mid-2001, some six months prior to their removal. There was no similar consultation with the BCTF. The Court also observed that the ILO CFA in Case No. 2190 (Canada/British Columbia), Report No. 330, ILO Official Bulletin, Vol. LXXXVI, 2003, Series B, No. 1, 239-305, [ñILO Decision BCTFò] had reviewed the legislation at para. 300:

> The Committee recalls that, while the determination of broad lines of educational policy is not a matter for collective bargaining between the competent authorities and teachersô organizations, it may be normal to consult these organizations on such matters (see Digest, op. cit., para 813). This is particularly important in cases such as the present one, where the issues in question were previously negotiated,

> with the usual give and take process, which means that the parties probably gave away some demands in return for concessions, which are now being taken away through legislative decision. Such a unilateral action by the authorities cannot but introduce uncertainty in labour relations which, in the long term, can only be prejudicial**.**
>
> *ILO Decision BCTF*.

517. The B.C Supreme Court found that the removal of collective agreement provisions without consultation in the *Public Education Flexibility and Choice Act,* violated section 2(d) of the *Charter*. The Court suspended the declaration of invalidity for a 12-month period to allow the Government the chance to address the implications of the decision**.**

***Fraser***

518. The Supreme Court of Canada most recently issued a decision applying section 2(d) in *Fraser,* in which agricultural workers and their unions challenged their exclusion from the Ontario *Labour Relations Act* as violating their freedom of association. The agricultural workers asserted a positive right for the Government to certify them under the *Labour Relations Act* as the specific labour relations regime for agricultural workers, the *Agricultural Employees Protection Act,* 2002 (the ñAEPAò), did not contain the same guarantees of certification or majoritarian exclusivity.

519. The Court summarized its ruling in *Health Services***:**

> The Court in *Health Services* emphasized that s. 2(d) does not require a particular model of bargaining, nor a particular outcome. What s. 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process. To use the language of *Dunmore*, it is among those ñcollective activities [that] must be recognized if the freedom to form and maintain an association is to have any meaningò (para 17). Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(d) associational right, and both must be justified under s. 1 of the *Charter* to avoid unconstitutionality.

*Fraser*, at para. 42.

520. The Court then applied the above principles to state that while a particular model of labour relations is not required, what is protected is associational activity and the ability to meaningfully exercise that right to that freedom:

> It follows that *Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements (C.A. reasons, at para 80). What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.

*Fraser,* at para. 47.

521. Although in the result of the application of *Health Services,* the Court did not find that the established framework for agricultural workers violated section 2(d), the Court endorsed the principles of *Health Services*.

> *Health Services* is grounded in precedent, consistent with Canadian values, consistent with Canadaôs international commitments and consistent with this Courtôs purposive and generous interpretation of other *Charter* guarantees.

*Fraser*, at para 97.

## *PSESA* - APPLICATION OF *HEALTH SERVICES* TEST

522. The *Health Services* decision extended *Charter* protection of the process and results of collective bargaining, distinct from the freedom to strike and organize. Specifically, the Court has held that it is an infringement of section 2(d) to eliminate significant collective bargaining rights and to prohibit unions and their members from engaging in collective bargaining, either generally, or on specific issues.

523. It is unconstitutional for governments to arbitrarily invalidate agreements and to arbitrarily place further restrictions on freedoms. Subsequent decisions have confirmed the importance of this decision and have expanded its principles to provide section 2(d) protection against other types of government interference into collective bargaining.

524. It is the Plaintiffsô position that the clear and unequivocal statement of the Supreme Court of Canada that a ñguarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issuesò should not and cannot be read down by this Honourable Court, and must include all components of collective bargaining, including organizing and taking strike action if necessary.

*Health Services,* at para 2.

525. The Plaintiffs submit that the test in *Health Services* should guide the Court to undertake the following review as it applies to the *PSESA* and *TUAA* to the extent that these statutes infringe the collective bargaining process beyond the right to strike and organize.

(1) Did the government action interfere with collective bargaining in purpose or effect?

(2) If so, did the government action substantially interfere with collective bargaining, so as to constitute a breach of freedom of association; considering:

(a) the importance of the matter affected to the collective bargaining process; and

(b) the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

***Health Services* Test Q1 - Did the Defendant's actions in passing the *PSESA* interfere with collective bargaining in purpose or effect?**

526. The Plaintiffs have detailed the interference with collective bargaining caused by the PSESA through (1) restricting the effectiveness of, and ability to, strike, and (2) overriding existing agreements concerning essential services and preventing collective bargaining in the future with respect to this significant term of employment.

***Health Services* Test Q2 A What was the importance to the collective bargaining process of the ability for unions negotiate or determine essential service agreements on their own terms?**

527. The right to withdraw oneôs labour has been described as essential in the collective bargaining context. In *Crofter Harris Tweed Co. v Veitch*, [1942] *1 All ER 142 (*HL), Lord Wright noted that:

> Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining.

528. The importance of the freedom to strike is immense in the collective bargaining relationship, but recognized as a justifiable and legitimate action, despite the impact on third parties. As explained by the Supreme Court of Canada, the strike is not an end, but a significant means to achieve an end of a fair collective agreement.

> Labour disputes may touch important sectors of the economy, affecting towns, regions, and sometimes the entire country. The cost to the parties and the public may be significant. Nevertheless, our society has come to see it as justified by the higher goal of achieving resolution of employer-employee disputes and the maintenance of economic and social peace. The legally limited use of economic pressure and the infliction of economic harm in a labour dispute has come to be accepted as a legitimate price to pay to encourage the parties to resolve their differences in a way that both can live with (see generally G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp 1-11 to 1-15).

*Pespi,* at para. 25.

529. While the vast majority of labour disputes in Saskatchewan are settled without the need for a strike or lockout, the ability to strike, or to threaten strikes, is integral to the collective bargaining process. The unions of Saskatchewan have demonstrated that the right to determine or freely negotiate what services, if any, are to be provided in the event of a strike is an important matter for them and vital to their ability to achieve fair collective agreements.

***Health Services* Test Q2 B What was the manner in which the *PSESA* impacts on the collective right to good faith negotiation and consultation?**

530. The *PSESA* and its introduction offends the collective bargaining principles of good faith negotiation and consultation in the following ways:

a. The *PSESA* was introduced without consultation;

b. The *PSESA* eliminates the right of unions to negotiate essential service agreements in good faith on terms different from the *PSESA*;

c. The *PSESA* gives an advantage to employers in collective bargaining through greatly reducing the effectiveness of strike action;

d. The *PSESA* undermines the collective bargaining process by requiring unions to attempt to negotiate essential service agreements, at considerable cost, instead of focussing efforts of reaching collective bargaining agreements.

**Requirements of good faith negotiation and consultation**

531. As noted above, in 1999, the Defendant was found to have breached the principles of international law by legislating locked out IBEW workers back to work during an employer lockout without consultation and without providing for binding arbitration. [Affidavit of G. Lewedon, paras 11-13]. The IBEW made a complaint to the CFA which found that this failure to properly consult was a breach of international law.

169. The Committee considers that if such conditions had been observed in the present case, i.e. that upper and lower limits or a ñbudgetary packageò had been established in consultation with the workers concerned and their organizations, the hesitation of the Government with regard to arbitration would have been reduced, even to nought. Compliance with such a procedure guaranteeing transparency and prior consultation of the workers concerned and their organizations would have enabled the Government to avoid resorting to hasty legislation which can only prove to be an obstacle in the establishment of sound industrial relations. Thus, the Committee requests the Government to explore this possibility in future, in consultation with the parties concerned, and to keep it informed in this respect.

170. In any event, the Committee deplores the fact that the Government passed Bill No. 65 so quickly and without holding the appropriate consultations with the parties concerned prior to its adoption and asks the Government to bring that legislation into conformity with freedom of association principles.

Case No. 1999 (Canada/Saskatchewan), Report No. 318, ILO Official Bulletin, Vol. LXXXII, 1999, Series B, No. 3, 119-171 [*ILO Decision IBEW*]; [Affidavit of G. Lewedon, Ex E,].

532. Prior to the ILO Decision SFL the CFA had already commented on the obligation of the Defendant to consult with unions, finding that the Defendant had breached this obligation. The Defendant was aware of its obligations to consult, and breached them again, as found by the CFA in the Plaintiffsô complaint over the *PSESA* and *TUAA*. The ILO described the minimal extent of the consultation by the Defendant as follows:

The complainants note that the Government of Saskatchewan did not consult any worker organizations on the need for, contents of or potential effects of the two Bills prior to drafting them. After the legislation was introduced, the Government of Saskatchewan held private meetings with less than a dozen unions during a two- to three-week period to obtain feedback. The SFL and the labour movement of Saskatchewan invited the Government of Saskatchewan to participate in various forms of meaningful consultation and study prior to the introduction and proclamation of Bills 5 and 6, including during an informal meeting between the President of the SFL and the Minister of Labour at which the President of the SFL asked for consultation before any legislation was introduced affecting unions and workers in Saskatchewan and offered a team of experts that would be willing to meet and discuss any proposed legislation. The offer was not accepted and Bills 5 and 6 were introduced a week later. The complainants claim that this consultative process was inadequate and insufficient to constitute meaningful consultation, contrary to the basic principles of freedom of association regarding the importance of consultation and cooperation between public authorities and employers and workersô organizations. According to the SFL, while there were

several minor and insignificant changes made to Bill 5, not one of the substantive changes or concerns that it has identified was addressed. No changes were made to Bill 6.

*ILO Decision SFL,* at para. 319.

533. The ILO found that this did not meet the level of good faith negotiation and consultation required and expected by international law standards and had the following recommendation:

The Committee further notes that according to the complainants, these pieces of legislation were adopted without prior consultation with the trade unions concerned. In this regard, the Committee notes that the Saskatchewan Government concedes that it had not undertaken consultations prior to introducing the draft legislation, but rather had extensive consultations afterwards é The Government must also ensure that it attaches the necessary importance to agreements reached between workersô and employersô organizations [see Digest of decisions and principles of the Freedom of Association Committee, fifth edition, 2006, paras 1068 and 1071]. The Committee expects that the provincial Government will hold full and specific consultations with the relevant workersô and employersô organizations in the future at the early stage of considering the adoption of any legislation in this regard so as to restore the confidence of the parties in the process and truly permit the attainment of mutually acceptable solutions where possible.

*ILO Decision SFL,* para. 362.

534. The Plaintiffs submit that the principles of good faith negotiation and consultation requires advance notice of the introduction of planned laws which will impact workers, and requires that workers and other stakeholders are given a real opportunity to fully discuss the legislation and its implications, and the ability to influence decisions. What is not acceptable, and what fundamentally breached the notion of good faith negotiation and consultation in this case, is the Defendantôs decision to involve a representative of the employer community, lawyer Kevin Wilson, in discussions about the introduction of the Bills in December 2007 while refusing requests from the Plaintiffs, specifically SFL president Larry Hubich, to meet to discuss the proposed legislation.

535. The Defendantôs actions were similar to that of the BC Government in involving employer representatives in discussions regarding changes to legislation without disclosing this to labour. The Court, in *BCTF 2011*, was critical of that approach:

> In addition, when considering the changes, the government informed and sought the advice of only one side to the bargaining table about its proposed changes, the employer side, BCPSEA. This occurred in the midst of collective bargaining, distorting the balance of power at the negotiating table and giving BCTF a distinct disadvantage in the bargaining.
>
> *BCTF 2011*, at para. 299.

536. The evidence of the Plaintiffs is that despite significant efforts on the part of unions to bring forward concerns, there was no discussion or meaningful consideration of the unionôs proposals, and no attempt by the Defendant to engage in a dialogue about the issues.

537. An explanation of the principles of good faith negotiation and consultation in section 2(d) was noted in *BCTF 2011*. The principles of good faith negotiation and consultation require more than the ability to make representations: they require allowing employees to influence the legislative process or outcome in association. Allowing an employee to influence an outcome is a substantially higher threshold than merely listening to representations.

> If the government prohibited collective bargaining through legislation, but otherwise in the process of implementing the legislation replaced collective bargaining with an equivalent process of good faith consultation or negotiation, then the legislation might not be an interference with freedom of association. However, if in the process of legislating limits to collective bargaining the government did not otherwise allow employees to influence the legislative process or outcome in association, then the interference with s. 2 (d) rights will be considered substantial. [Emphasis added]
>
> *BCTF 2011, supra* at para 297.

**Lack of good faith negotiation and consultation in introduction of the *PSESA***

538. The Plaintiffs submit that there was no consultation with labour, as required by the CFA and established in precedent in the 1993 *Trade Union Act* Review Committee consultations, prior to the introduction of the PSESA. This scenario is similar to the situations in *Health Services*, and *BCTF 2011*, in which the Government of British Columbia introduced legislation without prior consultation of the affected unions, but consulted the affected employers.

539. As set out above, the Defendant refused many requests from the Plaintiff SFL to discuss the legislation prior to its introduction, to have meaningful dialogue regarding the Bills, or appoint a committee to examine the proposed changes, similar to the 1993 Review Committee. The only modifications to Bill 5 were not substantive and failed to address the numerous and serious concerns of the Plaintiffs. There were no changes to Bill 6.

***SFL***

540. On February 6, 2008, Mr. Hubich and the SFL Communications and Research Officer, Cara Banks, met with Minister Norris and other officials from the Ministry of Advanced Education, Employment and Labour for approximately 45 minutes. Mr. Hubich and Ms. Banks presented and made comments on the SFL Brief analyzing the Bills and presented a brief later on February 15, 2008. The SFLôs position to the Defendant was clear that:

> ... if you are going to so drastically affect unionsô ability to function effectively on behalf of their members, that you are obligated to consult at length with unions themselves. A two to three-week window of private, hour-long meetings with less than a dozen unions does not constitute meaningful consultation.

[Affidavit of L. Hubich #1, Ex Q, page 4 ].

541. The SFL Brief raised concerns over the lack of definition of ñhealthò, the ability of the Government to prescribe essential services by regulation without legislative review, the ability of employers to unilaterally designate essential services without review, and the expansive scope of the legislation. [Affidavit of L. Hubich #1, Ex Q, page 5 ]. In particular, the SFL was concerned with the lack of administrative or legislative oversight of many of the provisions of Bill 5. [Affidavit of L. Hubich #1, Ex Q, page 6 ].

***SUN***

542. On February 8, 2008, the SUN provided a submission to the Government regarding Bill 5, including a request for ñdeep and meaningful consultationò. The

submission set out a detailed history of voluntarily providing emergency nursing services during any withdrawal of services during labour disputes, its expertise in doing so, and its commitment to continue to do so. Importantly, SUN noted that to its knowledge, ñthere is no evidence to establish that public safety has been jeopardized by job action in Saskatchewanò and noted that the Defendant had not shared any evidence to the contrary with SUN. [Affidavit of L. Hubich #3, Ex C,].

***GSU***

543. On February 14, 2008, the Plaintiff Grain Services Union (ñGSUò) provided a submission to the Government regarding Bill 5, including its view that the evidence of the unions presented a case for not needing to introduce legislation. GSU also raised a concern with over the need for full consultation.

> On several occasions over the years representatives of GSU, including the presenter of this brief, have been privileged to participate in consultations and other forums examining changes to labour legislation. As a result of this collective experience it is our firm belief that legislation proposing to change the dynamics of labour relations should be enacted only after extensive consultation with the affected stakeholders. In addition, the proposed stakeholder dialogue should be accompanied by appropriate opportunities for open public input.

[Affidavit of L. Hubich #3, Ex D page 2 ].

***HSAS***

544. In February 2008, the Plaintiff HSAS provided a briefing note to the Government regarding the Impugned Legislation. HSAS provided evidence of its provision of essential services in the past, submitted that employers could over-designate essential services under Bill 5 to ensure that they are not inconvenienced by job actions, that the definition of ñhealthò in Bill 5 was ambiguous, and that the ability of the Defendant to prescribe essential services could cause uncertainty and more problems. [Affidavit of L. Hubich #3, Ex E, pages 7-9].

***CUPE***

545. In February 2008, the Canadian Union of Public Employees Saskatchewan (ñCUPE Saskatchewanò) provided a submission to the Government detailing many concerns regarding Bill 5 including that Bill 5 was the most far-reaching in Canada; essential services legislation could prolong strikes; essential services legislation can lead to over-designation; Bill 5 could eliminate the right to strike of many workers; 96% of public sector settlements were reached without a work stoppage, and unions in Saskatchewan had a history of providing essential services. [Affidavit of L. Hubich #3, Ex F, page 3,].

546. CUPE Saskatchewan recommended that an independent committee of labour and employer representatives, along with a neutral chair, review the Impugned Legislation and solicit views. CUPE Saskatchewan also requested the disclosure of the background studies the Government conducted. CUPE Saskatchewan also provided comparisons of labour legislation in other jurisdictions, demonstrating that the Impugned Legislation had the most significant impact on employeesô rights in Canada. [Affidavit of L. Hubich #3, Ex F, pages 7-9].

***SEIU-West***

547. On February 14, 2008, the SEIU-West provided a brief to the Government regarding the Impugned Legislation. The SEIU submission detailed the less rights-impairing essential services frameworks in other jurisdictions, including the lack of designation of names of employees and the availability of binding arbitration in other jurisdictions. [Affidavit of L. Hubich #3, Ex G,].

***Carpenters, Local 1985***

548. On March 10, 2008, the Saskatchewan Regional Council of Carpenters and Millwrights (the ñCarpentersô Councilò) provided a letter to the Government setting out its concerns regarding Bill 5, including the concern that legislation limiting the right to strike might have the unintended consequence of encouraging further labour unrest. The

Carpentersô Council requested that the Government engage in a full consultation process regarding the Impugned Legislation. [Affidavit of L. Hubich #3, Ex H,].

***The CAUT***

549. The Canadian Association of University Teachers submitted a letter to the Defendant on March 26, 2008, setting out its concern for Bill 5, particularly the concern that it would violate international law principles:

> It is also a clear violation of internationally recognized labour conventions to which Saskatchewan is a signatory, including ILO Convention No. 87 *Concerning Freedom of Association and Protection of the Right to Organize.* In interpreting this Convention, ILO panels have explicitly stated that essential services legislation cannot be used by governments to restrict collective bargaining and the right to strike. According to the ILO, adherence to the Convention means that governments must define essential services narrowly as those ñwhose interruption would endanger the life, personal safety or health of the whole or part of the population.ò
>
> [Affidavit of L. Hubich #3, Ex I].

***SAHO***

550. SAHO met with the Defendant on February 5, 2008, to discuss Bill 5, and raised issues including the need to include private ambulance services in the legislation, and a suggestion that the legislation include final offer arbitration as a means to end strikes. [Affidavit of M. Wellsch, Ex T].

***Concerns common to unions***

551. As demonstrated, a number of issues arose among the unions including:

- Bill 5 would limit the ability of unions to strike
- Bill 5 does not define ñhealthò
- the ability of the Government to prescribe services was an issue
- Bill 5 gives the employer the unilateral right to designate who can strike

- Bill 5 is overly broad in the scope of employers it applies to
- Bill 5 may not meet the standard of international law
- Unions have provided essential services in the past
- Bill 5 did not provide unions with the opportunity to challenge most aspects of essential services
- Unions would like a more meaningful process to discuss the changes.

552. Other than the 45 minute to one hour discussions with the Unions, there was no consolidation of concerns, no publication of the position papers, no attempts to reconcile different concerns, no follow up meetings, no discussion of the need for Bill 5, and no ability for unions to attempt to influence the process or the legislation.

**Lack of good faith negotiation and consultation in the operation of the *PSESA***

553. In addition to the lack of consultation in the introduction of the *PSESA*, the application of the *PSESA* offends the freedom of association. The structure of the *PSESA* serves as a barrier to good faith negotiation of essential services in that it permits employers to unilaterally designate levels and individuals required to provide essential services, and does not allow unions to challenge classifications of essential service employees or job duties to be performed during a labour dispute.

554. The distinction between the ability to make representations and effectively negotiate was noted by the Court. There is a substantive difference between the ability to negotiate, a fundamental aspect of collective bargaining, and the ability to speak with an employer to make representation, as was explicitly noted by the Court when it considered the healthcare legislation before it in *Health Services* :

> 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.
>
> *Health Services,* at para. 114.

555. The ability of an employer to unilateral designate employees as essential has the effect of eliminating free bargaining. The climate of the ñnegotiationò of an essential services agreement is set by section 6(2) of the *PSESA* whereby the employer is required to set out what is considered an essential service before negotiations begin, while retaining the right to impose those services if there is not agreement on essential services. In the case of the Government, essential services are prescribed without any ability to negotiate.

556. The negotiation of an essential service agreement is not a level playing field. If there is no agreement on essential services, a public employer has the ability to unilaterally designate, in addition to the services to be essential, the classifications of persons to be essential, the numbers required, and the names of individuals. The only recourse to the union is to challenge the number of persons in each classification which may be essential.

## *TUAA* – APPLICATION OF THE *HEALTH SERVICES* TEST

### *Health Services* Test Q1 Did the Defendant's action in passing the *TUAA* interfere with collective bargaining in purpose or effect?

557. The Plaintiffs have detailed above how the changes to the TUAA, including the elimination of card certification and increased employer communication have impacted their ability to organize, bargain, and administer collective agreements

### *Health Services* Test Q2 A What was the importance of the matters affected by the *TUAA* to the collective bargaining process?

**Organizing**

558. Without a doubt, the most important aspect of collective bargaining is the ability to organize as a union. Without the ability to collectively form into a trade union which has recognized rights under the *Trade Union Act*, the freedom to associate is meaningless. Any restriction on the ability to organize impacts the most important matter in the collective bargaining process.

**Bargaining**

559. The second most important aspect of collective bargaining is the ability to negotiate a collective agreement on behalf of members that have associated to form a union. As discussed above, an integral component is the ability to take job actions. Equally important is the ability of unions to communicate with their members without employer interference or involvement about bargaining matters.

***Removal of 3 year term lengths on collective agreements***

560. In *United Steelworkers of America, Local 5917 (Re)*, (2005) 115 CLRBR (2d) 18, [2005] SLRBD No. 19, [*Steelworkers 5917*] affirmed on judicial review 2005 SKQB 364, [2005] S.J. No. 544, [*Steelworkers SKQB*], the union alleged that the employer engaged in an unfair labour practice and an illegal lockout when the employer pressed to

impasse a proposal for an agreement with a term exceeding three years on which to base a lock-out. The union argued that such a final offer proposal contained an illegality because section 33(3) of the *Trade Union Act* provided that a collective agreement with a term of operation in excess of three years is deemed to have an expiry date three years from its effective date for the purpose of section 33(4). Section 33(4) allowed a party to provide notice to the other party to the agreement to negotiate a revision of the agreement during the 30/60-day open period before the expiry date of the agreement.

561. The Saskatchewan LRB agreed with the union that the employer had committed an unfair labour practice by not collectively bargaining in good faith by pressing to impasse of a proposal for a collective agreement with a term exceeding three years and basing its lock-out on such proposal.

562. The Board determined that s. 33(3) provided that a party may make a proposal for an agreement with a term in excess of three years but could not press to impasse nor take industrial action predicated thereon. The employer did press the issue of the term of the collective agreement to impasse, and the Board found that the employerôs conduct amounted to an unfair labour practice because of its failure or refusal to negotiate in good faith. The employer did not attempt to justify, explain or rationalize its insistence on an agreement with a term greater than three years nor did the employer show a willingness to bargain a collective agreement on a term of three years or less. A lock-out aimed at inducing an agreement that dissuades employees from exercising their rights under the *Trade Union Act* is unlawful.

*Steelworkers 5917*, at para. 119.

563. In reaching its conclusions, the Board commented on the importance of the term of a collective agreement to the union:

> It is disingenuous of the Employer to say that the five-year length of the term of its proposal was not important to the Union, when it is axiomatic that the monetary provisions (whether in the form of wage increases, lump sum payments and/or enhancement of benefits) and the term of an agreement are so closely

bound together that a change to one such aspect can and often does make all the difference to the palatability of the proposal for one party or the other

*Steeworkers 5917, at* para. 125.

564. The Saskatchewan Court of Queenôs Bench upheld the Boardôs decision and further commented:

It is inconceivable that the length or term of an agreement, in circumstances such as the parties faced in these negotiations, would not have an important and central impact upon the issue of wages and benefits. Both of these issues fundamentally depend upon the length of any agreement that might be reached. The wage and benefit package is very much dependent upon whether or not it will bind the parties over a two, three or five year term of agreement.

The Board properly concluded that the Employer's "take it or leave it" position, communicated in its "final offer" with the threat of a lock-out, and the subsequent lock-out imposed did constitute a bargaining impasse on all major outstanding issues including, most importantly to the determination of this application, the length of the CBA.

*Steelworkers SKQB*, at para. 22-23.

565. The Board in *Pepsi Bottling Group (Re)*, [2006] SLRBD No. 11, 121 CLRBR (2d) 163, [*Pepsi Bottling Group*] looked at the same issue six months after the judicial review and commented on the principle behind *Steelworkers SKQB*:

... the intertwining of the term of a proposed collective agreement with a proposal on major monetary issues, particularly wages and benefits, nearly always underlies the rationale for the party making the proposal; that is, such party makes the proposal on the basis that it believes it understands what it will cost (or in the case of the union, what its members will obtain) over the term of the agreement. Thus, while a party may not engage in deliberately false bargaining with the intention to lull the other party into false expectations, both parties will know that either of them may seek to renegotiate the longer-term agreement during each open period commencing with that which coincides with the third anniversary of the agreement - the decision to do so may be predicated upon any number of reasons.

*Pepsi Bottling Group*, at para. 6.

566. The Plaintiffs submit that the combined changes to the *TUAA* meet the threshold of interference with established rights and the freedom of association of the Plaintiffs as it impacts their ability to bargain and organize under *Trade Union Act*.

**Administration**

567. Once negotiated, the administration of collective agreements is almost as important as their creation. Actions that change the labour relations climate, or increase the abilities of employers to discuss terms and conditions of employment directly with employees, undermine the role of unions and interfere with the collective bargaining process.

**Employer communication during bargaining**

568. There is also significant evidence that the Bill 6 amendment to s.11(1)(a) of the *Trade Union Act* led to increased employer communication with members during bargaining, that the unions characterized as amounting to unfair labour practices in several respects. In particular, in bargaining a renewal collective agreement with health sector employers, SGEU negotiators were continually frustrated and undermined by the employersô simultaneous communication of bargaining positions to members through the media and websites. [Affidavit of B. Erickson, paras. (l)(m)(n)(o)(p)].

569. According to SGEUôs evidence, ñé our efforts at bargaining with the employerôs negotiating team were effectively undermined by a sustained and coordinated media campaign through which SAHO eroded both public and member confidence in SGEU and the members of the Tri-Union by (1) repeating and amplifying the threat to withhold retroactive pay increases if the unions continued to attempt to bargain a better deal, and (2) calling on members to demand that their unions submit the employersô final offer to a vote.ò [Supplementary Affidavit of B. Erickson, para (t)]. The Intervenors SEIU-West and CUPE have tendered similar evidence.

**Diminishment of the role of unions**

570. Aside from the specific activities of bargaining, organizing, and collective agreement administration, any legislation which renders the organization of unions more difficult and removes the rights of workers to form unions has the indirect effect of diminishing the role of unions in civil society. Unions play a significant role in the economy and society and the diminishment of their rights generally can have a role in undermining trade union values.

***Health Services* Test Q2 B What was the manner in which the *TUAA* changes impacts on the collective right to good faith negotiation and consultation?**

571. There was no consultation and certainly no good faith negotiation, in the introduction of Bill 6 or the proclamation of the *TUAA*. None of the concerns of the Unions were addressed in the Defendantôs feedback and Bill 6 passed without any changes at all. The following concerns were raised regarding Bill 6 by the Plaintiffs and others which the Plaintiffs submit triggered a duty on behalf of the Defendant to have deep and meaningful discussions with the Unions to address their concerns.

**SFL**

572. The SFL submitted the SFL Brief to the Defendant on February 15, 2008 setting out its concerns on Bill 6:

a. the changes to the restrictions on employer communications could impact employeesô freedom to associate and express themselves. [Affidavit of L. Hubich #1, Ex Q, pages 10-11].

b. the elimination of card certification for mandatory votes and the increase in threshold application from 25% to 45%. [Affidavit of L. Hubich #1, Ex Q, pages 11-14].

c. the ability of the Government to prescribe regulations over form of union cards. [Affidavit of L. Hubich #1, Ex Q, page 15].

d. time limits for filing unfair labour practice complaints of 90 days. [Affidavit of L. Hubich #1, Ex Q, page 15].

e. removal of the three-year restriction on collective agreement length, with specific reference to *Wheat City Metals*. [Affidavit of L. Hubich #1, Ex Q, page 15].

573. Following delivery of the SFL Brief, the SFL received a one-page letter explaining that the amendments to the *Trade Union Act* which were introduced were done so to promote ñfair, cooperative, productive and healthy work environments for employees and employers alike, while ensuring Saskatchewan remains competitive with other Canadian provinces.ò There was no response to any of the concerns raised by the SFL. [Affidavit of L. Hubich #1, Ex S].

**IATSE**

574. IATSE presented a position paper on February 2, 2008, requesting that the Defendant consider the unique needs of the film industry. In particular, IATSE explained that the mandatory vote for certification would adversely impact the development of the film industry in Saskatchewan. In other jurisdictions, voluntary recognition agreements protect the rights of IATSE members without the need for a more onerous certification process. [Affidavit of L. Hubich #3, Ex B].

575. IATSE requested a meeting to discuss its concerns with the Government, but was not granted a meeting with Government. [Affidavit of B. Haines, para 21]

**GSU**

576. The GSU specifically requested in a letter dated February 12, 2008, that changes to the *Trade Union Act* should only be considered after extensive fact-based dialogue and consultation between and with stakeholders. In particular, GSU asked the Defendant to bring into the open claims that the *Trade Union Act* distorted employee choice for full discussion and examination. [Affidavit of L. Hubich #3, Ex D,].

**HSAS**

577. HSAS provided a briefing note to the Defendant setting out its position on Bill 6, in particular the changes to the employer communications provisions and the elimination of automatic certification. HSAS raised serious concerns about the potential for greater employer interference in the certification process and that the changes in Bill 6 would make organizing more difficult. HSAS raised its concerns over the removal of the restrictions on length of collective agreement terms in the healthcare context, and the limits on length of time for unfair labour practices. [Affidavit of L. Hubich #3, Ex E,].

**CUPE**

578. CUPE provided a detailed submission on Bill 6 to the Defendant, setting out concerns regarding the impact of mandatory certification votes, shortened card length, employer communications, time limits for LRB decisions, removal of limits of collective agreement length, and statistics on the superior wages and benefits enjoyed by union members over non-unionized employers. The CUPE submission requested information about who was consulted on the drafting of the legislation and setting out other examples of consultation. The CUPE submission included specific recommendations for an independent committee of employer and labour representatives to engage in a consultative process and a request for the Government to release background studies. [Affidavit of L. Hubich #3, Ex F,].

**SEIU-West**

579. SEIU-West provided a brief to the Defendant on its concerns about the changes posed by Bill 6 with reference to its organizing experience and its observation that loss of automatic certification would likely lead to more adversarial proceedings. SEIU-Westôs submission, like CUPEôs contained comparative data from other jurisdictions, demonstrating the link between automatic certification and organizing success. SEIU-West also raised concerns over the removal of the discretion to allow the LRB not to certify a union if there was an incumbent union, the removal of the collective agreement

term length and the change on employer communications. [Affidavit of L. Hubich #3, Ex G,].

**Carpenters, Local 1985**

580. The Carpentersô Council provided a letter to the Defendant setting out its concerns with Bill 6 and details of how previous changes to the legislation regulating construction unions had impacted the apprenticeship intake in the building trades. The Carpentersô Council raised the issue of labour shortages and the potential impact of Bill 6 on skilled labour in the future. The Carpentersô Council raised concerns with changes to the employer communications provisions and specifically requested a thorough consultation process before any changes were implemented. [Affidavit of L. Hubich #3, Ex H, page , para ].

581. None of the recommendations, requests, or concerns raised by the Plaintiffs and Intervenors noted above were addressed in the *TUAA*. There was no meaningful dialogue about the rationale for the changes or their potential impact. The combination of the significance of the changes brought by the *TUAA* and lack of consultation and good faith negotiation over their introduction violated the freedom of association.

## PART IV -- INTERFERENCE WITH INDIVIDUAL LIBERTY

582. Section 7 of the *Charter* provides individuals with the protection of certain rights and protection from interference with those rights:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

*Charter*, section 7.

583. The traditional approach to a section 7 analysis was described by Justice La Forest in *R v. Beare*; *R. v. Higgins*, [1988] 2 SCR 387, [1988] SCJ No. 92, [*Beare*], as a two step process:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to ñlife, liberty and security of the personò and, secondly, that the deprivation is contrary to the principles of fundamental justice.

*Beare,* at para. 28.

584. In *Charkauoi v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350, [*Charkaoui*] Madame Chief Justice McLachlin qualified that step one of the section 7 analysis includes whether ñ... there <u>has been or could be</u> a deprivation of the right to life, liberty and security of the person.ò

*Charkauoi*, at para. 12, Emphasis Added.

585. In *Blencoe v. British Columbia*, 2000 SCC 44, [2000] 2 SCR 307, [*Blencoe*], Justice Bastarache confirmed that ñé there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context.ò

*Blencoe,* at para. 45.

**The *PSESA* engages section 7 of the *Charter***

586. The Plaintiffs submit that the *PSESA* interferes with the exercise of individual rights and freedoms of workers by compelling an individual to work. Specifically, the *PSESA* makes it an offence for individuals to freely choose to withdraw their labour and have a meaningful role in defining the terms, conditions and purpose of their employment.

587. Legislation which compels an individual to work interferes with their section 7 liberty and security interests several ways:

a. Individual workers are prohibited from withdrawing their labour as they choose, under threat of severe financial and possible penal sanctions;

b. Individual workers are restricted from participating in improving their individual economic conditions through strike action as an integral part of a collective effort;

c. Individual workers are restricted from participating in improving the terms and conditions of their employment, including health and safety concerns and benefit and retirement plans, through strike action as an integral part of a collective effort; and

d. Individual workers are restricted from participating in improving the social service function through strike action as an integral part of a collective effort.

*588.* The Plaintiffs do not argue that section 7 gives individuals an absolute right to work in any profession that they choose, free from government interference under section 7.

*Blencoe*, at para. 86; *Chaoulli,* at para. 202.

589. Rather, individuals have a right under section 7 to ensure that the state does not interfere in fundamentally personal choices about whether or not to work, to have a meaningful role in defining the terms and conditions of their employment or improve

social services that are an inherent function of their employment. In *Alberta Reference,* Chief Justice Dickson highlighted the importance of work to a person:

> Work is one of the most fundamental aspects in a personôs life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A personôs employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a personôs dignity and self-respect.

*Alberta Reference*, at para. 91.

590. The importance of work to a personôs life informs the severity of the Defendantôs interference with an individualôs right to liberty and security of the person. Preventing persons from withdrawing their labour as they choose and interfering with their ability to have a meaningful role in defining the terms, conditions and purposes of their employment has a significant impact on an individualôs livelihood, personal autonomy, dignity and self-respect. The Plaintiffs argue that such interference can only be seen as violating an individualôs economical, physical, and psychological rights to liberty and security of the person.

591. The pre-*PSESA* labour regime under the *Trade Union Act* did not restrict an individual from making a decision to withdraw his or her labour on his or her own in accordance with their fundamental personal choices or personal autonomy. The pre-*PSESA* labour regime made it an offence for workers to withdraw their services collectively during prescribed periods:

> 1(k.1) ñstrikeò means any of the following actions taken by employees:
>
> (i) a cessation of work or a refusal to work or to continue to work by employees acting in combination or in concert or in accordance with a common understanding;

*Trade Union Act*, section 2(k.1).

592. The *PSESA*, however, fundamentally changes this structure and creates a regime in which individual workers are legally compelled to continue to work during a labour

dispute, under threat of severe financial penalty. The right of individuals to withdraw their labour and the right to participate in defining the terms, conditions and purpose of their employment are removed from the labour regime by the application of the *PSESA*. The applicable provisions of *PSESA* are as follows:

> 14 No essential services employee shall participate in a work stoppage against his or her public employer.
>
> 18(1) If there is a work stoppage:
>
> (a) every essential services employee shall continue or resume the duties of his or her employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement, if any; ...
>
> (2) If there is a work stoppage, no essential services employee shall, without lawful excuse, fail to continue or resume the duties of his or her employment with the public employer.
>
> 20(1) No person or trade union shall fail to comply with this Act, the regulations or an order of the board.
>
> (2) Every person who or trade union that contravenes any provision of this Act is guilty of an offence and liable on summary conviction: ...
>
> (b) in the case of an offence committed by any person other than one described in clause (a), to a fine of not more than $2,000 and, in the case of a continuing offence, to a further fine of $400 for each day or part of a day during which the offence continues.
>
> (3) In the case of default of payment of a fine imposed on a person pursuant to this section, the convicting court shall, on the request of the Attorney General, furnish the Attorney General with a certified copy of the order of conviction and fine imposed and, on its filing in the office of the local registrar of the Court of Queenôs Bench, that order is enforceable as a judgment of that court.
>
> *PSESA*, at sections 9(2)(c), (4), (6); 10(1); 14; 18(1)(a), (2), and (20)(1), (2)(b), (3).

**International Obligations and Law**

593. The Plaintiffs submit that Canadaôs obligations under the *ICESCR* are persuasive in interpreting an individualôs rights protected under section 7. The *ICESCR* declares:

> Article 6

> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.
>
> Article 11.1
>
> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based of free consen.t

*ICESCR,* at Articles 6 and 11.1. [Emphasis Added]

594. The *Declaration on Rights at Work* reaffirms the obligations of all members in the ILO to realize the principles concerning the fundamental rights at work. One of the fundamental rights is the ñthe elimination of all forms of forced or compulsory labour.ò

*Declaration on Rights at Work* at Article 2(b).

595. The Plaintiffs are not seeking to enforce international law under section 7, nor are we seeking to use the international covenants to interpret the *PSESA* or *TUAA*. Rather, the Plaintiffs provide the international obligations to assist in the interpretation of the meaning and scope of an individualôs rights under section 7. As elaborated earlier, the Supreme Court of Canada has confirmed that *Charter* rights must be interpreted in light of Canadaôs international obligations (*Fraser*, at para. 92). In *R. v. Ewanchuk*, [1999] 1 SCR 330, [1999] SCJ No. 10, [*Ewanchuk*], Madame Justice LôHereux-Dubé stated that ñ[o]ur *Charter* is the primary vehicle through which international human rights achieve a domestic effect... In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity.ò

*Ewanchuk*, at para. 73.

**Interference with workers' liberty interests**

596. Legislation that compels individuals to work by prohibiting them from making the fundamental choice to withdraw their labour and preventing them from participating in defining the terms and conditions of their employment impacts interests protected by the section 7 right to liberty.

**Individual's fundamental choice to withdraw their labour and define the terms, conditions *and* purpose of their employment**

597. The principle that the section 7 right to liberty protects an individualôs right to make inherently private and fundamental choices was confirmed in *Blencoe*.:

> The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices.... In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy:
>
> ... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

*Blencoe*, at para. 49.

598. In *R. v. Morgentaler*, [1988] 1 SCR 30 [*Morgentaler*], Justice Wilson emphasized that ñé an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state.ò

*Morgentaler*, at para. 230.

599. The liberty interests that arise in the employment context under the *PSESA* are similar to those in *Godbout v. Longueuil (City)*, [1997] 3 SCR 844, [1997] SCJ No. 95,

[*Godbout*], where the issue was whether a municipal resolution requiring all new permanent employees to reside within its boundaries offended the liberty interest under section 7. Justice La Forest, writing for three members of the Supreme Court of Canada, held that the right to choose where to live was an inherent private choice within the sphere of personal autonomy that fell within the right to liberty. As such, an individual has the right to make such choice free from state interference, due to the operation of section 7.

600. Although the decision was ultimately made under the *Quebec Charter of Human Rights and Freedoms*, RSQ, c. C-12, *Godbout* continues to be cited in subsequent majority opinions (see *Blencoe*, at para. 51; *R. v. Malmo-Levine; R v. Caine*, 2003 SCC 74, [2003] 3 SCR 571, [*Malmo-Levine*], at para. 86; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 SCR 6, at para. 45; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 100) for its explanation of the section 7 liberty interest, particularly as follows:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as ñprivateò. Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. ... In my view, choosing where to establish oneôs home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
>
> *Godbout,* at para. 66.

601. The right of an individual to choose to withdraw his or her labour and to have a meaningful role in defining the terms, conditions and purpose of his or her employment is an inherent right dealing with inherently personal decisions. These are fundamental personal choices that go to the core of the dignity and independence workers exercise, and are at the heart of workersô personal autonomy. Put another way, the choice of whether to work or not is intrinsic to the most basic liberty of workers in a free and democratic society. The *PSESA* interferes with the ability of an employee to exercise these interests by compelling individuals to work under threat of extreme fines, thereby offending that liberty interest.

602. The widespread scope of the interference with a workerôs right to withdraw their labour under the *PSESA* is evidenced in the Affidavit of W. Fischer:

> The percentage of our members designated and not permitted to exercise their legal right to strike exceeds 40 per cent overall and in some sectors 100 per cent. Approximately 30 per cent of our members are part-time and they have been designated as essential in the same manner. Some of our members who are being designated as essential include casual employees. These employees are not required to work under the collective agreement and are simply employees who may be called in to work to replace regular employees when they are absent. Under the collective agreement they can refuse a call or take the shift. The designation of these employees as essential means they must always be on call and must take the shift if called.
>
> [Affidavit of W. Fischer, at para. 7]

603. Canadaôs obligations under Article 6 of the *ICESCR* and Article 2(b) of the *Declaration on Rights at Work* inform both the scope and importance of an individualôs ability to withdraw their labour as a section 7 interest.

604. Article 11.1 of the *ICESCR* provides a ñ... right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.ò Any prohibition on an individualôs ability to withdraw his or her labour inherently takes away the concepts of choice and acceptance, which are principles recognized internationally as fundamental to human dignity. This amounts to a form of forced or compulsory labour in contradiction to the principle in Article 2(b) of the *Declaration on Rights at Work* that declares that all

Members must respect, promote and realize ñthe elimination of all forms of forced or compulsory labour.ò

*ICESCR* at Preamble and Article 6.

*ILO Declaration on Fundamental Principles*, at Article 2(d).

605. In *International Longshoremen's and Warehousemen's Union, Canada Area Local 500 v. Canada*, [1994] 1 SCR 150, [1994] SCJ No. 11, [*ILWU*], the Union challenged the *Maintenance of Ports Operations Act*, RSC 1986, c.46, that put an end to a lockout and mandated the workers back to work in the ports. The union argued that the *Maintenance of Ports Operations Act* violated section 7 because it prohibited an individual or worker from exercising his or her free choice not to work except under terms and conditions he or she had agreed to and, if necessary, to freely withdraw his or her labour upon expiry of the contract of employment. The union also argued that the *Maintenance of Ports Operations Act* compelled an individual to go to work at a time and at a place imposed by the government under the threat of penal sanctions.

606. The Supreme Court of Canada upheld the Federal Court of Appeals decision, [1992] 3 F.C. 758, that individuals and workers remained free to exercise his or her rights individually, and that the *Maintenance of Ports Operations Act* only restricted the workersô ability to resort to collective action in order to collectively assert their individual right.

607. The recognition that a right to withdraw oneôs labour and participate in defining oneôs employment on an individual basis as fundamental measures of autonomy is consistent with the broad development of *Charter* jurisprudence under section 2(d) relating to the freedom of association. In *ILWU,* the Supreme Court of Canada put it this way, ñ...the scope of freedom of association as it related to the right of union members to strike applies as well to the determination of the right to liberty under section 7 for the same purpose.ò

ILWU, at para. 1.

608. The Supreme Court of Canadaôs holding in *ILWU* supports the requirement that the scope of section 7 must broadly coincide with the scope of the freedom of association which recognizes the importance of collective bargaining. To do otherwise would prevent the attainment of constitutional freedoms because the government has failed to provide the conditions necessary for the exercise of individual rights.

*Fraser*, at para. 70.

609. The recent decision in *Fraser* reinforces the concept from the *ILWU* decision that recognizing an individualôs right to withdraw oneôs labour and participate in defining his or her employment must be considered given the broad development of *Charter* jurisprudence under section 2(d). The need for *Charter* provisions to be interpreted consistently with each other is a tenet of *Charter* jurisprudence.

610. The decisions of *Fraser* and *Health Services* permit a look at section 7 in the fashion suggested by the Federal Court of Appeal and the Supreme Court of Canada in *ILWU* in these circumstances. The impugned provisions of the *PSESA* specifically restrict individuals from freely withdrawing their labour and participating in defining their employment. In other words, the current situation involves the rights of individuals under section 7 separate from their freedoms as union members as a collective under section 2(d).

611. Prohibiting workers from being able to withdraw their labour as they choose under the *PSESA* also severely interferes with an individualôs liberty to make inherently private and important fundamental choices about refusing to cross a picket line.

*Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operations' Association*, 2009 FCA 201, [2009] FCJ No. 722, at para. 48.

612. The *PSESA* also interferes with an individualôs physical liberty by making it an offence for an individual to withdraw his or her labour and imposing the threat of a severe financial penalty which may lead to imprisonment. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Justice Lamer held that where an individual has really not done anything wrong, absolute liability offences that carry the potential of imprisonment

without offending the principles of fundamental justice and violating a personôs right to liberty are inconsistent with s.7 of the *Charter* and unconstitutional.

**Interference with Security of the Person**

613. The *PSESA* severely interferes with an individualôs economical, physical, and psychological security and integrity by compelling individuals to work. The Supreme Court of Canada has held that section 7 protects state interference with physical and psychological integrity and security in the criminal context and beyond the criminal context.

*Morgentaler*, at para. 22*; Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, [1993] SCJ No. 94, [*Rodriguez*]*; CUPE,* at para. 58.

614. In *CUPE*, Chief Justice Lamer defined the nature of the protection of psychological integrity in the section 7 security right as follows:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

*CUPE*, at para. 60.

615. In *Chaoulli*, Chief Justice McLachlin and Justice Major held for the majority that security of the person includes personal autonomy:

> In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, Sopinka J., writing for the majority, held that security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress" (pp. 587-88). The prohibition against private insurance in this case results in psychological and emotional stress and a loss of control by an individual over her own health.

*Chaoulli*, at paras. 122-124.

**Individual's fundamental choice to define the terms, conditions and purpose of their employment**

616. Under the *PSESA* individuals are economically impacted by the inability to take meaningful action to improve their wages. This places individuals in a position of possibly not being able to meet their basic necessities. As detailed in the section 2(d) part of the argument above, the importance of withdrawing onesô labour is an essential element of collective bargaining. It is also an individual interest essential to their right to security of the person.

617. Workers`economic interests are connected directly to their livelihood and fundamental to human life or survival. The Supreme Court of Canada has recognized the importance of work as a means of financial support.

*Alberta Reference,* at para. 91.

618. Canadaôs obligations under Article 11.1 of the *ICESCR* inform an individualôs interest in participating in improving his or her wages. Article 11.1 of the *ICESCR* expresses a comprehensive and significant obligation of states to recognize that an individualôs standard of living and continuous improvement of his or her living conditions are a basic and fundamental human right. The interpretation on the section 7 rights should recognize at least this same level of protection *(Health Services,* at para. 79) and any likely interference with this right engages an individualôs right to security.

619. In preventing an individual from participating in improving his or her economic conditions by compelling him or her to work, an individual is left with little, or no, control over the improvement of their wages. The Plaintiffs submit that this loss of control over oneôs personal autonomy may result in psychological and emotional stress. The report of Dr. Brown demonstrates that an individualôs participation in controlling his or her wages has always been an important aspect for workers in Saskatchewan.

[Affidavit of L. Brown, Ex B]

620. These far-reaching and diverse issues affect both the past, present and future of the worker and his or her family. In prohibiting workersô participation, the *PSESA* restricts individuals from having control over important aspects of their livelihood. Loss of such control has a profound effect on a person's psychological integrity.

621. Dr. Adams indicates that an individualôs dignity, liberty and autonomy are already triggered when his or her labour enters the capitalistic market because of the inherently fundamental and pervasive unequal relationship between employer and worker:

> In conventional economic theory labour is a commodity, one of the key elements in the production process. Entrepreneurs assemble labour, land and capital, and organize a production and distribution process. Labour is sold by individual workers and becomes the property of the capitalist. Since labour cannot be unraveled [SIC] from the human being performing it, the seller accepts an obligation to subordinate himself or herself to the buyer and to follow the buyer's orders. Under these conditions the seller has no autonomy and no liberty and in the view of many theorists and philosophers this condition compromises the individual's human dignity.
>
> At common law the relationship between the Master (employer) and the Servant (employee) is seen to be one of contract. The Master and Servant freely enter into a contract of employment for some period of time. In this view, subordination is not fundamental to the employment relationship but is one incident of the individual contract, a condition freely accepted in return for remuneration. Many theorists and philosophers have pointed out that this conception is flawed since the relationship between the buyer and seller is unequal. The enterprise of any size has many more resources than the individual job seeker and thus may dominate the negotiation. Moreover, in modem enterprises of any size conditions of work are standardized. They apply to classes of employees and do not vary individually. As a result they cannot be negotiated individually. The job seeker must take what is on offer or withdrawal. Collective bargaining, as the Supreme Court points out in *B.C. Health Services*, has long been heralded as the most appropriate way, within liberal society, to ameliorate this fundamental and pervasive inequality.
>
> [Affidavit of R. Adams, Ex.B at para. 6(ii)(b) and (c).]

622. The *PSESA* interferes with an individualôs ability to exercise control in connection to ameliorating this unequal relationship. On the most fundamental level, the *PSESA* restricts workers in an already pervasively unequal relationship from engaging with employers over terms and conditions of their employment.

**The individual's fundamental choice to withdraw labour as a matter of personal autonomy**

623. The Plaintiffs submit that prohibiting workers from withdrawing their labour as they choose has widespread and serious psychological consequences for individuals, that engages their personal and decisional autonomy and their health. Beyond the actual economic interests mentioned above, individuals may be faced with having to work in unsafe and unhealthy working conditions as a result of the *PSESA*.

624. In *Health Services,* quoting Chief Justice Dickson in *Alberta Reference*, Chief Justice McLachlin commented on the importance of an individual being able to withdraw their labour:

> 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 exploitative working conditions. As the United States Supreme Court stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), at p. 33:
>
> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; ...
>
> The "necessities of the situation" go beyond, of course, the fairness of wages and remunerative concerns, and extend to matters such as health and safety in the work place, hours of work, sexual equality, and other aspect of work fundamental to the dignity and personal liberty of employees. [pp.334-35]
>
> *Health Services*, at para. 84.

625. Under the *PSESA* workers may not only lose their ability to participate in improving the health and safety issues at their workplace, but they may be compelled to continue to work in unsafe conditions. Given the importance of employment in an individualôs life, this interference in their health and psychological integrity meets the seriousthreshold requirement and violates the workersô right to security of the person.

The *PSESA* infringes workersô right to security of the person by preventing workers from participating in efforts to improve their working conditions through strikes.

626. It may further be argued that the PSESA specifically impacts the security of the person of health and social services workers, by interfering with their ability to balance their right to withdraw their labour with their professional and personal obligations to continue providing these services. The Plaintiffs are not asserting that the *Charter* provides them with a right to work in professions that deliver social services; rather, the employer must not interfere with the personal and decisional autonomy of a worker once they are fulfilling an obligation inherent in their profession. In *Health Care Strikes: 'Pulling the Red Cord'*, Larry Haiven and Judy Haiven comment on the increasing need of health care workers to act as buffers against system failure:

> We contend that the right to threaten or implement a work stoppage is the only effective mechanism workers now have to warn employers and the public of impending problems - a mechanism that the government and employers wish to remove.
>
> Larry Haiven and Judy Haiven, *"Health Care Strikes: 'Pulling the Red Cord'*ò (November 2007) Number 2 Canadian Centre for Policy Alternatives - Nova Scotia: The Right to Strike in Nova Scotia Series at 1 [ñ*Pulling the Red Cord*ò].

627. Prior to its introduction, HSAS outlined how Bill 5 would interfere with the desire of workers in the health care profession to improve social services:

> Pursuant to Section 2(c) the definition of ñessential serviceò includes danger to ñhealthò. This is potentially a very broad concept. We would ask your government to consider what is meant by this. HSAS believes that wait lists of a year or more for services, lack of post-operative therapy and chronic disease management services are a danger to ñhealthò. We believe strongly that these are ñessential servicesò that are not being provided at sufficient levels currently in Saskatchewan. We would expect our new government to provide the necessary staffing and infrastructure investment that will improve the provision of these ñessential servicesò on a day to day basis. This will go a long way to ensuring that Employers are not faced with the prospect of job action compromising their efforts to deliver health services.
>
> In many jurisdictions it has been noted that Employers request and demand extremely high levels of ñessential servicesò. HSAS believes strongly in the provision of ñemergency servicesò and we are gravely concerned that Employers

> in this province will use this legislation to demand services that exceed normal levels of staffing in order to ensure that they are not ñinconveniencedò by job action. In the summer of 2007 Employers made numerous requests for services which are normally not provided by HSAS members. HSAS politely declined these requests. If Employers are allowed to make inappropriate and unreasonable requests then certain outcomes are likely. Hardening of relationships between Employers and workers, ineffective and unproductive Essential Service negotiations, lengthier job action and service disruptions and increasing erosion of the retention and recruitment of health care professionals in the province of Saskatchewan.
>
> [Affidavit of L. Hubich #3, Exhibit ñEò at page 8].

628. There is no doubt that workers who are affected by *PSESA* provide social services as a function of their employment. When the provision of those services is threatened because of working conditions, the workers are the first to suffer from the stress and anxiety of attempting to provide social services with inadequate means. The ability of workers to withdraw their labour is essential to indicate to the public and their employers that the system has overburdened them psychologically and prevented their ability to provide social services to the public. The ability to carry out their job in a safe and healthy manner is instrumental to their personal and decisional autonomy and physical and psychological safety and health.

*Pulling the Red Cord*, at page. 5.

629. In conclusion, the *PSESA* creates an impermissible barrier for individuals designated as essential to withdraw their labour as they choose, because an individual designation cannot be challenged. A designated individual cannot fully participate in determination of the terms, conditions and purpose of their employment through the collective bargaining process. The importance of work to an individual is paramount: it is central to an individualôs identity, self-worth and emotional well-being. As demonstrated, the Section 7 right to liberty and security of the person protects a workerôs ability to withdraw his or her labour and participate in defining the terms, conditions and purposes of his or her employment.

**Scope of section 7: Sufficient state action and harm resulting from state action**

630. In *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, [*Gosselin*], Madame Chief Justice McLachlin stated that the scope of the interests that section 7 protects are those ñ...that occur as a result of an individualôs interaction with the justice system and its administration.ò Madame Chief Justice McLachlin found that it was unnecessary and undesirable to define administration of justice and instead, to allow section 7 to develop incrementally. [*Gosselin*, at para. 77].

631. In *Dunmore,* the finding of minimum state action to ground a claim under section 2(d) was satisfied by the mere fact of legislating over the respective matter:

> Once the state has chosen to regulate a private relationship such as that between employer and employee, I believe it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to Charter review. As Dean P. W. Hogg has stated, "[t]he effect of the governmental action restriction is that there is a private realm in which people are not obliged to subscribe to 'state' values, and into which constitutional norms do not intrude. The boundaries of that realm are marked, not by an a priori definition of what is 'private', but by the absence of statutory or other governmental intervention" (see Constitutional Law of Canada (loose-leaf ed.), at p. 34-27).

*Dunmore*, at para. 29.

632. The Defendantôs enactment of specific statutory provisions prohibiting individuals from withdrawing their labour and participating in improving their terms, conditions and purpose of employment parallels the state action that infringed individualsô section 7 rights in *Chaoulli*. In *Chaoulli*, the claimants challenged the constitutionality of certain statutory provisions prohibiting Québec residents from obtaining private health insurance for services under the provinceôs health care plan. Madame Chief Justice McLachlin and Justice Major, writing for the majority, found that the state action of enacting specified statutory provisions fell within the scope of section 7.

**Principles of Fundamental Justice**

633. Having demonstrated that prohibiting individuals from withdrawing their labour as they choose constitutes a deprivation of liberty and security of the person, the second part of the traditional section 7 test requires that the Plaintiffs show that such deprivation is not in accordance with the principles of fundamental justice. If the laws in question adversely affect the right to liberty and security of the person and do so in a manner that violates any one of the principles of fundamental justice, this Court is bound to strike down those laws under the *Charter* as being unconstitutional.

**Deprivation not in accordance with principles of fundamental justice**

634. In *Rodriguez*, Justice Sopinka, writing for a majority of the Court, defined the principles of fundamental justice as legal principles capable of being identified with some precision, that are fundamental in that they would have general acceptance among reasonable people.

*Rodriguez*, at paras. 138-141, 173.

635. The principle of fundamental justice implicated in this case is that laws that affect the life, liberty or security of the person shall not be arbitrary, overbroad, grossly disproportionate or vague.

**Overbroad**

636. In *R. v. Heywood*, [1994] 3 SCR 761, [1994] SCJ No. 101, [*Heywood*], Justice Cory, writing for the majority, established the doctrine of overbreadth, which is a breach of the principles of fundamental justice that affects life, liberty or security of the person. The law under challenge in *Heywood* was a *Criminal Code* provision that made it an offence for a person previously convicted of sexual assault to be found loitering in or near a schoolground, playground, public park or bathing area. Justice Cory concluded that it restricted the liberty of affected individuals and that it was not in accordance with the principle of over breadth. Justice Cory summarized the overbreadth principle as follows:

> Over breadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of over breadth is that in some applications the law is arbitrary or disproportionate.

*Heywood*, at para. 49.

637. The principle of overbreadth is similar to the minimal impairment branch of the *Oakes* test under section 1. (*R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 SCR 606, [1992] SCJ No. 67, [*Nova Scotia Pharmaceutical*]. The Supreme Court of Canada in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, [*Hutterian Brethren*] stated it this way:

> I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. As I will explain, in my view the record in this case discloses no such alternative. [Emphasis Added]

*Hutterian Brethren*, at para. 55.

638. One question that this Honourable Court must determine is whether prohibiting individuals from withdrawing their labour as they choose and participating in improving the terms, conditions and purpose of their employment achieves the state objectives of administering essential services in Saskatchewan. Additionally, could the Defendant adopt less drastic alternative measures that satisfy their objectives?

639. As already examined in detail, the *PSESA* imports a regime that restricts individuals from withdrawing their labour collectively and individually by giving the control over essential service designation to the employer. Once an employer designates the classifications, duties, roles, who performs those roles and the number of people to perform those roles, an individual is unable to withdraw his or her labour if they are designated. The union only has the ability to challenge numbers of employees in each classifications, not individually designated employees. If workers do withdraw their labour during a labour dispute, they are subject to receiving a severe financial penalty and the possibility of proceedings that may lead to imprisonment. The Plaintiffs submit that ensuring that the province maintains a level of essential services in the event of job action can be achieved in other less pervasive means than interfering with a workerôs right to liberty and security of the person.

640. Larry Haiven and Judy Haiven accurately explain the tension behind the right to strike for health care workers, which equally applies to any industry where essential services are applicable:

> On the one hand, we have the right of users of the health care system to obtain care and not be subjected to conditions unnecessarily dangerous to life and limb. On the other hand we have the right of those who deliver the care to decent terms and conditions of employment, to negotiate those terms and not have those terms imposed upon them.
>
> Larry Haiven and Judy Haiven, ñThe Right to Strike and the Provision of Emergency Services in Canadian Health Care,ò (December 2002) Canadian Centre for Policy Alternatives at 3 [ñCanadian Health Careò].

641. The over breadth of the *PSESA* is demonstrated in the evidence of the Plaintiffs and intervenors, which explains that the process of voluntary essential services designation prior to the *PSESA* did not interfere with an individualôs right to liberty and security of the person, yet satisfied the objective of the Government, as the unions retained the ability to schedule the essential services. Evidence showing that alternative means met the governmentôs objective of preserving public safety during the 2006-7 SGEU PS/GE strike can be found in the Affidavit of R. Bymoen at para. 18, 21-22 and

the Affidavit of J. Rattray demonstrating the employerôs clear ability to deal with strikes affecting Corrections, Highways and others through the use of replacement workers.

642. The HSAS, with a membership of approximately 3100 workers, and SAHO, representing 12 health authorities, effectively provided essential services prior to the *PSESA* without interfering with the right to liberty and security of the person, as individuals retained a right to voluntarily participate in essential services:

> Two elements of the provision of emergency services by the Union described above are: every member has the opportunity to voluntarily participate in the provision of emergency services and every member participates in all forms of strike activity as part of the collective bargaining process.
>
> [Affidavit of C. Driol, at para. 40]

**Arbitrariness**

643. In *Chaoulli*, Madame Chief Justice McLachlin described the arbitrariness principle as follows:

> A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.
>
> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.
>
> In *Morgentaler*, Beetz J., Estey J. concurring, found that the limits on security of the person caused by rules that endangered health were "manifestly unfair" and did not conform to the principles of fundamental justice, in reasons that invoke arbitrariness. Some of the limitations bore no connection to Parliament's objectives, in his view, while others were unnecessary to assure that those objectives were met (p. 110).

*Chaoulli*, at para. 130-132.

644. In this case, the question is whether the interference with liberty and security of the person lacks a real connection on the facts to the purpose the interference is said to serve.

645. From this direction, the Plaintiffs submit that compelling an individual to work has no real connection to the Defendantôs objectives. The Defendantôs stated objectives in introducing the *PSESA* included enhancing Saskatchewanôs economic competitiveness and providing a level playing field.

646. The effect of the *PSESA* is inconsistent with meeting the governmentôs objectives:

> Also of note is that the Legislation tabled only gives provision to Unions to appeal the number of employees in a classification who shall be deemed "essential" to the Labour Relations Board. This may embolden and empower Employers to make blanket requests of all classifications and place in the hands of the Labour Relations Board who may have extremely limited expertise in health care - the responsibility to attempt to ascertain acceptable levels of service and necessary levels of staffing. It is vital that these rulings be made by an independent Arbitrator with expertise in matters related to the provision of these vital services.

[Affidavit of L. Hubich #3, Exhibit ñFò at page 9]

647. It is not difficult to see that when applying the impugned provisions to the facts, there is no real connection to the objectives of the government. As mentioned earlier, the *PSESA* allows an employer to unilaterally designate the roles, duties, classifications, who performs those roles and the number of employees needed for essential service. Once an individual is designated as essential service employee, he or she has no ability to withdraw their labour to address such interference with his or her right to security or liberty.

648. In addition, the possibility that the impugned provisions infringe an individualôs right to security by restricting their ability to take steps to improve their health and safety makes the arbitrariness ñmanifestly unfairò to individuals.

649. Any societal concerns in protecting the public by ensuring essential services are available during job action was dispensed with in considering the principle of over breadth, and the same holds true for the principle of arbitrariness. Essential services can be ensured without infringing an individualôs right to security and liberty of the person. Impugned provisions which are not rationally connected to the governmentôs objectives are not saved from arbitrariness if they remain overbroad.

**Gross Disproportionality**

650. Although the Plaintiffs contend that the impugned provisions offend the principles of arbitrariness and over breadth, if this Honourable Court accepts the means taken by the Defendant to achieve a legitimate state interest, the Plaintiffs submit that the Defendantôs measures are disproportionate to any legitimate objective.

651. In *Malmo-Levine* ,Justice Gonthier and Justice Binnie established that when considering whether the law is grossly disproportionate under section 7, the effects of the impugned provisions are balanced with the governmentôs objective.

*Malmo-Levine*, at para. 169.

652. There are two factors that demonstrate that the impugned provisions violate the principle of disproportionality. First, the possibility of a severe financial penalty and the potential penal consequences that may result from application of the *Summary Offences Procedure Act*, RSS 1990-91,c. S-63.1 Reg 2, 1991 is excessively harsh. Second, the ineffectiveness of the impugned provisions that restrict an individual from freely withdrawing his or her labour based on individual choice do not advance the governmentôs interests of maintaining essential services during collective job action. The deleterious effects of the impugned provisions are inconsistent with the governmentôs objectives.

653. The consequences of receiving an extreme fine and facing possible proceedings to enforce the fine under the *Summary Offences Procedure Act* or the *Queen's Bench Rules of Saskatchewan*, which may include legal fees and the potential adverse impact on job opportunities and familial and personal relationships, exacerbate this disproportionality.

These consequences are not related to any disobedience of the law or any other socially unacceptable activity. The ability to withdraw oneôs labour and participate in improving the terms, conditions and purpose of oneôs employment are recognized in Canada, and internationally, as fundamental aspects of the employment relationship.

654. On the ineffectiveness of restricting individuals from freely withdrawing their labour, the Plaintiffs encourage this Honourable Court to examine how other jurisdictions meet their objectives without disproportionate effects. The Affidavit of P.Dyke indicates that the essential services regime in British Columbia provided an adjudication of all issues relevant to an essential service agreement which achieved the objectives inherent in the process:

> My experience of the essential services process in British Columbia is that it provides relative equality between unions and employers in the process, at least in the health sector. Where agreement cannot be reached, the IRC and then the Labour Board provides an effective and reasonably fair mechanism for both employers and unions to make their case about the classifications and levels required. The 1992 dispute produced the longest negotiations and hearings before the IRe. That experience led to the development of a much more expedited process which still allowed for negotiations and for controlled strike action to take place.
>
> [Affidavit of P Dyke, at para 27].

655. The evidence also demonstrates that essential services agreements that are freely negotiated between the employer and the union and subject to fair and full adjudication by an independent tribunal serve the objectives of the Defendants. As stated in the Affidavit of J. Ahrens, the Manitoba government introduced essential services legislation for the first time in 1996. Although the legislation is very similar to the *PSESA,* Ahrens outlines how the establishment of a protocol for essential service negotiations between the Manitoba Council of Health Care Unions and the Manitoba government effectively meets the Defendantôs objectives without restricting individualôs rights [Affidavit of J. Ahrens at pages 5-6.] As is clear from the establishment of this Protocol, there are less invasive means available for the Defendant to meet the objective of ensuring public safety during labour disputes.

> ... good relations help immeasurably to diminish the strife. The point is that conflict is often a necessary ingredient to the resolution of labour disputes. It cannot be eliminated by a legislative snap of the fingers.

*Canadian Health Care* at page 7

656. The *PSESA* makes illegal an activity that is otherwise legal and socially acceptable. Withdrawing oneôs labour is necessary for an individualôs economic and psychological integrity. Compelling individuals to work under threat of a severe financial penalty for engaging in acceptable activities is clearly over and above any stated government objective.

**Vagueness**

657. It is accepted that a vague law violates the principles of fundamental justice, which causes a breach of section 7 if the law may cause a deprivation of life, liberty or security of the person. A vague law offends two values that are fundamental the legal system. First, the law does not provide fair notice to persons of what is prohibited, which makes it difficult for them to comply with the law. Secondly, the law does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement.

Peter Hogg, *Constitutional Law of Canada*, 4th ed. Vol.2 (looseleaf) (Toronto: Carswell, 1997), at para. 44.16(a).

658. In the seminal authority *Nova Scotia Pharmaceutical Society*, the Supreme Court identified a "doctrine of vagueness" that is "founded on the rule of law particularly on the principles of fair notice to citizens and limitation of enforcement discretion." (per Gonthier J. at pp. 626-7). On behalf of the Court, Gonthier J. explained the following:

> What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements.[é ]

A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. (at pp.626-7, 642, 643 per Gonthier J.)

*Nova Scotia Pharmaceutical,* at pages 642 and 643.

659. The *PSESA* clothes Cabinet with significant discretionary power to determine which employees will be affected by the essential services agreement or order. Wherever the *PSESA* says something is "prescribed", it means prescribed by regulation enacted by a committee of Cabinet (s.2(h)) (and as of the date of writing, few regulations have been enacted, leaving a number of significant blanks in the legislation unfilled.) Some of the terms that are to be "prescribed" by the unilateral action of Cabinet by regulation, without consultation with unions or even the legislature, include:

- which Government "services" meet the definition of essential services (s.2(c)(i)(B));

- which unnamed public bodies (in addition to those specifically named in the legislation) are public employers providing essential services (s.2(i)(xi)(B)); and;

- which services must be covered by an essential service agreement with the government (s.6(3))

660. In addition, the legislation reserves to Cabinet an almost unbounded authority to enact regulations:

- that will change the content of an essential services agreement by prescribing terms (s. 7)(1)(e));

- "defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act" (s.21(a));

- "prescribing any other matter or thing that is authorized or required by this Act to be prescribed in the regulations" (s.21(e)); and

- "respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent of this Act." (s.21(f))

661. Insofar as the "prescribed" meaning of key terms in the legislation has never been supplied by Cabinet as required by the *PSESA*, it can be argued that the provisions affecting an individualôs ability to withdraw his or her labour and participate in

improving the terms, conditions and purpose of their employment are too vague to be enforceable.

## PART V – INTERFERENCE WITH EQUALITY RIGHTS

663. In addition to the fundamental freedoms and liberty interests protected by the *Charter*, the *PSESA* and *TUAA* violate section 15 of the *Charter*.

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *Charter*, s. 15(1)

### Women in the workforce

664. Specifically, the Plaintiffs allege that the *PSESA* has the effect of adversely affecting women, who comprise a majority of the healthcare workforce. While the *PSESA* applies to a broad range of public services, the most significant and largest sector is healthcare. The *PSESA* impacts healthcare workers from registered and licensed practical nurses to para-professional care aides and rehabilitation workers to support and custodial workers. Women make up a substantial majority of health care workers, as established in a 2006 Statistics Canada national survey.

| Occupation | Total | Males | Females |
|---|---|---|---|
| Ambulatory health care services | 480,440 | 108,705 | 371,735 |
| Hospitals | 563,660 | 108,955 | 454,710 |
| Nursing and residential care facilities | 314,910 | 46,140 | 268,770 |

Statistics Canada, National Occupational Classification, 2006. (Retrieved online at: http://www5.hrsdc.gc.ca/noc/english/noc/2006/welcome.aspx)

665. In *Fraser* the Court discussed whether exclusions from the collective bargaining regime which adversely affect minority groups are more appropriately dealt with as equality claims rather than asserted as freedom of association claims. Deschamps, J., in a minority statement, observed:

> To redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15, as LôHeureux-Dubé, J. proposed in *Dunmore*. Such an approach is preferable to relying on a distinction that does not rest on a solid foundation. This, of course, would entail a sea change in the interpretation of s. 15 of the *Charter*. The majority in the instant case resist such a change, referring to ñCanadian valuesò and to the need to take a ñgenerous and purposiveò approach when interpreting *Charter* rights... but to ensure consistency with the approach of the majority in *Health Services* (at paras 81-96), they refer to equality in the s. 2(d) context without mentioning s. 15. My point here is not that each *Charter* protection should be interpreted in a formalistic manner. Rather, it is that if the law needs to move away from *Dunmore'*s distinction between positive and negative rights, this should not be accomplished by conflating freedom of association with the right to equality or any other *Charter* right that may be asserted by a litigant. An analysis based on principles grounding the protection of rights and freedoms offers a better prospect of judicial consistency than one based on the more amorphous notion of ñCanadian values.ò
>
> *Fraser*, at para 319.

**The Impact of the *PSESA***

666. The Plaintiffs are asserting that the right of workers in Saskatchewan to organize, bargain, and strike if necessary, are fundamental freedoms which include as their goals social and economic equality. However, the *PSESA* has an additional component of targeting care givers in the healthcare sector. Placing additional restrictions on a portion of the workforce which is predominantly female to collectively bargain makes it more difficult to achieve equality with other groups.

> The existence of a gap between the earnings of men and women is one of the few facts not in dispute in the ñequalityò debate. There are certainly open questions about it, the two main ones being the width of the gap and the right way to go about closing it. But no one seriously challenges the reality that women are paid less than men, sometimes for the same work, sometimes for comparable work.
>
> R. S. Abella, ñEmployment Equityò (1987), 16 Man. LJ 185, at 185.

667. The impact of the *PSESA* upon predominantly female healthcare workers in Saskatchewan, may be in part addressed by a section 15 *Charter* analysis. As noted by Mary Cornish and Fay Faraday:

> Canadian women continue to share with the worldôs women a common labour market experience - widespread and substantial economic inequalities. This is true, regardless of their level of income and whether they work in the formal or informal economy and whether they are employed or self-employed.
>
> Mary Cornish & Fay Faraday, ñUsing the *Charter* to Redress Gender Discrimination in Employmentò Paper delivered at the Summer Law Institute for Secondary School Teachers, August 31, 2005, [unpublished] at 1 [*Using the Charter*].

668. Even more concerning is that while there has been an increase in the number of women in Canadaôs workforce, there has yet to be true socio-economic equality. Poverty rates for Canadian women and their children show that 52% of families with children headed by sole support mothers were poor in 1970 - a figure that has since increased to 56%.

Using the *Charter*, page 1.

669. In certain fields, the disparity is even more evident. Prominent employment law scholar Professor Judy Fudge, cited in *Using the Charter*, notes:

> There remains a persistent segregation of men and women into different occupations and high rates of part-time work for women. Women continue to experience a greater risk of poverty than do men. The incidence of poverty among single-adult households is greatest for women regardless of their age or status as a parent. At the same time, womenôs wages have polarized, as the labour market became increasingly segmented by age, race, immigration status, and education attainment.
>
> Judy Fudge, ñLabour Market Deregulation and the Retreat from Pay Equity in Canada: Womenôs Work in an Era of Free Tradeò. (Paper delivered at the *Women's Access to the Economy in the Current Period of Economic Integration: What Economy?* Conference, Montreal, Québec April 23-25, 2003, [unpublished] at 4, cited in *Using the Charter*, at pp. 2-3.

670. Labour trends continue to reflect an underlying devaluation of the work performed by Canadian women. Any legislation that perpetuates this state of affairs may be discriminatory in nature, by continuing the stereotype that ñwomen's workò is not of economic value in the marketplace.

671. Saskatchewanôs *PSESA* severely restricts the collective bargaining abilities of a number of workers in Saskatchewan. The ability to bargain collectively, and to withhold labour through striking as a negotiation tactic, is crucial to enabling workers to create the best possible employment conditions. While remuneration is obviously a crucial issue, equally important are long- and short-term benefits, health and safety issues and standards of treatment.

672. The *PSESA* disproportionately affects healthcare workers, as almost every medical support worker loses many of their crucial bargaining freedoms. The vast majority of those healthcare workers are women, meaning that inadvertently or otherwise, the *PSESA* both limits womenôs freedoms and rights pertaining to their employment and severely impacts the ability of women to ensure adequate working conditions. By implementing the *PSESA* the Saskatchewan Government has created legislation that continues the historical and discriminatory mistreatment of working women.

***Withler v Canada (AG),***

673. When undertaking a section 15 analysis, one must be guided by the recent decision of the Supreme Court of Canada in *Withler v. Canada (AG)*, 2011 SCC 12, [2011] SCJ No. 12, [*Withler*]. Prior to the decision in *Withler*, many cases pertaining to section 15 discrimination had focused on finding a comparator group to show the effect of discrimination. The Court addresses that comparator group analysis, which had, by this point, been serving for quite some time as the method used to determine discrimination.

674. The Court begins its discussion by acknowledging the two-part test which arose in *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483, [*Kapp*].

> The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) does the law create a distinction that is based on an enumerated or analogous ground? and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?
>
> *Withler*, at para 30.

675. After noting the use of mirror comparator groups in numerous previous matters to fulfill the first stage of the *Kapp* analysis, the Court voiced its concerns with that approach. It notes that:

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic of characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis.
>
> *Withler*, at para 63.

676. To that end, the first step in establishing discrimination contemplated by section 15 is to show a distinction created by the law. The *PSESA*, as noted above, has a significant impact on workers in the healthcare industry.

677. The segregation of men and women into different career streams mentioned by Professor Fudge is especially prevalent within healthcare. This industry, both historically and currently, is staffed predominantly by women. As of 2006, Statistics Canada found that women workers make up 77% of ambulatory healthcare service workers, 80% of hospital workers and 85% of nursing and residential care facility workers.

678. Within Saskatchewan, this trend is even more pronounced. For example, in 2003 and 2004, 96.8% of registered nurses were female.

> Canadian Nurses Association, 2007 Workforce Profile of Registered Nurses in Canada, July 2009 at 2; Canadian Nurses Association, 2008 Workforce Profile of Registered Nurses in Canada, June 2010 at 2.

679. While more men are entering the profession, it is at a snailôs pace. As recently as 2008, 96.03% of registered nurses in Saskatchewan were female.

> Canadian Nurses Association, 2008 Workforce Profile of Registered Nurses in Canada, June 2010 at 2.

680. Therefore, the great majority of individuals affected by the essential services legislation are women. Women have historically struggled to attain equitable working

conditions with men. The *PSESA* severely limits the ways in which women are able to fight for workplace equality.

681. The *PSESA prima facie* discriminates against women by reducing their economic and employment freedoms and limiting their ability to obtain working conditions in line with those of their male counterparts.

682. The second element of the test discussed in *Kapp* is to ascertain if the distinction creates a disadvantage by perpetuating a prejudice or stereotype.

683. Healthcare has historically, and stereotypically, been viewed as ñwomen's workò. As the great majority of healthcare workers are female, to enact legislation that would strip women of employment rights and freedoms continues the historical disadvantage women have had in seeking workplace equality. Paradoxically, the *PSESA* simultaneously recognizes the importance of the work done by women in the healthcare field, classifying it as ñessentialò - and yet persists in undervaluing said work by not providing adequate protections for those who perform it.

**The impact of the *TUAA***

684. In addition to the discrimination caused by the *PSESA*, the Plaintiffs allege that the *TUAA* is also discriminatory under section 15. The *TUAA*, by its very nature, makes union organization decidedly more challenging. This is a violation of section 15, as it negatively impacts numerous societal groups already facing significant disadvantages. The *TUAA* exacerbates those disadvantages, and in doing so, discriminates against individuals on protected grounds, including sex, race and national origin and perpetuates the stereotype that women and minority groups are worth less to the workforce.

685. To begin, it is worth noting the findings of the ILO , as cited by Michael Lynk, a law professor at the University of Western Ontario. He notes:

> In its most recent report on the global workplace, the International Labour Organization postulated that a hydraulic relationship exists between unionization and inequality. Countries that have higher unionization rates tend to have lower

economic inequality patterns. And as unionization rates decline, inequality levels tend to climb.

*Labour law*, at p. 130.

686. The *ILO* report notes that there is:

...a clear negative correlation between unionization and inequality: the countries in which income inequality is on average lower in the period 1989-2005 tend to be those in which a greater proportion of workers is affiliated to trade unions.

*World of Work Report 2008 - Income Inequalities in the Age of Financial Globalization* (Geneva: ILO, 2008), at 83.

687. Trade unions are a crucial agent in the struggle to overcome the income gap that exists between the wealthy and the working poor. In Saskatchewan, workers who are not unionized tend, on average, to receive a significantly lower salary than those who are. Recent figures from Statistics Canada cited in a 2008 CUPE analysis of Bills 5 and 6, show a significant disparity in the wages of those who are unionized and those who are not. Permanent, unionized workers - over the age of 15 - tend to make an hourly wage of $23.53, whereas workers of the same age who are not unionized earn only $18.49, a difference of $5.14 an hour. This disparity is even more pronounced when it is comes to women. Unionized female workers in Saskatchewan received an average hourly wage of $22.06, compared to non-unionized women who made only $15.31 an hour. This is a difference of $6.75 per hour.

[Affidavit of L. Hubich Affidavit #3, Ex F, page 181].

688. Beyond the actual increase in wages that the worker receives, what is important to note is the role that the union plays in equalizing wages between men and women. Since womenôs wages are much lower than the overall average, and the overall averages cited already include *both* women and men, it is evident that in non-unionized situations, men are receiving much higher pay on average than women. However, the disparity between the overall average and women is much smaller when comparing unionized workers.

689. As unionization can clearly be a crucial strategy for achieving salary equality, to substantially increase the difficulties unions face while organizing is to limit the

available options for women. Inadvertently or not, the *TUAA* impedes the path of working women in achieving wage equality. Unions have been alive to the underrepresentation of women for decades. As noted in 1989:

> Women have endured a double burden of work, both in the home, as unpaid housework, and in the labour market, where they have disproportionately stocked the secondary labour market and the non-unionized clerical, financial retail, and service sectors. Suffering wage and job discrimination, women in the paid labour force have an average income only three-fifths that of men. Though not barred from unions, they have been underrepresented in union ranks, particularly at the executive level and in the ranks of the elected members of labour political parties, and womenôs issues have only recently become a major item on organized labourôs agenda.
>
> Paul Phillips, ñThrough Different Lenses: The Political Economy of Labourò in Wallace Clement & Glen Williams, eds,*The New Canadian Political Economy* (Kingston: McGill-Queens University Press, 1989) at 95.

690. Considering the focus of organized labour on womenôs issues as a ñmajor itemò more than two decades ago, it is not surprising that there is a near equality of wages between unionized men and women today. These gains were made possible, certainly in part, by the continued focus of unions on equality.

691. In a manner similar to Saskatchewanôs *TUAA*, *An Act to amend the Act respecting childcare centres and childcare services*, R.S.Q. c. C-13 (Bill 8), which was passed in Québec in 2003, sought to restrict unionization rights of some of its most historically vulnerable citizens. Bill 8 stripped at-home childcare workers of any rights under the *Québec Labour Code* by specifying that they were independent providers of services, and not employees. In *Confédération (employee status)*, Superior Court Justice Grenier ruled that Bill 8 was unconstitutional, violating both section 2(d) of the Canadian *Charter* and section 3 of the Québec *Charter*. Furthermore, provisions of Bill 8 discriminated on the basis of section15 of the *Charter*. Justice Grenier found that:

> ...women who tend to occupy typically feminine jobs are the victims of prejudice in our society. There is a reluctance to recognize that the work these women do is real work...[The Bill] was passed to avoid having at-home work, which is perceived as an extension of traditional and unremunerated domestic tasks and family responsibilities carried out by women, become subject to unionization.

*Confédération (employee status)*, *supra* at paras 369, 388.

692. Where a bill operates to discriminate against a disadvantaged group, it is *prima facie* discriminatory. In the matter of the *TUAA*, the provisions that make organization more difficult restrict unions from pursuing their equality goals. As a result, female workers suffer from a lack of representation in groups with political power who are able to effectively represent their interests.

693. By further harming the ability of unions to organize continue the fight for gender equality, the *TUAA* perpetuates the stereotype that womenôs work is of less value. The *TUAA* seeks to muffle a strong voice for equal wages and limits the avenues for the pursuit of overall equality within the workforce. In effect, the challenged legislation acts as a social retardant, and forces women to remain underrepresented in the Canadian workforce.

694. However, it is not only women who face discrimination as a result of the *TUAA*. Immigrants and racial groups have historically been underrepresented in unions and in the political process. The challenge faced by immigrants was acknowledged as recently as the decision in *Fraser*. In a strongly-worded dissent Justice Abella drew upon the work of Professor David Beatty and explained the vulnerabilities faced by migrant and immigrant workers.

> Because they are heavily drawn from a migrant and immigrant population, these workers face even more serious obstacles to effective participation in the political process... Denying agricultural workers the benefits of [collecting bargaining] means that the legal processes which enable much of the rest of our workforce to be involved in decision-making at the workplace in a realistic way are unavailable to the farm workers. Thus a group of workers who are already among the least powerful are given even less opportunity than the rest of us to participate in the formulation and application of the rules governing their working conditions.

*Fraser*, at para 348, citing Professor D. Beatty.

695. This is especially relevant, as in Canada, racial minority groups are, generally, earning less money and are less likely to be found in unionized jobs than the majority. Jeffery Reitz and Anil Verma, in ôImmigration, Race and Labour: Unionization and Wages in the Canadian Labour Marketò (2004) 42 Ind Rel 835 [*Immigration, Race and*

*Labour*], found that visible minorities earn significantly less than other people with similar attributes. However, union status has generally led to improved wages. The effect is twofold. First, unions boost the wages of all workers at the low end of the distribution, and those low-end workers tend more often to be minorities. Secondly, unionized minority workers tend to earn more than their non-unionized counterparts. That said, the study notes that the increase in wages is not enough to substantially offset the shortfall between majority workers and minority ones.

696. While this may appear to mitigate against the practical utility of unions to racial minority groups, there are important factors to consider. Primarily, there *is* a measurable increase in wages for unionized minorities. Whether it is enough to offset the broader difference or not is less important than the principle that unionized employees are ahead of the national trend.

697. Secondly, the study notes that unions are alive to the issues faced by minority groups, and are working towards correcting them. It is also found that many unions have already begun to place a higher priority on racial equality. While the authors worry about the slow pace of the change and the still-large gap for wages, they conclude:

> One message that can be taken away from this analysis is that unions may have to redouble their efforts if they want to help racial minorities close the disadvantage gap.

*Immigration, Race and Labour*, at 852.

698. Unions have an opportunity to continue their work for equality in the same manner as with womenôs concerns in the 1980s and beyond. Based on the overarching and founding principles that are associated with unions - equality, justice and solidarity - there is reason to believe that they are capable of helping to achieve equal working conditions for racial and immigrant groups.

699. That there is discrimination against immigrant and racial minorities in the workforce seems evident. By restricting the methods through which those immigrant groups are able to attain equal working conditions, the *TUAA* is *prima facie* discriminatory. Furthermore, it helps maintains the stereotype that historically

> disadvantaged workers are somehow worth less than their majority counterparts, by restricting their political options and means of representation.

While there are undeniably challenges that unions face in pushing for the goals of equity and equality, the fact that they are alive to those issues places unions in a position to perform significant societal good if they are capable of organizing underrepresented minority workers. However, the introduction of the *TUAA* creates additional challenges to that organization, and pushes the needs of racial minority groups for effective labour representation to the back-burner.

**CONCLUSION**

700. The passage of the *TUAA* and *PSESA* had a significant impact on working men and women across the province of Saskatchewan. Despite raising concerns with the Defendant about the changes to the labour relations framework, the Defendant passed the *TUAA* and *PSESA* and did not respond to the concerns of workers and unions..

701. For the women and men in the public service, the PSESA imposed severe restrictions on their ability to engage in job action and eliminated their historical ability to withdraw their labour, or otherwise reduce services, in a manner and time of their choosing in order to achieve a fair collective agreement. When these services affected health and safety, the unions did so in a manner which respected the safety of others by either negotiating essential service agreements, setting up protocols to provide essential services on request, or making thoughtful judgments about how to meet the public interest while preserving their right to collectively improve their working conditions. To eliminate that freedom, to determine how and when a union will negotiate their collective agreement, fundamentally interfered with the right to strike protected under sections 2(b), (c) and (d) and (7) of the *Charter*.

702. The men and women working the private sector, in film, retail, mining, and building trades for example, also had their rights and freedoms impacted. The changes to the *TUAA* increased employer interference in their unionized environments and served to create barriers to organizing unions, bargaining collective agreements, and administering those agreements. The Plaintiffs have demonstrated instances where workers lost the right to be certified due to the changes to the *Trade Union Act*, where the changes fundamentally infringed upon the right to organize protected under sections 2(b), (c) and (d) of the *Charter.* Additionally, the *PSESA* and *TUAA* are contrary to the principles of international law and violate sections 7 and 15 of the *Charter*.

703. The Plaintiffs submit that they have met the onus of demonstrating that the *PSESA* and *TUAA* have violated the rights and freedoms guaranteed under the *Charter,* and that it now falls to the respondent to demonstrate how these infringements may be justified under section 1 of the *Charter*, including any assessment of the degree of infringement, harm, and justification for the changes.

**REMEDY**

704. The Parties have agreed to bifurcate on the issue of damages pursuant section 24(1) of the *Charter* and to deal of damages at a later date in the event that the Court determines that the *TUAA* and the *PSESA* violate the *Charter.* The Plaintiffs request the following by way of relief:

a. a declaration that, taken together, the *PSESA* and *TUAA* violate sections 2(b), 2(c) and 2(d), 7 and 15 of the *Charter* and is not saved by section 1;

b. in addition or in the alternative, a declaration that the following sections of the *PSESA* violate sections 2(b), 2(c) and 2(d), 7, and 15 of the *Charter* and are not saved by section 1: sections 2 (definition of ñpublic employerò and ñessential servicesò), 4, 6(2), 6(3), 7(1)(d), 7(2), 9(2), 9(4)(b), 10, 11, 14, 16, 18, 20(2), and 21;

c. in addition or in the alternative, a declaration that the following sections of the *TUAA* violate sections 2(b), 2(c) and 2(d), 7, and 15 of the *Charter* and are not saved by section 1: sections 3, 6, 7 and 11;

d. damages pursuant to section 24(1) of the *Charter*

e. an interlocutory and/or permanent injunction declaring the *PSESA* and *TUAA* inoperative;

f. (in addition or in the alternative, an interlocutory and/or permanent injunction declaring sections 2 (definition of ñpublic employerò and ñessential servicesò), 4, 6(2), 6(3), 7(1)(d), 7(2), 9(2), 9(4)(b), 10, 11, 14, 16, 18, 20(2), and 21 of the *PSESA* inoperative;

g. in addition or in the alternative, an interlocutory and/or permanent injunction declaring sections 3, 6, 7 and 11 of the *TUAA* inoperative;

h. pre-judgement and post-judgement interest;

i. (costs, including special costs or increased costs; and

j. such other relief, under section 52 of the *Constitution* or otherwise, as counsel requests or this Honourable Court declares just.

All of which is respectfully submitted at Regina, Saskatchewan, this 29th Day of July, 2011.

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per Larry Kowalchuk, Craig Bavis, and Juliana Saxberg,
Counsel for the Plaintiffs

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