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

PLAINTIFFS

AND

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

DEFENDANT

AND:

SASKATCHEWAN UNION OF NURSES
CANADIAN UNION OF PUBLIC EMPLOYEES
SERVICE EMPLOYEES INTERNATIONAL UNION (WEST)
SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION
CYPRESS REGIONAL HEALTH AUTHORITY
FIVE HILLS REGIONAL HEALTH AUTHORITY
HEARTLAND REGIONAL HEALTH AUTHORITY
PRINCE ALBERT PARKLAND REGIONAL HEALTH AUTHORITY
REGINA QU'APPELLE REGIONAL HEALTH AUTHORITY
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

ARGUMENT OF THE INTERVENOR
SASKATCHEWAN UNION OF NURSES

INDEX

INTRODUCTION

1. The Saskatchewan Union of Nurses ("SUN") is a trade union as defined in *The Trade Union Act*, R.S.S. 1978, c.T-17, ("*TUA*") with offices in Saskatoon and Regina, Saskatchewan. It is the certified bargaining agent for Registered Nurses, Graduate Nurses, Registered Psychiatric Nurses and Graduate Psychiatric Nurses in Saskatchewan, as more particularly described below. [Affidavit of R. Longmoore, para. 2.]

2. SUN was originally established on January 19, 1974. It received its first certification order from the Saskatchewan Labour Relations Board in approximately February of 1974, when SUN, Local 2 was certified to represent all Nurses employed at the Rosthern Union Hospital. [Affidavit of R. Longmoore, para. 3.]

3. Today, SUN is the certified bargaining agent for Registered Nurses, Registered Psychiatric Nurses, and Graduate Nurses across Saskatchewan that are employed as more particularly described in paragraph 6 herein. It has over 8,000 members, and represents Nurses employed in both rural and urban acute care hospitals, long-term care facilities, home-care services, integrated facilities, public and mental health services, and Nurses employed by Canadian Blood Services. [Affidavit of R. Longmoore, para. 4.]

4. SUN's membership is divided into 312 locals and sub-locals across the Province. On behalf of these Locals, SUN bargains collective agreements with the following entities:

a) Saskatchewan Association of Health Organizations ("SAHO");
b) All Nations Healing Hospital;
c) Canadian Blood Services;
d) Extendicare Canada Inc.;
e) Athol Murray College of Notre Dame; and
f) Regina Public School Board

[Affidavit of R. Longmoore, para. 6.]

5. Of these entities, SAHO is by far the largest. SAHO is the employers' bargaining representative for Saskatchewan's Regional Health Authorities, independent hospitals and

special care homes, and certain other agencies and associations. For more particularity, SUN does not bargain individual collective agreements on behalf of each Local with each employer. Instead, with respect to SAHO, it bargains on behalf of all of its members on a Province-wide basis for a single collective agreement. It also negotiates single collective agreements on behalf of its members with the other three employers referred to in paragraph 4 herein. [Affidavit of R. Longmoore, para. 7.]

6. While collective bargaining is generally conducted on a Province-wide basis, the relevant collective agreement is administered and enforced "locally" – ie. between each individual employer institution and the applicable SUN Local.

[Affidavit of R. Longmoore, para. 8.]

7. Until the events more particularly described below, SUN has over its nearly 35 year history enjoyed the complete freedom to contract, and more specifically to bargain collectively, without interference. SUN's complete freedom to bargain such contracts, at such time, containing such terms as SUN and only SUN decides, is circumscribed only by the common law and *The Trade Union Act*, which limitations apply only to the conduct of the collective bargaining, and not the form or substance of such contracts.

[Affidavit of R. Longmoore, para. 9.]

8. Collective bargaining involves far more than the activity of negotiating a contract. It is an entire process undertaken by both parties with well-established procedures and hallmarks. An historical and necessary aspect of this process is the inherent right of either party (on compliance with statutory procedural requirements) to seek to pressure the other into concluding a collective agreement on terms favourable to it, either by the use of a lock-out by the employer or the use of a strike by the Union. In short, the modern right to strike is not a right that stands apart from collective bargaining; it is an integral part of, and the means to enforce, the process of collective bargaining.

9. Through its history, SUN has had and enjoyed the unfettered right to strike, which it has exercised when necessary as part of the collective bargaining process. With a single

exception, this right to strike has been exercised by SUN without governmental interference, and has had the desired effect of causing a movement in positions in the collective bargaining process that has allowed a successful negotiation of a revised collective agreement between the parties to that contract.

[Affidavit of R. Longmoore, paras. 68-69.]

10. The single exception referred to in paragraph 9 herein was in 1999, when shortly after SUN commenced a lawful strike, the Defendant considered it necessary on that single and specific occasion to pass legislation, ordering SUN's members to return to work. This legislation, *The Resumption of Services (Nurses – SUN) Act*, S.S. 1999, c. R-22.001, was the only instance in which the Defendant has had to interfere with SUN's process of collective bargaining and its right to strike in all of the previous instances when SUN has conducted strike action, and demonstrates the Defendant's ability and willingness to respond to collective bargaining concerns in the public sector on a case by case basis.

[Affidavit of R. Longmoore, para. 69.]

11. On May 14, 2008, the Defendant enacted *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2, ("*PSESA*"), which included unprecedented and fundamental alterations to the public sector collective bargaining landscape in Saskatchewan, with particularly adverse effects on SUN and its membership.

12. On September 11, 2008, the Saskatchewan Union of Nurses issued a Statement of Claim against the Defendant Government of Saskatchewan seeking, *inter alia*:

(a) A declaration that the Collective Bargaining Provisions of *The Public Service Essential Services Act* violate s. 2(d) of the *Charter*, and are therefore of no force or effect;

(b) A declaration that the No-Strike Provisions of *The Public Service Essential Services Act* violate s. 2(d) of the *Charter*, and are therefore of no force or effect; and

(c) An Order quashing the said impugned provisions as being in contravention of the *Charter*.

13. On August 9, 2010, by Fiat of Laing C.J.Q.B., SUN's claim, along with separate legal proceedings commenced by the Canadian Union of Public Employees, the Saskatchewan Government Employees Union, and the Service Employees International Union, were suspended, and the instant action, initiated by the Saskatchewan Federation of Labour, which challenges aspects of both *The Public Service Essential Services Act*, and *The Trade Union Act*, became the "lead case".

14. By the same Fiat, the parties whose proceedings were suspended, including SUN, were granted Intervenor status in the instant proceeding.

15. The issues to be addressed in this Argument are restricted to those which arise from the provisions of the *PSESA* which adversely affect the *Charter* rights of SUN and its members, including:

a) Do the Collective Bargaining Provisions of *The Public Service Essential Services Act* infringe upon the Charter rights of the Intervenor SUN and its members, in violation of the Union's Charter right to achieve a collective agreement though good faith bargaining?

b) Do the No-Strike Provisions of the *PSESA* violate the Union's *Charter* right to collectively bargain in good faith by removing the right to withdraw services from virtually every SUN member?

c) Do the provisions of the *PSESA* otherwise violate the Charter rights of SUN members?

d) Does the Defendant Government of Saskatchewan owe a duty to consult to such parties as the Saskatchewan Union of Nurses when enacting legislation which adversely affects the rights of the Union and its members?

ARGUMENT

I. THE FREEDOM OF ASSOCIATION

16. The Plaintiff in this action has done a thorough job of reviewing the history of the freedom of association and the relevant *Charter* and international jurisprudence as it relates to collective bargaining. It is not the intention of SUN to reiterate this informative discussion. At the same time, it is important to consider the *Charter* jurisprudence of Canada's appellate courts as it relates to SUN and its members.

17. Section 2 of the *Charter of Rights and Freedoms* sets out four rights deemed fundamental:

> **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.

18. In 1987, the Supreme Court concurrently released three decisions, *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*") [TAB 1]; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424 ("*PSAC*") [TAB 2]; and *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460 ("*Dairy Producers*") [TAB 3], which came to be known collectively as the *Labour Trilogy*. The conclusion of LeDain J., who wrote for the plurality in *Alberta Reference*, is an appropriate barometer of the prevailing jurisprudence at the time: "[the] constitutional guarantee of freedom of association in s. 2(d) of the Canadian Charter of Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike".

19. In the 24 years since the Trilogy, appellate courts have revisited the fundamental freedoms generally and the freedom of association specifically, in the result that current judicial thinking no longer resembles the approach articulated by LeDain J. By the time the Court considered *Dunmore v. Ontario*, [2001] 3 S.C.R. 1016 [TAB 4], it had adopted the approach taken by Bastarache J., who wrote for the majority, at para. 30:

> In my view, the activities for which the appellants seek protection fall squarely within the freedom to organize, that is, the freedom to collectively embody the interests of individual workers. Insofar as the appellants seek to establish and maintain an association of employees, there can be no question that their claim falls within the protected ambit of s. 2(d) of the Charter. Moreover, the effective exercise of these freedoms may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer. *These activities are guaranteed by the purpose of s. 2(d), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which recognizes the inevitably collective nature of the freedom to organize*. [emphasis added.]

20. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, ("*Health Services*") [TAB 5], the Court built on the principle articulated in *Dunmore* to determine, at para. 40:

> Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. This suggests that the framers of the *Charter* intended to include it in the protection of freedom of association found in s. 2(*d*) of the *Charter*.

a. The role of international law in *Charter* analysis

21. In reaching the conclusion that the freedom of association is intended to encompass collective bargaining rights, the Supreme Court sought guidance from Canada's international treaties. Citing the dissent of Dickson C.J. in *Dairy Producers*, McLachlin C.J. and LeBel J wrote, at paras. 70-72:

> Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the Charter. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, t*he Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified*.
>
> The sources most important to the understanding of s. 2(d) of the Charter are the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 ("ICESCR"), the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 ("ICCPR"), and the International Labour Organization's (ILO's) Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, 68 U.N.T.S. 17 ("Convention No. 87"). Canada has endorsed all three of

these documents, acceding to both the ICESCR and the ICCPR, and ratifying Convention No. 87 in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

The ICESCR, the ICCPR and Convention No. 87 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).

22. Professor Patrick Macklem, in an expert analysis provided for SUN, described the judicial approach to application of international treaties to Charter cases as follows: "In summary, the Court relies on international and regional legal instruments as persuasive sources of guidance in constitutional interpretation regardless of whether Canada is party to their terms." [Affidavit of P. Macklem, Exhibit "A", para. 14.]

23. Following a comprehensive review of current international law, Professor Macklem concluded, regarding the right to collective bargaining, at para. 101:

> The right to bargain collectively as an incident of freedom of association enjoys a secure legal footing as a human right in international law from its recognition as such in several international and regional legal instruments and institutions. The protection that these international and regional legal sources extend to the right to bargain collectively has strengthened since the 2007 decision by the Supreme Court of Canada in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia.*
>
> [Affidavit of P. Macklem, Exhibit "A", para. 101.]

24. Professor Macklem further concluded that the ability of union members to withdraw their services is an incident of freedom of association recognized in international law, except for explicitly identified exemptions:

> The right to strike as an incident of freedom of association enjoys a secure legal footing as a human right in international law from its recognition as such in several international and regional legal instruments and institutions. Each of these instruments has been interpreted as enshrining the right to strike, and their respective supervisory bodies have insisted that the right to strike may be restricted or prohibited:

> (a) in the public service only for public servants exercising authority in the name of the state;
>
> (b) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); or
>
> (c) in the event of an acute national emergency and for a limited period of time.
>
> [Affidavit of P. Macklem, Exhibit "A", para. 120.]

25. SUN submits that the provisions of the *PSESA* which infringe upon the Union's ability to bargain collectively, and which deny its members the right to strike, are inconsistent with Canada's obligations under international law.

II. THE COLLECTIVE BARGAINING PROVISIONS

26. The members of the Saskatchewan Union of Nurses are affected by the provisions of *The Public Service Essential Services Act* in greater proportion than the members of virtually any other union. By the very definition of "essential service" found in s. 2 of the Act, every Union member could be deemed essential. Essential services are defined in the Act as those "that are necessary to enable a public employer to prevent: (A) *danger to life, health or safety;* (B) the destruction or serious deterioration of machinery, equipment or premises; (C) serious environmental damage; or (D) disruption of any of the courts of Saskatchewan". [emphasis added.] [Affidavit of R. Longmoore, paras. 52 & 57.]

27. SUN is an experienced labour organization with a mature relationship with the province's health care employers. In 36 years, the Union has negotiated more than 160 collective agreements, and taken strike action five times. The Union has enjoyed an unfettered right to negotiate freely with employers and to bargain such terms as agreed upon by SUN and the province's health care employers.

[Affidavit of R. Longmoore, paras. 9 & 17.]

28. Sections 3, 4, 6, 7, 8 and 9 of the *Act* (the "Collective Bargaining Provisions") compel SUN (and the corresponding employer) to collectively bargain a particular **form** of

collective agreement, with particular **content**, at a particular **time**, and of a particular **duration**. Notwithstanding that an historic imbalance of power already exists between an employer and a Union, these provisions will further skew that imbalance in favour of employers by removing any incentive of a public sector employer to bargain such an agreement, when it has the unilateral right pursuant to s. 9 to dictate the very terms of such an agreement. . [Affidavit of R. Longmoore, para. 55]

29. By dictating the form, content, timing, duration, and manner of termination of a particular type of collective agreement, and by further directing in s. 4 that these will prevail over (*inter alia*) the parties' own collective agreement, the provisions of the legislation are in fundamental violation of SUN's freedom of association as guaranteed by s. 2(d) of the *Charter*.

30. The scope of that *Charter* right was discussed by the Supreme Court in *Health Services*, at para. 89 - 90:

> The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(*d*) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and in this historical and international perspective, *the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives.*
>
> ...
>
> *It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith.* Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation. [emphasis added]

31. At para. 96, the Court further explained that: "laws that unilaterally nullify significant negotiated terms in existing collective agreements" "may substantially interfere with the activity of collective bargaining".

32. In the instant case, not only does the *Act* order the Union to negotiate a specific agreement on specific matters, any contract provisions which have been – or may be - negotiated in good faith are declared void. In itself, this constitutes a substantial interference with the right of SUN and its members to bargain collectively.

33. This interference is exacerbated by the authority provided to employers in s. 9 of the *Act* to impose the entirety of the "collective" bargain unilaterally. Good faith negotiation, the very essence of the right to collective bargaining, is simply not possible when one party has the permanent authority by statute to simply impose an agreement.

[Affidavit of R. Longmoore, para. 56.]

34. In *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [TAB 6], the majority undertook a thorough review of previous jurisprudence to explain the content of the right of collective bargaining as protected by s. 2(d). At para 37, McLachlin C.J. and LeBel J. wrote:

> While *Health Services* concerned the actions of a government employer nullifying collective bargaining arrangements with unions representing its own employees, the Court rested its decision on a more general discussion of s. 2 of the *Charter*. Applying the principles of interpretation established in *Dunmore*, a majority of the Court held that s. 2(*d*) includes "a process of collective action to achieve workplace goals" (para. 19). This process requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace (para. 90). *By legislating to undo the existing collective bargaining arrangements and by hampering future collective bargaining on important workplace issues, the British Columbia government had "substantially interfered" with the s. 2(d) right of free association,* and had failed to justify the resultant limitation on the exercise of the right under s. 1 of the *Charter* (paras. 129-161). [emphasis added.]

35. SUN submits that the Collective Bargaining Provisions of *The Public Service Essential Services Act* constitute such interference with right of the Union and its members to bargain collectively.

III. THE NO-STRIKE PROVISIONS

36. Sections 3, 14, 15, 16, 17, 18 and 20 of the *Act* (the "No-Strike Provisions") remove the right of substantially all of SUN's members to strike, and SUN's lawful right to authorize, declare, or cause a strike or any form of "work stoppage", as defined. .

[Affidavit of R. Longmoore, paras. 56.]

37. While the No-Strike Provisions purport to deny the right to strike only for employees deemed to be "essential services employees" as defined in s. 2(e) of the legislation, the breadth of this definition, coupled with the nature of a nurse's duties and the existing chronic nursing shortage in Saskatchewan, amounts to a *de facto* total ban on the right to strike possessed by SUN, and its membership.

[Affidavit of R. Longmoore, paras. 52 & 57.]

38. During the last decade, there has been considerable appellate jurisprudence which has provided direction as to the extent of the *Charter* right to bargain collectively. The majority decision in *Alberta Reference* predates the approach now taken, and the dissenting opinion of Dickson C.J. is more in keeping with the current interpretation provided by the Supreme Court in *Dunmore, Health Services, Fraser*, and others. At para. 97-98, the Chief Justice wrote:

> The importance to collective bargaining of the ultimate threat of a strike has also been recognized in the cases. Lord Wright noted in *Crofter Hand Woven Harris Tweed Co. v. Veitch*, at pp. 158-59, "The right of workmen to strike is an essential element in the principle of collective bargaining". As the editors of Kahn-Freund's Labour and the Law (3rd ed. 1983), point out in respect of this comment: "If the workers could not, in the last resort, collectively refuse to work, they could not bargain collectively" (at p. 292). See also: Broadway Manor; Dairy Workers case; Blount, per Wright J. The necessity and lawfulness of strikes has also been acknowledged by this Court: *Perrault v. Gauthier*; *Canadian Pacific Railway Co. v. Zambri.*
>
> I am satisfied, in sum, that whether or not freedom of association generally extends to protecting associational activity for the pursuit of exclusively pecuniary ends -- a question on which I express no opinion -- collective bargaining protects important employee interests which cannot be characterized as merely pecuniary in nature. Under our existing system of industrial relations, *effective constitutional protection*

> *of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services,* subject to s. 1 of the Charter. [citations removed; emphasis added]

39. Collective bargaining consists of a range of activities. Section 2 of *The Trade Union Act*, defines collective bargaining as:

> (b) "bargaining collectively" means *negotiating in good faith* with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;

40. On those occasions when bargaining toward a collective agreement reaches an impasse, the parties have recourse to a number of measures as part of the collective bargaining process to support their bargaining position, including: for employers, the ability to lock-out their workforce; and for employees, the right to restrict or withdraw their services. Because the duty to act in good faith applies to the all of the activities which make up collective bargaining, there is an inherent statutory limitation on the use of such measures as strike or lockout.

41. As with the *Alberta Reference*, the Supreme Court's decision in *Dairy Producers*, predates the now-recognized *Charter* protection of the right to bargain collectively. It is instructive, then, to consider the analysis of the right to collective bargaining undertaken by Cameron J.A. in *R.W.D.S.U., Local 544 v. Saskatchewan*, [1985] S.J. No. 476, [TAB 7], at paras. 88-89:

> We were also referred to *United Federation of Postal Clerks v. Blount*, a decision in the first instance of the United States District Court, District of Columbia, which was later affirmed by the Supreme Court, but without written reasons. This case seems to have held that in the United States public employees, at least, do not have a constitutionally protected "right to strike", even though they apparently enjoy a constitutionally protected right to bargain collectively. I am inclined to agree with this decision, to this extent: once it is established that employees, as such, enjoy constitutional freedom of association and are entitled, in exercise of that freedom to

> form trade unions for the purpose of bargaining collectively with their employers, then it does seem to me that a protected freedom to bargain collectively cannot be excluded. Otherwise, freedom of association - in the context of the workplace - would be largely devoid of practical value.
>
> But once the scope of the freedom in issue is taken to extend that far, can the "right to strike" be far behind? It is, after all, essential to collective bargaining, and without it there would be little if anything left of the freedom of employees to act as one in their dealings with their employer. In *Crofter Harris Tweed Co. v. Veitch*, 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.

42. Acknowledging that a new approach to *Charter* interpretation was developing, Cameron J.A. further wrote, at para. 92:

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

43. SUN and its members ask the question simply: how can *Charter* protection of the right to bargain collectively <u>not</u> include the very activities which constitute collective bargaining, including strikes and lockouts?

44. The No-Strike Provisions of the *PSESA* infringe upon the freedom of association rights of SUN and its members by preventing them from exercising their right to withdraw services as protected by s. 2(d) of the *Charter of Rights and Freedoms*, and as is consistent with Canada's obligations under international instruments, covenants and treaties.

a. Restricting collective bargaining rights in the absence of an alternate process

45. In the developing jurisprudence regarding the *Charter* protection of the right to bargain collectively, it is worthy to note that all three of the Supreme Court's most recent decisions, *Dunmore, Health Services,* and *Fraser,* draw heavily on the dissenting opinion of Dickson C.J. in *Dairy Producers.*

46. Among the issues considered by the Chief Justice in *Dairy Producers* was the imposition by the state of a restriction on the right to strike in the absence of a fair and impartial dispute resolution scheme. At para. 29, he wrote:

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

47. In *Alberta Reference*, released concurrently with *Dairy Producers,* the Chief Justice expanded on the need to first determine if a prohibition of strikes is the "least drastic means" of achieving the purpose of legislation, and then to determine if the

prohibition is accompanied by a fair and effective system of conciliation or arbitration, at para. 118:

> As noted above, the purpose of the prohibitions of strike activity of police officers and firefighters is to prevent interruptions in essential services. If prohibition of strikes is to be the least drastic means of achieving this purpose it must, in my view, be accompanied by adequate guarantees for safeguarding workers' interests. Any system of conciliation or arbitration must be fair and effective or, in the words of the I.L.O. Committee on Freedom of Association "adequate, impartial and speedy ... in which the parties can take part at every stage". [citations removed.]

48. The limitations placed on the arbitration process under consideration in *Alberta Reference* were considered at length by Dickson C.J. He ultimately found that the failure to provide a fair and impartial mechanism for dispute resolution was fatal to the legislation, at para. 126:

> None of the arbitration schemes in the Acts in question in this Reference provides a right to refer a dispute to arbitration. Rather, a discretionary power is placed in a Minister or an administrative board to establish an arbitration board if deemed appropriate ... Under s. 50 of the Public Service Act, the Public Service Employees Relations Board can direct the parties to continue collective bargaining or appoint a mediator instead of establishing an arbitration board. Under s. 117.3 of the Labour Relations Act and s. 10 of the Police Officers Act the Minister can direct the parties to continue collective bargaining and can prescribe the procedures or conditions under which it is to take place.
>
> The respondent makes no submissions in respect of these provisions. In the absence of argument or evidence demonstrative of why such government involvement is necessary in the arbitration process, I believe the legal capacity of a Minister or administrative board to determine when and under what circumstances a dispute is to reach arbitration compromises the fairness and effectiveness of compulsory arbitration as a substitute for the freedom to strike. *In effect, under the Labour Relations Act and Police Officers Act the employer -- i.e., the executive branch of government -- has absolute authority to determine at what point a dispute should go to arbitration. Such authority considerably undermines the balance of power between employer and employee which the arbitration scheme is designed to promote*. Under previous legislation either party had an absolute right to remit the matter to an arbitration board. In the present legislation they do not, and counsel for the respondent has not provided any reasons for this alteration. *The discretionary power of a Minister or administrative board to determine whether or not a dispute goes to arbitration is, in my view, an unjustified compromise of the effectiveness of the arbitration procedure in promoting equality of bargaining power between the parties*. [citations removed; emphasis added.]

49. The process described in ss. 10 & 11 of the *PSESA* is the only remedy provided under the *Act* for SUN and its members to seek amendments to a "collective agreement" unilaterally imposed by the employer under s. 9. The imbalance inherent in this process is evident simply by comparing the "collective agreement" with the matters which may be amended.

50. The "collective agreement" itself, as defined by s. 7 of the *Act*, must contain: the identity of the essential services to be maintained; the classifications of the employees deemed essential; the number of employees in each classification; the names of those employees; and any other prescribed provisions. Yet the only dispute resolution available to SUN and its members is one which removes much of the substance of the "collective agreement" from consideration:

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

51. The Saskatchewan Union of Nurses submits that not only do the No-Strike Provisions of the *PSESA* constitute a restriction on activity protected under s. 2(d), the failure of the *Act* to provide a fair or impartial mechanism for resolving disputes constitutes a separate and distinct infringement on these rights.

IV. THE DUTY TO CONSULT

52. It is not the intention of SUN to argue the s.1 tests from *R. v. Oakes*, [1986] 1 S.C.R. 103, at this time, but to reserve the right to address those issues in reply. The Union believes, however, that timely consideration must be given to the obligation on government which is implicit in the opening section of *The Canadian Charter of Rights and Freedoms:*

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

53. While much of the judicial and legal discussion of section 1 focusses on the justifications tests arising from the latter half of this section - and this action will be no different in that regard - SUN submits that the *first* phrase in the *Charter* imposes a significant responsibility on governments to act in accordance with its principles: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it".

54. The placement of the constitutional guarantee ahead of the test for justification is instructive: it directs governments and government actors first to guarantee *Charter* rights, and then advises that they must act reasonably and in keeping with *Charter* principles when seeking to limit those rights. As Dickson C.J. wrote in Oakes, at para. 63:

> It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured.

55. As with the interpretation of any statute, the *Charter* must be considered in its entirety. As Dickson C.J. noted in *Oakes*, s. 33 already provides legislatures with a means by which to legislate "notwithstanding" the *Charter*. It is submitted that the intention of s.1, therefore, is not to provide governments with an alternate "escape hatch" from the confines of the *Charter*. Rather, the wording and placement of s.1 should be seen to emphasize both the "guarantee" and the obligation of reasonableness.

56. This direction from the *Charter* obliges governments to be reasonable in all aspects of drafting and enacting legislation which limits the *Charter* rights of its citizens. In *Health Services*, the Supreme Court found that the state's obligation included a duty to consult, at para. 107:

> In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. *Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.* [emphasis added.]

57. In the instant case, in which that vast majority of SUN's members are employed by government or government actors, the state is both the employer and the drafter of legislation governing the terms and conditions of employment. As explained by SUN President Rosalee Longmoore, the *Act* compels members of the union to agree to a particular form of agreement, with particular content, at a particular time, and of a particular length, while one party [the employer] has the unilateral right to dictate the terms of the agreement. [Affidavit of R. Longmoore, paras. 55-56.]

58. Because the nature of the changes to the terms and conditions of employment imposed by the Act are so vast, and the implications for the *Charter* rights of SUN members so serious, the duty on the part of the government to consult with nurses arises from its dual role as both drafter and employer. The Defendant's actions have failed from the outset to meet the description of "good faith consultation" found in *Health Services*. Instead, the Minister responsible for the legislation met with the nurses for only 45-minutes after the Bill had been introduced in the legislature, and subsequently failed to respond to repeated requests from the nurses for further information and another opportunity to discuss the legislation. [Affidavit of R. Longmoore, paras. 59-66.]

59. Professor Patrick Macklem, in providing an expert opinion on aspects of the legislation for SUN, undertook a thorough review of international jurisprudence regarding the duty to consult, and Canada's obligations under international law. He offered the following commentary on the issue of consultation as addressed by the Committee on Freedom of Association (CFA) of the International Labour Organization (ILO):

> The CFA also criticized British Columbia for introducing legislation, *with little or no consultation with affected parties,* that proposed to restructure the education and health care sectors in British Columbia in ways that would affect dramatically the working environment of approximately 100,000 workers. The legislation sought to impose collective agreements containing pay and working conditions reflecting the employer's position on workers whose collective agreements had expired. In addition, it sought to override terms and conditions of existing collective agreements respecting job security, and contract out work to non-union employees. It also sought to restrict and in some cases eliminate existing rights to strike in the sector. The government defended its restructuring initiatives on the basis that changes in the global economy and public sector expenditure commitments led to unsustainable pressures on its capacity to service its debt and deficit.
>
> In strongly worded remarks, the CFA noted that the government was proposing to intervene legislatively in collective bargaining processes, either to put an end to a legal strike, impose wages and working conditions, circumscribe the scope of collective bargaining, or restructure bargaining processes themselves. It acknowledged that public sector collective bargaining requires verification of available resources and that such resources are dependent on the timing and duration of budgets which do not always correspond to collective agreements in the sector. It also acknowledged that it would not be objectionable in certain circumstances for a government to legislate wage ceilings in the face of debt and deficit pressures. *It stated that "the bargaining parties should, however, be free to reach an agreement;* if this is not possible, a*ny exercise by the public authorities of their prerogatives in financial matters which hampers the free negotiation of collective agreements is incompatible with the principle of freedom of collective bargaining."*
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> [Affidavit of P. Macklem, Exhibit "A", paras. 40-41.]

60. The most extensive discussion of the duty to consult by Canada's appellate courts has been as in relation to infringements on the s. 35 treaty or title rights of aboriginal people. Some appellate courts have also considered the duty of the Crown to consult other groups when an infringement of a *Charter* right may be found. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3, [TAB 8], the Supreme Court found a duty to consult provincial court judges on matters

of remuneration where it was necessary to avoid infringing s. 11(d) of the *Charter*. In *Pacific Fishermen's Defence Alliance v. Canada*, [1988] 1 F.C. 498, [TAB 9], the Federal Court of Appeal considered a claim made by non-aboriginal fishermen that their Charter rights had been violated by government's failure to consult with them regarding allocation of fish stocks during the Nishga'a treaty negotiations. Rather than reject the Alliance's assertion that a duty existed, the Court found the question to be premature as the negotiations had not by then concluded.

61. SUN acknowledges that the source of the duty to consult in *Charter* cases arising out of s. 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, is the reconciliation of aboriginal rights and title with the sovereignty of the Crown, and the *sui generis* relationship between the Crown and aboriginal peoples, conditions not under consideration in the instant case. At the same time, the substantial discussion undertaken by appellate courts in describing the duty to consult in s. 35 *Charter* cases is instructive in establishing the principles which come into consideration when a *Charter* infringement invokes such a duty.

62. Like the right to collective bargaining, aboriginal title has its roots in the common law predating the *Charter*. The Supreme Court made reference to this common law right in the seminal case of *R. v. Calder* [1973] S.C.R. 313, where Hall J. wrote:

> While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here.

63. The constitutionalization of aboriginal rights in s. 35 of the *Charter* gave rise to the duty to consult, which was first articulated in *R. v. Sparrow* [1990] 1 S.C.R. 1075, [TAB 10], in which an individual who was charged with fishing with an illegal drift net claimed that he was exercising an aboriginal right to fish and that the net length restriction contained in the First Nation's fishing licence was inconsistent with s. 35(1) of the

Constitution Act, 1982 and therefore invalid. In *Sparrow*, the court held that government regulations cannot determine the content and scope of an aboriginal right, but can the regulate exercise of that right in keeping with s. 35(1) of the *Constitution Act, 1982*, at para. 61:

> In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1). [emphasis added]

64. The Court then described the analysis to be undertaken when legislation has the effect of interfering with those rights. At paras. 68-83, the court said:

> 68. *The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement* of s. 35(1).
>
> ...
>
> 71. *If a prima facie interference is found, the analysis moves to the issue of justification.* This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective?
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> ...
>
> 75. If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples.
>
> ...
>
> 78. Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of *whether there has been as little infringement as possible in order to effect the desired result*; whether, in a situation of expropriation, fair compensation is available; and, *whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented*. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries. [emphasis added]

65. Consider this language alongside that in *Health Services,* at para. 93, which also found two levels of inquiry when addressing government action which infringes on a *Charter* right:

> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. *The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.*

And at para. 97:

> Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining -- the duty to consult and negotiate in good faith?

66. In *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, [TAB 11], the Court further explained that the nature of the consultation will vary with the circumstances, depending on the nature of the right infringed. At para. 168, the Court wrote:

> *There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified,* in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [emphasis added]

67. In *Haida Nation v. British Columbia,* [2004] 3 S.C.R. 511, [TAB 12], the Supreme Court provided more flesh to the duty to consult under s. 35, advising that it arises "when

the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." At paras. 43-46, the Court described the "spectrum" of obligations which would meet the duty to consult, depending on the circumstances:

> *At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.*
>
> ...
>
> *At the other end of the spectrum lie cases where a strong prima facie case for the claim is established,* the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. *In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.* While precise requirements will vary with the circumstances, *the* consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> ...
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. [emphasis added.]

68. In *Mikisew Cree First Nation v. Canada,* [2005] 3 S.C.R. 388, [TAB 13], the Court confirmed the nature of a flexible spectrum of obligations which arise with a duty to consult, at para. 34:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered.

69. This view is consistent with the conclusion of the Court in its s. 2 analysis in *Health Services* that if a government measure has a substantial impact on a Charter right,

issues of process and consultation become part of the very inquiry into the breach of s. 2(d), and are not postponed until the s. 1 *Oakes* analysis.. At para. 94:

> Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation.

70. The Saskatchewan Union of Nurses submits that the Defendant Government of Saskatchewan owed a duty to consult prior to enacting legislation which significantly alters the terms and conditions of collective agreements governing employment; interferes with the Union's ability to bargain collectively, as protected by s. 2(d) of the Charter of Rights; and which otherwise adversely affects their *Charter* rights:

a) Section 1 of the *Charter* is not intended to be read solely as an alternate justification clause to that found in s. 33 of the Charter. It is implicit in the very presence of s. 33, which provides legislatures with the authority to place limits on Charter rights, that in all other instances, governments must live up to the "guarantee" and obligation of reasonableness found in s.1.

b) While it is a useful judicial tool to apply the second element of s. 1 - the justificatory tests - *subsequent* to finding a breach of one of the following sections, it is not appropriate for government actors to *first* infringe a *Charter* right, and *then* seek justification under the second element the section. Government actors and legislatures must approach the *Charter* in the order it was written: The commitment to guarantee the rights of its citizens; and the obligation to act reasonably that are found in section 1 apply to the actions of government *prior* to taking action which will infringe on the rights of its citizens.

c) While the duty to consult as articulated in s. 35 decisions arises from a distinct set of Crown obligations, the rights it seeks to uphold were grounded in the common law prior to constitutionalization, just as collective bargaining rights arise from a

common law right which existed prior to s. 2(d) of the *Charter of Rights and Freedoms*. The Supreme Court's jurisprudence on s.35 is instructive, as it is the most exhaustive discussion of the principles which guide the duty to consult in *Charter* cases.

d) The nature of obligations arising from a duty to consult will vary with the circumstances. According to the Supreme Court in *Haida Nation*: "deep consultation" is called for "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance". SUN submits that the *prima facie* infringement on the association rights of the Union and its members, including the imposition of collective agreement terms without consultation, is of the significance needed to warrant such consultation.

e) Where the Crown has "real or constructive" knowledge that its actions "might" adversely affect a Charter right, a duty to consult arises from the "guarantee", and reasonableness obligation found in s.1. The Defendant received notice on more than one occasion that the affected parties believed that the government's actions adversely affected their *Charter* rights. The Defendant failed to respond to SUN's questions and invitations to further discussions.

f) The breach of a duty to consult constitutes a distinct infringement on the rights of the Union and its members. Under the s.2 test identified in *Health Services*, questions of process and consultation arise where the nature of the infringement is significant.

V. ACTION IN THE ABSENCE OF JUSTIFICATION

71. As noted above, SUN does not intend to put forward arguments at this time relating to the justification tests arising from the s. 1 application of *Oakes*. The Union reserves the right to address those issues in reply submissions.

72. SUN believes, however, that s. 1 of the *Charter* gives rise to Crown obligations to guarantee *Charter* rights first, and then to act reasonably in placing limits on those rights. This includes giving consideration, prior to taking action, to the nature of the rights being restricted by proposed legislation, and the legislation's impact on those protected rights. In short, the Crown must go through the *Charter* in order, and must consider its justification prior to acting. This is especially so when the planned government action is particularly wide-sweeping.

73. It is inappropriate for the members of SUN to be subject to a restriction on the collective bargaining rights of virtually its entire membership. The overbroad nature of the *PSESA*, with its heavy-handed affect on SUN and its members, is contrary to the evidence of SUN's successful conclusion of more than 160 collective agreements with only five strikes, and the professional standards and ethics of the regulated profession of nursing. As SUN President Rosalee Longmoore, nurses are keenly aware that their professional obligations during job action are governed by the Code of Ethics of the Canadian Nurse Association, which states: "Nurses planning to take job action or practicing in environments where job action occurs take steps to safeguard the health and safety of people during the course of the job action." The Code of Ethics is enforceable by an act of the provincial legislature, being *The Registered Nurses Act*, 1988, SS 1988-89, c R-12.2.

[Affidavit of R. Longmoore, paras. 17 & 26-29.]

74. As Ms. Longmoore further explained in her affidavit, the position of Emergency Services Coordinator is a requirement of the Union's bylaws. She also noted that SUN's commitment to ensuring the delivery of essential services prompted Premier Brad Wall, while sitting as Opposition Leader, to write to the Union on January 10, 2007 stating:

> I want to emphasize that it is our view that in the past, the Saskatchewan Union of Nurses, on their own volition, has been responsible for protecting the public safety by agreeing to provide essential services during a strike.
>
> . [Affidavit of R. Longmoore, paras. 33-49.]

75. The Saskatchewan Union of Nurses submits that the Defendant failed to discharge its duty to guarantee the Union's *Charter* rights by acting without justification, for the following reasons:

a) By the test described in *Health Services*, issues of process become relevant in s. 2(d) analysis when legislative changes "substantially touch on collective bargaining"; and

b) The Defendant's actions disregard the historic and mature bargaining relationship between SUN and public employers in the province, which includes the successful conclusion of more than 160 collective agreements and only five strikes; and

c) The obligation on the part of nurses to provide essential services during work stoppages is already governed by the profession's Code of Ethics and enforceable by virtue of an act of the provincial legislature; and

d) SUN's governing documents oblige the Union to create the position of Emergency Services Coordinator:

> 1. To ensure that all SUN locals and District Councils have planned to provide for emergency services during strike action, and are reporting as required;
>
> 2. To ensure that the emergency services being provided are consistent from local to local; and
>
> 3. To monitor the emergency services being provided during job action, and reporting accordingly.

e) The Defendant knew, or ought to have known, these material facts and acted in disregard of them.

CONCLUSION

76. The *Charter* right to freedom of association of the Saskatchewan Union of Nurses and its members is adversely affected by the provisions of *The Public Service Essential Services Act* which both restrict the Union's ability to engage in good faith collective bargaining (the Collective Bargaining Provisions), and which remove the right to strike from virtually the entirety of SUN's membership (the No-Strike Provisions).

77. The Collective Bargaining Provisions, specifically, preclude good faith bargaining by: dictating the form and content of a collective agreement; undoing existing collective agreements and hampering future collective bargaining on important workplace issues; and providing the employer with the authority to unilaterally impose a "collective agreement".

78. The No-Strike Provisions, specifically, are overbroad, and have a disproportionate impact on the right of SUN members to bargain collectively.

79. The No-Strike Provisions further infringe upon the s. 2(d) rights of SUN by failing to provide a fair and impartial process for dispute resolution as a consequence of restricting the right of union members to strike.

80. The two-stage test from *Health Services* advises that the first stage of the inquiry into an infringement of the freedom of association is a consideration of the nature of the rights infringed by the legislation. In those circumstances in which the restriction substantially touches upon collective bargaining, then issues of process and consultation arise as part of the s.2 analysis.

81. This approach is consistent with that taken by appellate courts in other *Charter* cases in which a duty to consult has arisen, notably within the extensive discussion on the issue in s. 35 cases. The obligations contained within the duty to consult are variable, depending on the nature of the right being infringed and the impact of the government action on that right. In the instant case, the impact on the collective bargaining rights of

SUN and its members is so substantial that the Defendant's duty to consult is at the high end of the spectrum.

82. Further, SUN views the opening words of the *Charter* as a guarantee against the infringement of its rights, from which arises a duty to consult where there is "real or constructive" knowledge that government actions will adversely affect significant *Charter* rights.

83. SUN also views the guarantee contained in s.1 as imposing a duty upon government to act only with justification. The Defendant failed to discharge this duty despite extensive evidence that it is inappropriate to impose such restrictions on the rights of SUN members; and despite the fact that the professional obligations of SUN members during job action are already enforceable by virtue of an act of the provincial legislature.

84. The *Act*'s Collective Bargaining and No-Strike Provisions; its failure to provide a fair and impartial dispute resolution process; and the Defendant's failure to consult are each inconsistent with Canada's obligations under international law, and with the *Charter* application of those obligations.

85. The Intervenor Saskatchewan Union of Nurses submits that the above detailed argument demonstrates that the provisions of the *PSESA* violate the rights and freedoms of the Union and its members as guaranteed under the *Charter*.

All of which is respectfully submitted.

Dated at Saskatoon, Saskatchewan, this 11th day of August, 2011.

BAINBRIDGE JODOUIN CHEECHAM

Per: _____
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