SUPREME COURT OF CANADA

CITATION: Saskatchewan Federation of Labour *v.* Saskatchewan, 2015 SCC 4

DATE: 20150130
DOCKET: 35423

BETWEEN:

Saskatchewan Federation of Labour (in its own right and on behalf of the unions and workers in the Province of Saskatchewan), Amalgamated Transit Union, Local 588, Canadian Office and Professional Employees' Union, Local 397, Canadian Union of Public Employees, Locals 7 and 4828, Communications, Energy and Paperworkers' Union of Canada and its Locals,

Health Sciences Association of Saskatchewan, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of U.S., its Territories and Canada, Locals 295, 300 and 669, International Brotherhood of Electrical Workers, Locals 529, 2038 and 2067, Saskatchewan Government and General Employees' Union, Saskatchewan Joint Board Retail, Wholesale and Department Store Union, Saskatchewan Provincial Building & Construction Trades Council, Teamsters, Local 395, 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 and University of Regina Faculty Association

Appellants

and

Her Majesty The Queen in Right of the Province of Saskatchewan

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Saskatchewan Union of Nurses, SEIU-West, United Nurses of Alberta, Alberta Federation of Labour, Professional Institute of the Public Service of Canada, Canadian Constitution Foundation, Air Canada Pilots' Association, British Columbia Civil Liberties Association, Conseil du patronat du Québec, Canadian Employers Council, Canadian Union of Postal Workers, International Association of Machinists and Aerospace Workers, British Columbia Teachers' Federation, Hospital Employees' Union, Canadian Labour Congress, Public Service Alliance of Canada, Alberta Union of Provincial Employees, Confédération des syndicats nationaux,

Regina Qu'Appelle Regional Health Authority, Cypress Regional Health Authority,
Five Hills Regional Health Authority, Heartland Regional Health Authority, Sunrise Regional Health Authority, Prince Albert Parkland Regional Health Authority, Saskatoon Regional Health Authority, National Union of Public and General Employees,
Canada Post Corporation and Air Canada
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 103)	Abella J. (McLachlin C.J. and LeBel, Cromwell and Karakatsanis JJ. concurring)
JOINT REASONS DISSENTING IN PART: (paras. 104 to 176)	Rothstein and Wagner JJ.

Saskatchewan Federation of Labour
(in its own right and on behalf of the unions and
workers in the Province of Saskatchewan),
Amalgamated Transit Union, Local 588,
Canadian Office and Professional Employees' Union, Local 397,
Canadian Union of Public Employees, Locals 7 and 4828,
Communications, Energy and Paperworkers'
Union of Canada and its Locals,
Health Sciences Association of Saskatchewan,
International Alliance of Theatrical Stage Employees,
Moving Picture Technicians, Artists and Allied Crafts of U.S.,
its Territories and Canada, Locals 295, 300 and 669,
International Brotherhood of Electrical Workers,
Locals 529, 2038 and 2067,
Saskatchewan Government and General Employees' Union,
Saskatchewan Joint Board Retail,
Wholesale and Department Store Union,
Saskatchewan Provincial Building & Construction Trades Council,
Teamsters, Local 395,
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 and
University of Regina Faculty Association *Appellants*

v.

Her Majesty The Queen in Right of the Province of Saskatchewan *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,

Attorney General of Newfoundland and Labrador,
Saskatchewan Union of Nurses,
SEIU-West,
United Nurses of Alberta,
Alberta Federation of Labour,
Professional Institute of the Public Service of Canada,
Canadian Constitution Foundation,
Air Canada Pilots' Association,
British Columbia Civil Liberties Association,
Conseil du patronat du Québec,
Canadian Employers Council,
Canadian Union of Postal Workers,
International Association of Machinists and Aerospace Workers,
British Columbia Teachers' Federation,
Hospital Employees' Union,
Canadian Labour Congress,
Public Service Alliance of Canada,
Alberta Union of Provincial Employees,
Confédération des syndicats nationaux,
Regina Qu'Appelle Regional Health Authority,
Cypress Regional Health Authority,
Five Hills Regional Health Authority,
Heartland Regional Health Authority,
Sunrise Regional Health Authority,
Prince Albert Parkland Regional Health Authority,
Saskatoon Regional Health Authority,
National Union of Public and General Employees,
Canada Post Corporation and Air Canada *Interveners*

Indexed as: Saskatchewan Federation of Labour *v.* Saskatchewan

2015 SCC 4

File No.: 35423.

2014: May 16; 2015: January 30.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Freedom of Association — Right to strike — Public Service Employees — Stare Decisis – Whether right to strike is protected by s. 2(d) of Charter — Whether prohibition on essential services employees participating in strike action amounts to substantial interference with meaningful process of collective bargaining and therefore violates s. 2(d) of Charter — If so, whether such violation is justified under s. 1 of Charter — Canadian Charter of Rights and Freedoms, s. 2(d) — The Public Service Essential Services Act, S.S. 2008, c. P-42.2.

Constitutional law — Charter of Rights — Freedom of association — Provincial legislation changing certification process and provisions dealing with communications by employers with employees — Whether legislation violates s. 2(d) of Charter — Canadian Charter of Rights and Freedoms, s. 2(d) — The Trade Union Amendment Act, 2008, S.S. 2008, c. 26.

In December, 2007, the newly elected Government of Saskatchewan introduced two statutes: *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*), and *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26, which became law in May, 2008. The *PSESA* is Saskatchewan's first statutory

scheme to limit the ability of public sector employees who perform essential services to strike. It prohibits unilaterally designated "essential service employees" from participating in any strike action against their employer. These employees are required to continue the duties of their employment in accordance with the terms and conditions of the last collective bargaining agreement. No meaningful mechanism for resolving bargaining impasses is provided.

The Trade Union Amendment Act, 2008 changes the union certification process by increasing the required level of written support and reducing the period for receiving written support from employees. It also changes the provisions dealing with communications between employers and their employees.

In July 2008, the Saskatchewan Federation of Labour and other unions challenged the constitutionality of both the *PSESA* and *The Trade Union Amendment Act, 2008*. The trial judge concluded that the right to strike was a fundamental freedom protected by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* and that the prohibition on the right to strike in the *PSESA* substantially interfered with the s. 2(*d*) rights of the affected public sector employees. He also found that the absolute ban on the right to strike in the *PSESA* was neither minimally impairing nor proportionate and therefore was not saved by s. 1 of the *Charter*. The declaration of invalidity was suspended for one year. On the other hand, the trial judge concluded that the changes to the certification process and permissible employer

communications set out in *The Trade Union Amendment Act, 2008* did not breach s. 2(*d*).

The Saskatchewan Court of Appeal unanimously allowed the Government of Saskatchewan's appeal with respect to the constitutionality of the *PSESA*. The appeal against the finding that *The Trade Union Amendment Act, 2008* did not violate s. 2(*d*) of the *Charter* was dismissed.

Held (Rothstein and Wagner JJ. dissenting in part): The appeal with respect to the *PSESA* should be allowed. The prohibition against strikes in the *PSESA* substantially interferes with a meaningful process of collective bargaining and therefore violates s. 2(*d*) of the *Charter*. The infringement is not justified under s. 1. The declaration of invalidity is suspended for one year. The appeal with respect to *The Trade Union Amendment Act, 2008* is dismissed.

Per McLachlin C.J. and LeBel, **Abella**, Cromwell and Karakatsanis JJ.: The right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations. The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. This crucial role in collective bargaining is why the right to strike is constitutionally protected by s. 2(*d*).

In *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, this Court recognized that the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(*d*). The right to strike is essential to realizing these values through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives. The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

The right to strike also promotes equality in the bargaining process. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. While strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all, it is the possibility of a strike which enables workers to negotiate their employment terms on a more equal footing.

In 1935, the *Wagner Act* was adopted in the United States, introducing a model of labour relations that came to inspire legislative schemes across Canada. This model was adopted in Canada because the federal and provincial governments recognized the fundamental need for workers to participate in the regulation of their work environment. One of the goals of the Wagner model was to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining. The right to strike, however, is not a creature just of the Wagner model. Most labour relations models include it because the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals.

Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. Canada is a party to international instruments which explicitly protect the right to strike. Besides these explicit commitments, other sources confirm the protection of a right to strike recognized in international law. And strikes are protected globally, existing in many of the countries with labour laws outside the *Wagner Act* model.

This historical, international, and jurisprudential landscape suggests compellingly that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective

agreement. The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is, and has historically been, the irreducible minimum of the freedom to associate in Canadian labour relations.

To determine whether there has been an infringement of s. 2(*d*) of the *Charter*, the test is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with a meaningful process of collective bargaining. The prohibition in the *PSESA* on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment meets this threshold and therefore amounts to a violation of s. 2(*d*) of the *Charter*.

The breach of s. 2(*d*) of the *Charter* is not justified under s. 1. The maintenance of essential public services is self-evidently a pressing and substantial objective, but the determinative issue in this case is whether the means chosen by the government are minimally impairing, that is, carefully tailored so that rights are impaired no more than necessary.

The fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered "essential". Under the *PSESA*, a public employer has the unilateral authority to dictate whether and how essential services will be maintained, including the authority to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification, and, for

public employers other than the Government of Saskatchewan, the essential services that are to be maintained. Only the number of employees required to work is subject to review by the Saskatchewan Labour Relations Board. And even where an employee has been prohibited from participating in strike activity, the *PSESA* does not tailor his or her responsibilities to the performance of essential services alone. The provisions of the *PSESA* therefore go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

Nor is there any access to a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration. Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Those public sector employees who provide essential services have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all.

The unilateral authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the conclusion that the *PSESA* is not minimally impairing. It is therefore unconstitutional.

The Trade Union Amendment Act, 2008, on the other hand, does not violate s. 2(*d*). The changes it introduces to the process by which unions may obtain or lose the status of a bargaining representative, as well as the changes to the rules governing employer communication to employees, do not substantially interfere with freedom of association.

Per **Rothstein** and **Wagner** JJ. (dissenting in part): This Court should not intrude into the policy development role of elected legislators by constitutionalizing the right to strike under the freedom of association guarantee in s. 2(*d*) of the *Charter*. The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained.

Democratically elected legislatures are responsible for determining the appropriate balance between competing economic and social interests in the area of labour relations. This Court has long recognized that it is the role of legislators and not judges to balance competing tensions in making policy decisions, particularly in the area of socio-economic policy. The legislative branch requires flexibility to deal with changing circumstances and social values. Canadian labour relations is a complex web of intersecting interests, rights and obligations, and has far-reaching implications for Canadian society. It is not the role of this Court to transform all

policy choices it deems worthy into constitutional imperatives. The exercise of judicial restraint is essential in ensuring that courts do not upset the balance by usurping the responsibilities of the legislative and executive branches.

Constitutionalizing a right to strike restricts governments' flexibility, impedes their ability to balance the interests of workers with the broader public interest, and interferes with the proper role and responsibility of governments. Constitutionalizing a right to strike introduces great uncertainty into labour relations: it will make all statutory limits on the right to strike presumptively unconstitutional. By constitutionalizing a broad conception of the right to strike, the majority binds the governments's hands and limits its ability to respond to changing needs and circumstances in the dynamic field of labour relations.

Constitutionalizing a right to strike enshrines a political understanding of the concept of "workplace justice" that favours the interests of employees over those of employers and even over those of the public. While employees are granted constitutional rights, constitutional obligations are imposed on employers. Employers and the public are equally entitled to justice: true workplace justice looks at the interests of all implicated parties. In the public sector, strikes are a political tool. The public expects that public services, and especially essential services, will be delivered. Thus unions attempt to pressure the government to agree to certain demands in order that these services be reinstated. Public sector labour disputes are

unique in that the government as employer must take into account that any additional expenditures incurred to meet employee demands will come from public funds.

It is incorrect to say that without the right to strike a constitutionalized right to bargain collectively is meaningless. The threat of work stoppage is not what motivates good faith bargaining. It is the statutory duty, and after *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, the constitutional duty, not the possibility of job action, that compels employers to bargain in good faith. The statutory right to strike allows both employers and employees to exercise economic and political power. Now by constitutionalizing only the ability of employees to exert such power, the majority disturbs the delicate balance of labour relations in Canada and impedes the achievement of true workplace justice.

The conclusion that the right to strike is an indispensable component of collective bargaining does not accord with recent jurisprudence. There is nothing in the concept of collective bargaining as it was defined by this Court in *Health Services*, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, that would imply that employees have a constitutional right to strike and that employers have a constitutional obligation to preserve the jobs of those employees. The threshold for overturning prior judgments is high. While the s. 2(d) jurisprudence has developed since the Labour Trilogy, neither this development, nor any change in

the circumstances of Canadian labour relations justifies a departure from precedent. If anything, developments in the law support a finding that the right to freedom of association does not require constitutionalizing the right to strike. This is because recent s. 2(*d*) jurisprudence has already established a right to meaningful, good faith collective bargaining.

International bodies disagree as to whether the right to strike is protected under international labour and human rights instruments. The current state of international law on the right to strike is unclear and provides no guidance in determining whether this right is an essential element of freedom of association.

A right to strike is not required to ensure the constitutional guarantee of freedom of association. Therefore, the *PSESA*, which restricts the ability of public sector workers who provide essential services to strike, does not violate the right to meaningful collective bargaining protected under s. 2(*d*) of the *Charter*. The *PSESA*'s controlled strike regime does not render effectively impossible, nor substantially interfere with, the ability of associations representing affected public sector employees to submit representations to employers and to have them considered and discussed in good faith. The *PSESA* facilitates consultation between employers and unions regarding the designation of essential services and the evidence in this case demonstrates that good faith collective bargaining took place. A violation of s. 2(*d*) of the *Charter* cannot be founded simply on allegations that the legislation does not provide an adequate dispute resolution process; s. 2(*d*) does not entail such a right.

Moreover, the goal of strikes is not to ensure meaningful collective bargaining, but instead to exert political pressure on employers. Finally, the statutory balance struck by the Government of Saskatchewan is eminently reasonable. Canadian federal and provincial governments have made a constitutional commitment "to provide essential public services of reasonable quality to all Canadians" (*Constitution Act, 1982*, s. 36(1)(*c*)). As a result, the Government of Saskatchewan cannot subject itself to arbitral awards that could make it unaffordable to deliver on its undertaking. It has devised a particular legislative framework in order to safeguard the continued delivery of essential services to the community during labour disputes. This Court should defer to the government's policy choices in balancing the interests of employers, employees, and the public.

The Trade Union Amendment Act, 2008 does not infringe the right to freedom of association.

Cases Cited

By Abella J.

Overruled: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; **referred to:** *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1; *Canada*

(Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Perrault v. Gauthier* (1898), 28 S.C.R. 241; *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231; *Williams v. Aristocratic Restaurants (1947) Ltd.*, [1951] S.C.R. 762; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 120 D.L.R. (3d) 590; *Demir v. Turkey*, No. 34503/97, ECHR 2008-V; *Enerji Yapi-Yol Sen v. Turquie*, No. 68959/01, April 21, 2009 (HUDOC); *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, No. 31045/10, April 8, 2014 (HUDOC); *Attorney-General v. National Labour Court*, [1995-6] Isr. L.R. 149; *New Histadrut General Workers' Union v. State of Israel* (2006), 25 I.L.L.R. 375; *Koach La Ovdim v. Jerusalem Cinematheque* (2009), 29 I.L.L.R. 329; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793; *Dunmore v. Ontario (Attorney General)*, 2001

SCC 94, [2001] 3 S.C.R. 1016; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

By Rothstein and Wagner JJ. (dissenting in part)

R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8, [2002] 1 S.C.R. 156; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465; *Canadian Union of Public Employees v. Labour Relations Board (Nova Scotia)*, [1983] 2 S.C.R. 311; *Perfection Foods Limited v. Retail Wholesale Dairy Worker Union, Local 1515* (1986), 57 Nfld. & P.E.I.R. 147; *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *J.B. v. Canada*, Communication No. 118/1982 (1986), UN Doc. CCPR/C/OP/2, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. 2 (1990), p. 34; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Turp v. Canada*

(Justice), 2012 FC 893, [2014] 1 F.C.R. 439; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016.

Statutes and Regulations Cited

Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16.

Canada Labour Code, R.S.C. 1985, c. L-2, ss. 50(*a*), 88.1, 89.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), (*d*).

Constitution Act, 1982, s. 36(1)(*c*).

Constitution of France, preamble § 7.

Constitution of Italy, art. 40.

Constitution of Portugal, art. 57.

Constitution of South Africa, s. 23(2).

Constitution of Spain, art. 28(2).

Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 1(1) "collective bargaining".

Labour Act, R.S.P.E.I. 1988, c. L-1, s. 22(a).

Labour Code, CQLR, c. C-27, s. 53.

Labour Relations Act, C.C.S.M. c. L10, s. 62.

Labour Relations Act, R.S.N.L. 1990, c. L-1, s. 71.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 17.

Labour Relations Code, R.S.A. 2000, c. L-1, s. 60(1)(a).

Labour Relations Code, R.S.B.C. 1996, c. 244, s. 11(1).

National Labor Relations Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

Public Service Essential Services Act, S.S. 2008, c. P-42.2, ss. 2(c) "essential services", (i) "public employer", 6, 7, 9(2), 18.

Public Service Essential Services Regulations, R.R.S., c. P-42.2, Reg. 1, App., Table 1.

Trade Union Act, R.S.N.S. 1989, c. 475, s. 35(a).

Trade Union Act, R.S.S. 1978, c. T-17 [rep. 2013, c. S-15.1, s. 10-11], s. 2(b).

Trade Union Amendment Act, 2008, S.S. 2008, c. 26, ss. 3, 6, 7, 11.

Trade Unions Act, 1872, S.C. 1872, c. 30.

Treaties and Other International Instruments

Charter of the Organization of American States, Can. T.S. 1990 No. 23, art. 45(c).

Convention (No. 87) concerning freedom of association and protection of the right to organize, 68 U.N.T.S. 17, art. 3(1).

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 11.

European Social Charter, E.T.S. No. 35 [revised E.T.S. No. 163], art. 6(4).

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 22.

International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 8(1), (2), (3).

Authors Cited

Adams, George W. *Canadian Labour Law*, 2nd ed. Aurora, Ont.: Canada Law Book, 1993 (loose-leaf updated June 2014, release 50).

Adams, Roy J. *Labour Left Out: Canada's Failure to Protect and Promote Collective Bargaining as a Human Right*. Ottawa: Canadian Centre for Policy Alternatives, 2006.

Adams, Roy J. "The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille" (2008), 14 *C.L.E.L.J.* 317.

Adell, Bernard, Michel Grant and Allen Ponak. *Strikes in Essential Services*. Kingston: IRC Press, 2001.

Arthurs, H. W. "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship" (1960), 38 *Can. Bar Rev*. 346.

Bellace, Janice R. "The ILO and the right to strike" (2014), 153 *Int'l Lab. Rev*. 29.

Canada. Task Force on Labour Relations. *Canadian Industrial Relations: The Report of the Task Force on Labour Relations*. Ottawa: Privy Council Office, 1969.

Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.

D'Aoust, Claude, and François Delorme. "The Origin of the Freedom of Association and of the Right to Strike in Canada: An Historical Perspective" (1981), 36 *R.I.* 894.

Davidov, Guy. "Judicial Development of Collective Labour Rights — Contextually" (2009-2010), 15 *C.L.E.L.J.* 235.

Deakin, Simon, and Gillian S. Morris. *Labour Law*, 6th ed. Oxford: Hart, 2012.

England, Geoffrey. "Some Thoughts on Constitutionalizing the Right to Strike" (1988), 13:2 *Queens L.J.* 168.

Ewing, K. D., and John Hendy. "The Dramatic Implications of *Demir and Baykara*" (2009-2010), 15 *C.L.E.L.J.* 165.

Fudge, Judy, and Eric Tucker. "The Freedom to Strike in Canada: A Brief Legal History" (2009-2010), 15 *C.L.E.L.J.* 333.

Hepple, Bob. "The Right to Strike in an International Context" (2009-2010), 15 *C.L.E.L.J.* 133.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Carswell, 2007 (updated 2014, release 1).

International Labour Conference. Committee of Experts on the Application of Conventions and Recommendations. *Freedom of Association and Collective Bargaining*. Geneva: International Labour Office, 1994.

International Labour Conference, 102nd Sess. *Conference Committee on the Application of Standards: Extracts from the Record of Proceedings*. Geneva: International Labour Office, 2013.

International Labour Organization. *Constitution of the International Labour Organization*, Annex (online: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:

0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO).

International Labour Organization. *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO,* 5th (rev.) ed. Geneva: International Labour Office, 2006.

Kahn-Freund, Otto, and Bob Hepple. *Laws Against Strikes*. London: Fabian Society, 1972.

Langille, Brian. "What Is a Strike?" (2009-2010), 15 *C.L.E.L.J.* 355.

Langille, Brian A. "Can We Rely on the ILO?" (2006-2007), 13 *C.L.E.L.J.* 273.

Novitz, Tonia. "Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact" (2009-2010), 15 *C.L.E.L.J.* 465.

Oliphant, Benjamin. "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard Under 2(d) & Saving the Freedom to Strike" (2012), 70:2 *U.T. Fac. L. Rev*. 36.

Palmer, Bryan D. "Labour Protest and Organization in Nineteenth-Century Canada, 1820-1890" (1987), 20 *Labour* 61.

Regenbogen, Sonia. "The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?" (2012), 16 *C.L.E.L.J.* 385.

Rubin, Neville, in consultation with Evance Kalula and Bob Hepple, eds. *Code of International Labour Law: Law, Practice and Jurisprudence*, vol. I, *Essentials of International Labour Law*. Cambridge: Cambridge University Press, 2005.

Servais, Jean-Michel. "ILO Law and the Right to Strike" (2009-2010), 15 *C.L.E.L.J.* 147.

Swepston, Lee. "Human rights law and freedom of association: Development through ILO supervision" (1998), 137 *Int'l Lab. Rev*. 169.

Trudeau, Gilles. "La grève au Canada et aux États-Unis: d'un passé glorieux à un avenir incertain" (2004), 38 *R.J.T.* 1.

Valticos, N., and G. von Potobsky. *International Labour Law*, 2nd rev. ed. Deventer, the Netherlands: Kluwer Law and Taxation, 1995.

Verge, Pierre, et Dominic Roux. "L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien: deux solitudes?", dans Pierre Verge, dir., *Droit*

international du travail: Perspectives canadiennes, Cowansville (Qc), Yvon Blais, 2010, 437.

Weiler, Paul. *Reconcilable Differences: New Directions in Canadian Labour Law*. Toronto: Carswell, 1980.

Weiss, Manfred, and Marlene Schmidt. *Labour Law and Industrial Relations in Germany*, 4th rev. ed. Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2008.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Klebuc C.J.S. and Richards, Ottenbreit, Caldwell and Herauf JJ.A.), 2013 SKCA 43, 414 Sask. R. 70, 575 W.A.C. 70, 361 D.L.R. (4th) 132, 280 C.R.R. (2d) 187, [2013] 6 W.W.R. 453, 227 C.L.R.B.R. (2d) 1, 2013 CLLC ¶220-032, [2013] S.J. No. 235 (QL), 2013 CarswellSask 252 (WL Can.), setting aside in part a decision of Ball J., 2012 SKQB 62, 390 Sask. R. 196, 254 C.R.R. (2d) 288, [2012] 7 W.W.R. 743, 211 C.L.R.B.R. (2d) 1, 2012 CLLC ¶220-016, [2012] S.J. No. 49 (QL), 2012 CarswellSask 64 (WL Can.). Appeal allowed in part, Rothstein and Wagner JJ. dissenting in part.

Rick Engel, Q.C., *Craig D. Bavis* and *Peter Barnacle*, for the appellants.

Graeme G. Mitchell, *Q.C.*, *Barbara C. Mysko* and *Katherine M. Roy*, for the respondent.

Mark R. Kindrachuk, *Q.C.*, and *Sean Gaudet*, for the intervener the Attorney General of Canada.

Robert E. Charney and *Sarah Wright*, for the intervener the Attorney General of Ontario.

Caroline Renaud and *Amélie Pelletier Desrosiers*, for the intervener the Attorney General of Quebec.

Keith Evans, for the intervener the Attorney General of British Columbia.

Roderick Wiltshire, for the intervener the Attorney General of Alberta.

Chantelle MacDonald Newhook, for the intervener the Attorney General of Newfoundland and Labrador.

Gary L. Bainbridge and *Marcus R. Davies*, for the intervener the Saskatchewan Union of Nurses.

Drew S. Plaxton, for the intervener SEIU-West.

Written submissions only by *Ritu Khullar, Q.C.*, and *Vanessa Cosco*, for the interveners the United Nurses of Alberta and the Alberta Federation of Labour.

Written submissions only by *Peter C. Engelmann* and *Colleen Bauman*, for the intervener the Professional Institute of the Public Service of Canada.

Darryl Cruz and *Brandon Kain*, for the intervener the Canadian Constitution Foundation.

Steve Waller and *Christopher Rootham*, for the intervener the Air Canada Pilots' Association.

Lindsay M. Lyster, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *Louise Laplante*, *Nancy Ménard-Cheng* and *Sébastien Beauregard*, for the intervener Conseil du patronat du Québec.

John D. R. Craig and *Christopher D. Pigott*, for the intervener the Canadian Employers Council.

Paul J. J. Cavalluzzo and *Adrienne Telford*, for the interveners the Canadian Union of Postal Workers and the International Association of Machinists and Aerospace Workers.

Joseph J. Arvay, Q.C., and *Catherine J. Boies Parker*, for the interveners the British Columbia Teachers' Federation and the Hospital Employees' Union.

Written submissions only by *Steven Barrett* and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Andrew Raven and *Andrew Astritis*, for the intervener the Public Service Alliance of Canada.

Patrick G. Nugent and *Tamara Friesen*, for the intervener the Alberta Union of Provincial Employees.

Éric Lévesque and *Benoît Laurin*, for the intervener Confédération des syndicats nationaux.

Evert van Olst, Q.C., and *Leah Schatz*, for the interveners the Regina Qu'Appelle Regional Health Authority, the Cypress Regional Health Authority, the Five Hills Regional Health Authority, the Heartland Regional Health Authority, the Sunrise Regional Health Authority, the Prince Albert Parkland Regional Health Authority and the Saskatoon Regional Health Authority.

Paul Champ and *Bijon Roy*, for the intervener the National Union of Public and General Employees.

Written submissions only by *Brian W. Burkett*, for the interveners the Canada Post Corporation and Air Canada.

The judgment of McLachlin C.J. and LeBel, Abella, Cromwell and Karakatsanis JJ. was delivered by

ABELLA J. —

[1] In the *Alberta Reference* (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313), this Court held that the freedom of association guaranteed under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* did not protect the right to collective bargaining or to strike. Twenty years later, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, this Court held that s. 2(*d*) protects the right of employees to engage in a meaningful process of collective bargaining. The rights were further enlarged in *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, where the Court accepted that a meaningful process includes employees' rights to join together to pursue workplace goals, to make collective representations to the

employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith. And, most recently, in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, the Court recognized that a process of collective bargaining could not be meaningful if employees lacked the independence and choice to determine and pursue their collective interests. Clearly the arc bends increasingly towards workplace justice.

[2] The question in this appeal is whether a prohibition on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment amounts to a substantial interference with their right to a meaningful process of collective bargaining and, as a result, violates s. 2(*d*) of the *Charter*. The question of whether other forms of collective work stoppage are protected by s. 2(*d*) of the *Charter* is not at issue here.

[3] The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. As Otto Kahn-Freund and Bob Hepple recognized:

> The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers. This — in all its simplicity — is the essence of the matter.
>
> (*Laws Against Strikes* (1972), at p. 8)

The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.

[4] This applies too to public sector employees. Those public sector employees who provide essential services undoubtedly have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all. Because Saskatchewan's legislation abrogates the right to strike for a number of employees and provides no such alternative mechanism, it is unconstitutional.

Background

[5] On December 19, 2007, the newly elected Government of Saskatchewan introduced two statutes which ground this appeal: *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*) and *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26. They became law on May 14, 2008.

[6] Prior to the enactment of *The Public Service Essential Services Act*, public sector strikes were regulated on an *ad hoc* basis in Saskatchewan. Without a regime in place, it was often difficult to ensure the adequate provision of essential services during labour disputes. In April 1999, for example, 8,400 members of the Saskatchewan Union of Nurses participated in a province-wide strike and many health care facilities throughout the province lost the capacity to provide critical care

to patients. Similarly, in 2001, health care employees represented by the Canadian Union of Public Employees withdrew their services, seriously affecting the delivery of health care:

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

And from December 2006 to February 2007, the Saskatchewan Government and General Employees' Union engaged in lawful strike action. A large number of highway workers, snow plow operators, and corrections workers participated, sparking concerns about public safety.

[7] As a result of these experiences, in 2007 the newly elected provincial government moved to implement an essential services labour relations regime in the province. The *PSESA* is Saskatchewan's first statutory scheme to regulate and limit the ability of public sector employees who perform "essential services" to strike. The *Act* applies to every "public employer" in Saskatchewan and to every "employee" of a public employer who is represented by a union.

[8] Under the *PSESA*, designated "essential services employees" are prohibited from participating in any work stoppage against their public employer. In the event of a strike, those employees are required to continue "the duties of [their] employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement", and are prohibited from refusing to continue those duties "without lawful excuse". Contravention of any provision under the *PSESA* is a summary conviction offence that could result in an increasing fine for every day the offence continues.

[9] The *PSESA* sets out a broad definition of "essential services":

> s. 2(c) (i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:
>
> (A) danger to life, health or safety;
>
> (B) the destruction or serious deterioration of machinery, equipment or premises;
>
> (C) serious environmental damage; or
>
> (D) disruption of any of the courts of Saskatchewan; and
>
> (ii) with respect to services provided by the Government of Saskatchewan, services that:
>
> (A) meet the criteria set out in subclause (i); and
>
> (B) are prescribed;[1]

[1] The "prescribed" services referred to in s. 2(c)(ii) are listed in Table 1 of the Appendix of *The Public Service Essential Services Regulations*, R.R.S., c. P-42.2, Reg. 1, enacted in 2009.

[10] A "public employer" is defined as:

s. 2(1) (i) the Government of Saskatchewan;

(ii) a Crown corporation as defined in *The Crown Corporations Act, 1993*;

(iii) a regional health authority as defined in *The Regional Health Services Act;*

(iv) an affiliate as defined in *The Regional Health Services Act*;

(v) the Saskatchewan Cancer Agency continued pursuant to *The Cancer Agency Act*;

(vi) the University of Regina;

(vii) the University of Saskatchewan;

(viii) the Saskatchewan Polytechnic ;

(ix) a municipality;

(x) a board as defined in *The Police Act, 1990*;

(xi) any other person, agency or body, or class of persons, agencies or bodies, that:

(A) provides an essential service to the public; and

(B) is prescribed;

[11] A public employer and the union are to negotiate an "essential services agreement" to govern how public services are to be maintained in the event of a work stoppage. In the event that the negotiations break down, the public employer has the authority to unilaterally designate, by "notice", which public services it considers to be essential, the classifications of employees required to continue to work during a

work stoppage, and the names and number of employees in each of the classifications. Further notice may be given by the public employer at any time, either to increase or decrease the numbers of employees required to maintain essential services.

[12] Where the employer is the Government of Saskatchewan, essential services are prescribed by regulation.

[13] The Saskatchewan Labour Relations Board has limited jurisdiction to review the numbers of employees required to work in a given classification during a strike, but it has no authority to review whether any particular service is essential, which classifications involve the delivery of genuinely essential services, or whether specific employees named by the employer to work during the strike have been reasonably selected.

[14] The second statute at issue in this appeal is *The Trade Union Amendment Act, 2008*. It introduced stricter requirements for a union to be certified by increasing the required level of written support from 25% to 45% of employees; by reducing the period for receiving written support from the employees from six months to three; and by eliminating the automatic certification previously available when over 50% of the employees had given written support prior to the application. The Saskatchewan Labour Board no longer had any discretion to decide whether a representation vote by secret ballot was needed.

[15] *The Trade Union Amendment Act, 2008* also decreased the level of employee support required for decertification. The predecessor legislation, *The Trade Union Act*, R.S.S. 1978, c. T-17 (repealed by S.S. 2013, c. s-15.1) , had set out a process by which employees in a bargaining unit could apply to have a union decertified as the bargaining representative. That provision was changed in *The Trade Union Amendment Act, 2008* by decreasing the required level of advanced written support for decertification from 50% plus one to 45%. The period within which the required written support was to be submitted was reduced from six months to three.

[16] Finally, it was no longer an "unfair labour practice" for an employer to communicate "facts and its opinions to its employees" during the exercise of their rights under *The Trade Union Amendment Act, 2008*.

[17] In July 2008, the Saskatchewan Federation of Labour and other unions challenged the constitutionality of both the *PSESA* and *The Trade Union Amendment Act, 2008*. The Saskatchewan Union of Nurses, the Canadian Union of Public Employees, the Service Employees International Union-West, and the Saskatchewan Government and General Employees' Union each subsequently commenced separate proceedings challenging only the constitutionality of the *PSESA*.

[18] Both sets of challenges were decided by the trial judge, Ball J., under s. 2(*d*) of the *Charter*. In his view, the majority decisions in the *Alberta Reference* had been superseded by this Court's interpretation of the scope of s. 2(*d*) of the *Charter* in

Health Services and *Fraser* to include protection for the right to engage in collective action to achieve workplace goals. While recognizing that the Court had not yet directly considered whether strike activity was encompassed by s. 2(*d*), Ball J. nonetheless concluded that "the right to strike is a fundamental freedom protected by s. 2(*d*) of the *Charter*".

[19] He accordingly found that the prohibition on the right to strike in the *PSESA* substantially interfered with the s. 2(*d*) rights of the affected public sector employees. He acknowledged that while Canadian and international law supports the restriction or prohibition of strikes by essential services employees, after an extensive and thoughtful analysis, he found that the absolute ban on the right to strike in the *PSESA* was neither minimally impairing nor proportionate for essentially the following reasons:

- Saskatchewan failed to engage in meaningful consultation or negotiation with respect to the *PSESA* and the *Public Service Essential Services Regulations*.

- Good-faith negotiation in determining essential services designations is not possible under the *PSESA* since one side has the capacity to impose an agreement.

- The definition of "essential services" is "very broad". In the absence of an agreement with the Unions about what the definition means, employers are entitled unilaterally to decide what they included.

- The definition of "public employer" is also overbroad. There was no evidence that some of the designated public employers actually employed any employees who were engaged in the delivery of essential services.

- The power of public employers during a work stoppage to designate how essential services are to be maintained and by whom was unilateral and required no consultation with the Unions.

- The unilateral decision-making power granted to public employers was unnecessary. There was no explanation for why the Unions were denied any input into naming essential services employees.

- The *PSESA* goes beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

- Compared to analogous legislation in other Canadian jurisdictions, the *PSESA* is uniquely restrictive of the right to strike and devoid of both review mechanisms and alternate means of addressing workplace issues.

[20] The declaration of invalidity was suspended for one year.

[21] In his analysis of the second statutory scheme, *The Trade Union Amendment Act, 2008*, on the other hand, Ball J. concluded that the legislation did not breach s. 2(*d*). While he acknowledged that the changes to the certification process introduced by *The Trade Union Amendment Act, 2008* had the effect of reducing the success rate of union applications for certification, he held that s. 2(*d*) does not require the enactment of legislation that ensures that unions succeed easily in their efforts to be certified; "it precludes the enactment of legislation that interferes with the freely expressed wishes of employees in the exercise of their s. 2(*d*) rights".

[22] With respect to the broadened scope of permissible employer communications, Ball J. held that permitting employers to communicate facts and opinions is consistent with the employers' freedom of expression under s. 2(*b*) of the *Charter*. He concluded that both the purpose and effect of the relevant provision is that employers could only communicate with employees in a manner that does not infringe on the ability of the employees to engage their collective bargaining rights.

[23] The Saskatchewan Court of Appeal unanimously allowed the Government of Saskatchewan's appeal with respect to the constitutionality of the *PSESA*, concluding that "[w]hile the Court's freedom of association jurisprudence has evolved in recent years, it has not shifted far enough, or clearly enough, to warrant a ruling by this Court that the right to strike is protected by s. 2(*d*) of the *Charter*". The

appeal against the trial judge's finding that *The Trade Union Amendment Act, 2008* did not violate s. 2(*d*) of the *Charter* was dismissed.

[24] I agree with the trial judge. Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(*d*). As the trial judge observed, without the right to strike, "a constitutionalized right to bargain collectively is meaningless".

[25] Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the *Charter*. In my view, the failure of any such mechanism in the *PSESA* is what ultimately renders its limitations constitutionally impermissible.

Analysis

[26] Section 2 of the *Charter* guarantees the following:

> **2.** Everyone has the following fundamental freedoms:
>
> . . .

(*d*) freedom of association.

[27] The trial judge in this case relied on changes in this Court's s. 2(*d*) jurisprudence to depart from the precedent set by the majority in the *Alberta Reference*.

[28] The recognition of the broader purpose underlying s. 2(*d*) led the Court to conclude in *Health Services* that "s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining" (para. 87). In reaching this conclusion, McLachlin C.J. and LeBel J. held that none of the majority's reasons in the *Alberta Reference* which had excluded collective bargaining from the scope of s. 2(*d*) "survive[d] scrutiny, and the rationale for excluding inherently collective activities from s. 2(*d*)'s protection has been overtaken by *Dunmore*" (*Health Services*, at para. 36).

[29] This Court reaffirmed in *Fraser* that a meaningful process under s. 2(*d*) must include, at a minimum, employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.

[30] The evolution in the Court's approach to s. 2(*d*) was most recently summarized by McLachlin C.J. and LeBel J. in *Mounted Police*, where they said:

> The jurisprudence on freedom of association under s. 2(*d*) of the *Charter* . . . falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.
>
> . . .
>
> . . . after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(*d*). . . . [paras. 30 and 46]

[31] They confirmed that freedom of association under s. 2(*d*) seeks to preserve "employee autonomy against the superior power of management" in order to allow for a meaningful process of collective bargaining (para. 82).

[32] Given the fundamental shift in the scope of s. 2(*d*) since the *Alberta Reference* was decided, the trial judge was entitled to depart from precedent and consider the issue in accordance with this Court's revitalized interpretation of s. 2(*d*): *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 42.

[33] Dickson C.J.'s dissenting reasons in the *Alberta Reference* were influential in the development of the more "generous approach" in the recent jurisprudence. Recognizing that association "has always been vital as a means of protecting the essential needs and interests of working people" (at p. 368), and that Canada's international human rights obligations required protection for both the formation and essential activities of labour unions, including collective bargaining

and the freedom to strike, Dickson C.J. concluded that "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw . . . their services [collectively], subject to s. 1 of the *Charter*" (at p. 371). (See also *Perrault v. Gauthier* (1898), 28 S.C.R. 241, at p. 256; and *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609, at pp. 618 and 621.)

[34] His views are supported by the history of strike activity in Canada and globally.

[35] This Court referenced this history in *Health Services*:

> In England, as early as the end of the Middle Ages, workers were getting together to improve their conditions of employment. They were addressing petitions to Parliament, asking for laws to secure better wages or other more favourable working conditions. Soon thereafter, strike activity began (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 29-30). [para. 45]

[36] In England in the 19th century, strike action was the subject of criminal sanction under the common law doctrine of criminal conspiracy, reflected in the *Combination Acts* of 1799 and 1800. Even when certain forms of trade unionism and collective bargaining became legal under the *Combination Act* of 1825, strike activity itself remained criminal: *Health Services*, at paras. 47-48. This state of affairs continued in England "until the 'legislative settlement' of the 1870s… lifted the threat of criminal sanctions from all but violent forms of behaviour associated with

industrial action": Simon Deakin and Gillian S. Morris, *Labour Law* (6th ed. 2012), at p. 8.

[37] British labour law was influential in the development of Canadian labour law prior to the 1940s, but the extent to which the restrictions on collective action were actually adopted and enforced in Canada appears to be unclear: *Health Services*, at paras. 43 and 50. As Judy Fudge and Eric Tucker wrote in describing the Canadian experience:

> The collective dimension of striking was covered by combination law, but just what that law was in early and mid-nineteenth century Canada is even more opaque than the status of English master and servant law. However, regardless of the formal law, historians have not identified a single case in which workers were successfully prosecuted under combination law simply for the act of striking. It is also clear that the social practice of workers striking to improve terms and conditions of employment became deeply rooted during this era.
>
> ("The Freedom to Strike in Canada: A Brief Legal History" (2009-2010), 15 *C.L.E.L.J.* 333, at pp. 340-41)

[38] What is known, however, is that workers participated in strike activity long before the modern system of labour relations was introduced in Canada. Strikes and collective bargaining were seen to go hand in hand since both "are creatures of working class action: working people turned to these methods to improve their lot in industry from the earliest days of nineteenth century Canadian capitalism": Geoffrey England, "Some Thoughts on Constitutionalizing the Right to Strike" (1988), 13:2 *Queens L.J.* 168, at p. 175. See also Gilles Trudeau, "La grève au Canada et aux États-Unis: d'un passé glorieux à un avenir incertain" (2004), 38 *R.J.T.* 1; Claude

D'Aoust and François Delorme, "The Origin of the Freedom of Association and of the Right to Strike in Canada: An Historical Perspective" (1981), 36 *R.I.* 894; Bryan Palmer, "Labour Protest and Organization in Nineteenth-Century Canada, 1820-1890" (1987), 20 *Labour* 61; Fudge and Tucker.

[39] The acceptance of the crucial role of strike activity led to its eventual decriminalization. In 1872, Parliament began the process of eliminating the criminal prohibition against collective action by enacting the Canadian *The Trade Unions Act, 1872*, S.C. 1872, c. 30. Through a series of legislative reforms, "the taint of criminal liability" had finally been removed from all trade unions in Canada by 1892: George W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at ¶ 1.80. Parliament recognized the importance of this legislative reform for workers:

> [In enacting the 1872 *Trade Unions Act*], the Canadian Parliament recognized the value for the individual of collective actions in the context of labour relations. As Sir John A. Macdonald mentioned in the House of Commons, the purpose of the *Trade Unions Act* of 1872 was to immunize unions from existing laws considered to be "opposed to the spirit of the liberty of the individual" (*Parliamentary Debates*, vol. III, 5th sess., 1st Parl., May 7, 1872, at p. 392, as cited by M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984), 16 *Ottawa L. Rev*. 267, at p. 267)
>
> (*Health Services*, at para. 52)

[40] McLachlin C.J. and LeBel J. further explain in *Health Services* that,

> [b]efore the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the workers' desire to have an employer recognize a union and bargain collectively with it (D. Glenday

> and C. Schrenk, "Trade Unions and the State: An Interpretative Essay on the Historical Development of Class and State Relations in Canada, 1889-1947" (1978), 2 *Alternate Routes* 114, at p. 128; M. Thompson, "Wagnerism in Canada: Compared to What?", in *Proceedings of the XXXIst Conference — Canadian Industrial Relations Association* (1995), 59, at p. 60; C. D. Baggaley, *A Century of Labour Regulation in Canada* (February 1981), Working Paper No. 19, prepared for the Economic Council of Canada, at p. 57). [para. 54]

[41] And in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, at para. 35, the Court noted that "[s]trikes and picketlines have been used by Canadian unions to exert economic pressure and bargain with employers for over a century".

[42] In 1935, the *Wagner Act* was adopted in the United States, introducing a model of labour relations that came to inspire legislative schemes across Canada. This model was adopted in Canada because the federal and provincial governments "recognized the fundamental need for workers to participate in the regulation of their work environment", and, in doing so, "confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers" (*Health Services*, at para. 63). One of the goals of the Wagner model, therefore, was to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining.

[43] As this Court noted in *Health Services*, the "unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to

bargain collectively, led to governments adopting the American *Wagner Act* model of legislation" (para. 54). In implementing statutorily protected bargaining rights, modern labour relations legislation was "designed to secure a greater measure of industrial peace to the public by encouraging collective bargaining and conciliation procedures rather than strikes as a method of resolving industrial disputes" (*Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, at pp. 443-44, *per* Ritchie J.).

[44] Modern labour relations legislation in Canada accordingly limited certain forms of strike activities and replaced the freedom to collectively engage in the withdrawal of services with statutorily protected rights to organize and engage in collective bargaining. As Judy Fudge and Eric Tucker noted, this model gave workers collective bargaining protection as a trade-off for limitations imposed on the freedom to strike:

> The loss of the freedom to strike for recognition was accompanied by a certification procedure that enabled employees to obtain union representation through a democratic process, and also imposed on employers a duty to recognize and to bargain in good faith with certified unions. The loss of the freedom to strike during the life of a collective agreement came with a right to enforce the terms of that agreement through binding arbitration. And, of course, the postponement of strikes until after conciliation . . . also came with a statutory freeze on terms and conditions. Finally, the new regime also gave workers a right to strike in the Hohfeldian sense, by prohibiting employers from terminating the contract of employment merely because the worker was on strike. The scope of the right to resume employment varies from jurisdiction to jurisdiction, but it protects striking workers' jobs in most situations. [p. 350]

[45] As George Adams writes, "All statutes have a policy commitment to the postponement of the reciprocal rights of lockout and strike until the exhaustion of all settlement mechanisms" (¶ 1.250). The trade-off in the Wagner labour relations model, limiting the ability to strike in favour of an emphasis on negotiated solutions for workplace issues, remains at the heart of labour relations in Canada. That is not to say it is the only model available, but it is the prevailing model in this country and the one under the s. 2(*d*) microscope in this case.

[46] It is important to point out, however, that the right to strike is not a creature just of the Wagner model. Most labour relations models include it. And where history has shown the importance of strike action for the proper functioning of a given model of labour relations, as it does in Wagner-style schemes, it should come as no surprise that the suppression of legal strike action will be seen as substantially interfering with meaningful collective bargaining. That is because it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals. As Prof. H. D. Woods wrote in his landmark 1968 report, the "acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike" (*Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1969), at p. 175). The strike is "an indispensable part of the Canadian industrial relations system" and "has become a part of the whole democratic system" (pp. 129 and 176).

[47] Bob Hepple writes that "the strike weapon as a last resort is an essential safety-valve, a sanction aimed at achieving meaningful participation" ("The Right to Strike in an International Context" (2009-2010), 15 *C.L.E.L.J.* 133, at p. 139).

[48] The recognition that strikes, while a powerful form of economic pressure, are nonetheless critical components of the promotion of industrial — and therefore socio-economic — peace, was also cogently summarized in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156:

> 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). [para. 25]

[49] As Gilles Trudeau wrote, [TRANSLATION] "[t]he strike was at the heart of the industrial relations system that prevailed throughout most of the 20th century . . . in Canada" (p. 5). Its significance as an economic sanction to collective bargaining — or threat thereof — is what led Dickson C.J. to conclude in the *Alberta Reference*, as previously noted, that "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*" (p. 371).

[50] The inevitability of the need for the ability of employees to withdraw services collectively was also accepted by McLachlin C.J. and LeBel J. in *R.W.D.S.U.*, where they recognized that the purpose of strikes — placing economic pressure on employers — is a legitimate and integral means of achieving workplace objectives:

> Occasionally . . . 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.* [Emphasis added; para. 24.]

[51] The preceding historical account reveals that while strike action has variously been the subject of legal protections and prohibitions, the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining. Protection under s. 2(*d*), however, does not depend solely or primarily on the historical/legal pedigree of the right to strike. Rather, the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.

[52] Within this context and for this purpose, the strike is unique and fundamental. In *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Ont. H.C.J.), Galligan J. emphasized the importance of strikes to the process of collective bargaining:

> . . . freedom of association contains a sanction that can convince an employer to recognize the workers' representatives and bargain effectively with them. That sanction is the freedom to strike. By the exercise of that freedom the workers, through their union, have the power to convince an employer to recognize the union and to bargain with it. . . .
>
> . . . If that sanction is removed the freedom is valueless because there is no effective means to force an employer to recognize the workers' representatives and bargain with them. When that happens the *raison d'être* for workers to organize themselves into a union is gone. Thus I think that *the removal of the freedom to strike renders the freedom to organize a hollow thing*. [Emphasis added; p. 249.]

[53] In *Health Services*, this Court recognized that the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(*d*) (para. 81). And, most recently, drawing on these same values, in *Mounted Police* it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(*d*) aims

> to protect the individual from "state-enforced isolation in the pursuit of his or her ends". . . . The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [para. 58]

[54] The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike,

workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

[55] Striking — the "powerhouse" of collective bargaining — also promotes equality in the bargaining process: England, at p. 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the *Alberta Reference*, Dickson C.J. observed that

> [t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. [p. 368]

And this Court affirmed in *Mounted Police* that

> [Section] 2(*d*) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way. . . [the] process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals.
>
> (at paras. 70-71)

Judy Fudge and Eric Tucker point out that it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality" (p. 333). Without it, "bargaining risks being inconsequential — a dead letter" (Prof. Michael Lynk, "Expert Opinion on Essential Services", at par. 20; A.R., vol. III, at p. 145).

[56] In their dissent, my colleagues suggest that s. 2(*d*) should not protect strike activity as part of a right to a meaningful process of collective bargaining because "true workplace justice looks at the interests of all implicated parties" (para. 125), including employers. In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying. It drives us inevitably to Anatole France's aphoristic fallacy: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

[57] Strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all. And, as the trial

judge recognized, strike action has the potential to place pressure on *both* sides of a dispute to engage in good faith negotiations. But what it does permit is the employees' ability to engage in negotiations with an employer on a more equal footing (see *Williams v. Aristocratic Restaurants (1947) Ltd.*, [1951] S.C.R. 762, at p. 780; *Mounted Police*, at paras. 70-71).

[58] Moreover, while the right to strike is best analyzed through the lens of freedom of association, expressive activity in the labour context is directly related to the *Charter*-protected right of workers to associate to further common workplace goals under s. 2(*d*) of the *Charter*: *Fraser*, at para. 38; *Alberta (Information and Privacy Commissioner)*, at para. 30. Strike action "bring[s] the debate on the labour conditions with an employer into the public realm": *Alberta (Information and Privacy Commissioner)*, at para. 28. Cory J. recognized this dynamic in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901:

> Often it is only by means of a strike that union members can publicize and emphasize the merits of their position as they see them with regard to the issues in dispute. It is essential that both the labour and management side be able to put forward their position so the public fully understands the issues and can determine which side is worthy of public support. Historically, to put forward their position, management has had far greater access to the media than have the unions. At times unions had no alternative but to take strike action and by means of peaceful picketing put forward their position to the public. This is often the situation today. [p. 916]

[59] As Dickson C.J. observed, "[t]he very nature of a strike, and its *raison d'être*, is to influence an employer by joint action which would be ineffective if it were carried out by an individual" (*Alberta Reference*, at p. 371).

[60] Alternative dispute resolution mechanisms, on the other hand, are generally not associational in nature and may, in fact, reduce the effectiveness of collective bargaining processes over time: Bernard Adell, Michel Grant and Allen Ponak, *Strikes in Essential Services* (2001), at p. 8. Such mechanisms can help avoid the negative consequences of strike action in the event of a bargaining impasse, but as Dickson C.J. noted in *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, they do not, in the same way, help to realize what is protected by the values and objectives underlying freedom of association:

> . . .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. . . . [a]s 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. . . . [pp. 476-77]

That is why, in the *Alberta Reference*, Dickson C.J. dealt with alternative dispute resolution mechanisms not as part of the scope of s. 2(*d*), but as part of his s. 1 analysis: p. 374-75.

[61] The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically

been, the "irreducible minimum" of the freedom to associate in Canadian labour relations (Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 69).

[62] Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. These obligations led Dickson C.J. to observe that

> [T]here is a clear consensus amongst the [International Labour Organization] adjudicative bodies that [*Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize* (68 U.N.T.S. 17 (1948))] goes beyond merely protecting the formation of labour unions and provides protection of their essential activities — that is of collective bargaining and the freedom to strike. [*Alberta Reference*, at p. 359]

[63] At the time of the *Alberta Reference*, Dickson C.J.'s reliance on Canada's commitments under international law did not attract sufficient collegial support to lift his views out of their dissenting status, but his approach has more recently proven to be a magnetic guide.

[64] LeBel J. confirmed in *R. v. Hape*, [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*,

[2013] 3 S.C.R. 157, at para. 23, "the *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".

[65] Given this presumption, Canada's international obligations clearly argue for the recognition of a right to strike within s. 2(*d*). Canada is a party to two instruments which explicitly protect the right to strike. Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 to which Canada acceded in May 1976, provides that the "States Parties to the present Covenant undertake to ensure. . . (*d*) *the right to strike, provided that it is exercised in conformity with the laws of the particular country*". (See also affidavit of Prof. Patrick Macklem (Expert Report), sworn December 21, 2010). In Dickson C.J.'s view, the qualification that the right had to be exercised in conformity with domestic law appeared to allow for the regulation of the right, but not its legislative abrogation (*Alberta Reference*, at p. 351, citing *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 120 D.L.R. (3d) 590 (Alta. Q.B.), at p. 597; see also Hepple, at p. 138).

[66] In addition, in 1990, just over two years after the *Alberta Reference* was decided, Canada signed and ratified the *Charter of the Organization of American States*, Can. T.S. 1990 No. 23. Article 45(c) states:

> Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, *including the right to collective bargaining and the workers' right to*

> *strike*, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;

[67] Besides these explicit commitments, other sources tend to confirm the protection of the right to strike recognized in international law. Canada is a party to the International Labour Organization (ILO) *Convention (No. 87) concerning freedom of association and protection of the right to organize*, ratified in 1972. Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention: see Pierre Verge and Dominic Roux, "L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien: deux solitudes?", in Pierre Verge, ed., *Droit international du travail: Perspectives canadiennes* (2010), 437, at p. 460; Janice R. Bellace, "The ILO and the right to strike" (2014), 153 *Int'l Lab. Rev.* 29, at p. 30. Striking, according to the Committee of Experts, is "one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests": *Freedom of Association and Collective Bargaining* (1994), at para. 147; Jean-Michel Servais, "ILO Law and the Right To Strike," (2009-2010), 15 *C.L.E.L.J.* 147, at p. 150.

[68] Under the *International Covenant on Economic, Social and Cultural Rights* signatory states are not permitted to take "legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in [*Convention No. 87*]": Article 8(3) of the *ICESCR*. The principles relating to the right to strike were summarized by the Committee on Freedom of Association as follows:

> **521.** The Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests.
>
> **522.** The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.
>
> **523.** The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.
>
> . . .
>
> **526.** The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. [References omitted.]
>
> (ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev.) ed. 2006))

[69] Though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the

world, including our Court: Lynk, at para. 9; *Health Services*, at para. 76; *Alberta Reference*, at pp. 354-55, *per* Dickson C.J. The relevant and persuasive nature of the Committee on Freedom of Association jurisprudence has developed over time through custom and practice and, within the ILO, it has been the leading interpreter of the contours of the right to strike: Bellace, at p. 62. See also Roy J. Adams, "The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille" (2008), 14 *C.L.E.L.J.* 317, at p. 321; Neville Rubin, in consultation with Evance Kalula and Bob Hepple, eds., *Code of International Labour Law: Law, Practice and Jurisprudence*, vol. I, *Essentials of International Labour Law* (2005), at p. 31.

[70] Canada is also a party to the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (*ICCPR*), which incorporates *Convention No. 87* and the obligations it sets out: see Article 22(3); Tonia Novitz, "Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact" (2009-2010), 15 *C.L.E.L.J.* 465, at p. 472; Roy J. Adams, at p. 324.

[71] Additionally, there is an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike. The European Court of Human Rights now shares this view. After concluding in *Demir v. Turkey* [GC], No. 34503/97, ECHR 2008-V, that freedom of association under Article 11 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, protects a right to collective bargaining, it went on in *Enerji Yapi-Yol Sen v. Turquie*, No. 68959/01,

April 21, 2009 (HUDOC), to conclude that a right to strike is part of what ensures the effective exercise of a right to collective bargaining:

> The terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members' interests. Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests. . . . The Court also observes that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights (for the Court's consideration of elements of international law other than the Convention, see *Demir et Baykara*. . .). It recalls that the European Social Charter also recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining.
>
> (Unofficial translation of *Enerji Yapi-Yol Sen*, at para. 24, cited in K. D. Ewing and John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2009-2010), 15 *C.L.E.L.J.* 165, at pp. 181-82 (text in brackets in Ewing and Hendy); see also *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, No. 31045/10, April 8, 2014 (HUDOC).

[72] Even though German labour relations are not based on the Wagner model, German courts too have concluded that strike action is protected when it is complementary to collective bargaining, that is, when the strike action is aimed at the achievement of a collective agreement and is proportionate to that aim (Hepple, at p. 135; Manfred Weiss and Marlene Schmidt, *Labour Law and Industrial Relations in Germany* (4th rev. ed. 2008), at paras. 484-86).

[73] Israeli courts have also held that freedom of association is a basic right, derived from the right to human dignity. They have interpreted freedom of

association to include the right to organize, the right to bargain collectively, and the right to strike: *Attorney-General v. National Labour Court*, [1995-6] Isr. L.R. 149 (H.C.J.) at p. 162; *New Histadrut General Workers' Union v. State of Israel* (2006), 25 I.L.L.R. 375, at para. 10; *Koach La Ovdim v. Jerusalem Cinematheque* (2009), 29 I.L.L.R. 329, at p. 331. Guy Davidov, "Judicial Development of Collective Labour Rights — Contextually" (2009-2010), 15 *C.L.E.L.J.* 235, at p. 241.

[74] And strikes, as collective action, are protected globally, existing in many countries with labour laws outside the *Wagner Act* model: J. Servais, at p. 148. Moreover, several countries have explicitly included the right to strike in their constitutions, including France (Constitution of 1946, § 7 of the preamble), Italy (Constitution of 1948, art. 40), Portugal (Constitution of 1976, art. 57), Spain (Constitution of 1978, art. 28(2)), and South Africa (Constitution of 1996, s. 23(2)) (Hepple, at p. 135). The *European Social Charter* similarly recognizes the importance of the freedom to strike for meaningful collective bargaining (E.T.S. No. 35, 1961(revised E.T.S. No. 163, 1996), Article 6(4)).

[75] This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2(*d*) has arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break

down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.

[76] In their dissenting reasons, however, my colleagues urge deference to the legislature in interpreting the scope of s. 2(*d*). This Court has repeatedly held that the rights enumerated in the *Charter* should be interpreted generously: *Hunter v. Southam* Inc., [1984] 2 S.C.R. 145, at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. It is not clear to me why s. 2(*d*) should be interpreted differently: *Health Services*, at para. 26; *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, at para. 162; *Mounted Police*, at para. 47. In the context of constitutional adjudication, deference is a conclusion, not an analysis. It certainly plays a role in s. 1, where, if a law is justified as proportionate, the legislative choice is maintained. But the whole purpose of *Charter* review is to assess a law for constitutional compliance. If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?

[77] This brings us to the test for an infringement of s. 2(*d*). The right to strike is protected by virtue of its unique role in the collective bargaining process. In *Health Services*, this Court established that s. 2(*d*) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process

of collective bargaining (para. 90). And in *Mounted Police*, McLachlin C.J. and LeBel J. confirmed that

> [t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power . . . Whatever the nature of the restriction, *the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining* . . . . [Emphasis added; para. 72].

[78] The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining. The *PSESA* demonstrably meets this threshold because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process. It must therefore be justified under s. 1 of the *Charter*.

[79] The maintenance of essential public services is self-evidently a pressing and substantial objective, as the Unions acknowledge. The Unions also accept the trial judge's further conclusion that the government's objective — ensuring the continued delivery of essential services — is rationally connected to the "basic structure of the legislation, including the sanctions imposed on employees and their unions to ensure compliance with its provisions".

[80] The determinative issue here, in my view, is whether the means chosen by the government are minimally impairing, that is, "carefully tailored so that rights are impaired no more than necessary." (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160).

[81] The trial judge concluded that the provisions of the *PSESA* "go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike". I agree. The *unilateral* authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the trial judge's conclusion that the *PSESA* impairs the s. 2(*d*) rights more than is necessary.

[82] In *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, L'Heureux-Dubé J. explained why public sector strike action engages singular considerations:

> When "public" employees strike, the pressure exerted on the employer is not largely financial, as in the private sector, but rather arises from the disruption of services upon which society depends for the daily activities of its members. While consumers may simply go to another source for goods and services provided by private enterprise, alternatives to the services targeted by the special regimes may be unavailable or very difficult and expensive to obtain. [para. 32]

[83] That is why the trial judge accepted that "the principle that it is unacceptable to risk the health and safety of others as a means to resolve a public sector collective bargaining dispute is well established in Canada".

[84] But it is important to keep in mind Dickson C.J.'s admonition in the *Alberta Reference* that "essential services" be properly interpreted:

> It is . . . necessary to define "essential services" in a manner consistent with the justificatory standards set out in s. 1. The logic of s. 1 in the present circumstances requires that an essential service be one the interruption of which would threaten serious harm to the general public or to a part of the population. In the context of an argument relating to harm of a non-economic nature I find the decisions of the Freedom of Association Committee of the I.L.O. to be helpful and persuasive. These decisions have consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population" (*Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O., supra*). In my view, and without attempting an exhaustive list, persons essential to the maintenance and administration of the rule of law and national security would also be included within the ambit of essential services. *Mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike*. [Emphasis added; pp. 374-75]

[85] In other words, the fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered "essential". In some circumstances, the public may well be deprived of a service as a result of strike action without being deprived of any essential service at all that would justifiably limit the ability to strike during negotiations. As Ball J. wrote:

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

[86] This need for demarcated limits on both the right of essential services employees to strike and, concomitantly, on the extent to which services may justifiably be limited as "essential", is reflected too in international law. As the trial judge noted:

> International law also recognizes the necessity of limitations on the right to strike of essential service workers. . . . The jurisprudence under ILO Convention No. 87, the ICSECR [sic] and the ICCPR has been consistent. As expressed by Prof. Patrick Macklem:
>
> > 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.
>
> (Para. 127, citing affidavit of Patrick Macklem sworn December 21, 2010.)

See also Lynk, at paras. 19-20; Verge and Roux, at pp. 461-62. And within the general category of essential services, the ILO has recognized that "certain classes of personnel. . . should not be deprived of the right to strike, because the interruption of their functions does not in practice affect life, personal safety or health": Servais, at p. 154.

[87] Under the *PSESA*, however, the categories of workers whose right to strike may be abrogated because they provide essential services is subject to the employer's unilateral discretion. The scheme requires a public employer and a trade union to first attempt to negotiate the terms of an essential services agreement. Section 6(2) of the *Act* contemplates that the employer must "advise the trade union" of the services it considers to be essential within the meaning of the *Act*. And where the employer is the Government of Saskatchewan, the prescribed essential services have been identified by regulation, without any room for further discussion about what constitutes an essential service. It is, as a result, not even clear that the scheme necessarily contemplates that the designation of certain services as essential will be the subject of negotiation under an agreement.

[88] Moreover, s. 7(2) of the *PSESA* states that under an essential services agreement, the number of employees within each classification "is to be determined without regard to the availability of other persons to provide essential services". As the trial judge found:

> The apparent purpose of s. 7(2) is to enable managers and non-union administrators to avoid the inconvenience and pressure that would ordinarily be brought to bear by a work stoppage. Yet if qualified personnel are available to deliver requisite services, it should not matter if they are managers or administrators. If anything s. 7(2) works at cross purposes to ensuring the uninterrupted delivery of essential services during a work stoppage. [para. 192]

[89] And in the event that an agreement cannot be reached, s. 9(2) gives a public employer the unilateral authority to dictate whether and how essential services will be maintained, including the authority to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification, and, for public employers other than the Government of Saskatchewan, the essential services that are to be maintained. As the trial judge found, "[o]f the unilateral designations made by public employers under s. 9(2) only one, that of the number of employees required to work, is subject to review by the [Saskatchewan Labour Relations Board]." There is no jurisdiction for the Board to even *consider* significant dimensions of an employer's unilateral designation with regard to the maintenance of essential services, such as whether any particular service is essential, or which job classifications involve the delivery of genuinely essential services.

[90] There is no evidence to support Saskatchewan's position that the objective of ensuring the continued delivery of essential services requires unilateral rather than collaborative decision-making authority. And its view that public employers can be relied upon to make fair decisions has the potential to sacrifice the

right to a meaningful process of collective bargaining on the altar of aspirations. The history of barriers to collective bargaining over the past century represents a compelling reality check to such optimism.

[91] And even where an employee has been prohibited from participating in strike activity, the *PSESA* does not tailor his or her responsibilities to the performance of essential services alone. Section 18(1)(a) of the *PSESA* requires that in the event of a work stoppage, all essential services employees must continue "the duties of . . . [their] employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement" and must not fail to continue those duties "without lawful excuse" (s. 18(2)). Requiring those affected employees to perform both essential *and* non-essential work during a strike action undercuts their ability to participate meaningfully in and influence the process of pursuing collective workplace goals.

[92] All this is in addition to the absence of an impartial and effective dispute resolution process to challenge public employer designations under s. 9(2) of the legislation, a particular concern in light of the significant definitional latitude given to public employers. As noted, the ILO's Committee on Freedom of Association defined essential services as those needed to prevent a "clear and imminent threat to the life, personal safety or health of the whole or part of the population" (*Freedom of Association*, at para. 581). The definition of "essential services" under the *PSESA* requires basic judgments to be made about when life, health, safety, or environmental

concerns, among others, justify essential services designation. These are fundamental questions, yet all are permitted to be answered unilaterally by the employer under the *Act* with no access to an effective dispute resolution mechanism for reviewing disputed employer designations.

[93] Nor is there any access to a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration. Paul Weiler persuasively explained why such an alternative is crucial for essential services employees:

> If we pull all the teeth of a union by requiring provision of imperative public safety services, such that any remaining strike option does not afford the union significant bargaining leverage, then I believe the union should have access to arbitration at its option. [Emphasis deleted; p. 237.]

[94] Not surprisingly, Dickson C.J. was alive to the profound bargaining imbalance the union inherits when the removal of the right to strike is not accompanied by a meaningful mechanism for resolving collective bargaining disputes:

> Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Fire Fighters Association at p. 22 of its factum that "It is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn". *The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition*

> *of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers*. [Emphasis added.]
>
> (*Alberta Reference*, at p. 380)

[95] The trial judge compared the *PSESA* with other Canadian essential services labour relations schemes and was struck by how uniquely restrictive the *PSESA* was:

> . . . no other essential services legislation in Canada comes close to prohibiting the right to strike as broadly, and as significantly, as the [*PSESA*]. No other essential services legislation is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential service workers and, where those designations have the effect of prohibiting meaningful strike action, an independent, efficient, overall dispute mechanism. . . .
>
> . . .
>
> Canadian legislation prohibiting strikes by firefighters and police officers, where the level of essentiality is very high, invariably provides compensatory access to arbitration to resolve collective bargaining disputes. The same is true for legislation prohibiting strikes by hospital workers. Although that legislation contains a variety of approaches for determining when and how access should be provided, the point is that it is invariably provided.
>
> There is a pragmatic reason why "no strike" legislation almost always provides for access to independent, effective dispute resolution processes: mechanisms of that kind can operate as a safety valve against an explosive buildup of unresolved labour relations tensions.

[96] Given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate, impartial and effective alternative mechanism for resolving collective

bargaining impasses, there can be little doubt that the trial judge was right to conclude that the scheme was not minimally impairing. Quite simply, it impairs the s. 2(*d*) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services.

[97] The *Public Service Essential Services Act* is therefore unconstitutional.

[98] The Unions had alternatively argued that the *PSESA* interferes with freedom of expression under s. 2(*b*) of the *Charter* by limiting the ability of essential services employees to conduct and participate in strike activity. In light of the conclusion that the limits on strike activity in the *PSESA* violate the s. 2(*d*) rights of public sector employees, it is unnecessary to realign the arguments under s. 2(*b*).

[99] As for *The Trade Union Amendment Act, 2008*, this Court has long recognized that the freedom of association protects the "right to join associations that are of [employees'] choosing and independent of management, to advance their interests": *Mounted Police*, at para. 112; see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 30. In *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, this Court stated that "s. 2(*d*) protects the freedom to establish, belong to and maintain an association" (p. 402), and in *Health Services* it was reaffirmed that s. 2(*d*) guarantees employees "the right to unite" (para. 89).

[100] But I agree with the trial judge, whose conclusion was upheld by the Court of Appeal, that in introducing amendments to the process by which unions may obtain (or lose) the status of a bargaining representative, *The Trade Union Amendment Act, 2008* does not substantially interfere with the freedom to freely create or join associations. This conclusion is reinforced by the trial judge's findings that when compared to other Canadian labour relations statutory schemes, these requirements are not an excessively difficult threshold such that the workers' right to associate is substantially interfered with.

[101] I also agree with the trial judge that permitting an employer to communicate "facts and its opinions to its employees" does not strike an unacceptable balance so long as the communication is done in a way

> that does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes.

[102] Accordingly, I would uphold the conclusion that *The Trade Union Amendment Act, 2008* does not violate s. 2(*d*) of the *Charter*.

[103] In light of the conclusion that the *PSESA* is unconstitutional, I would therefore allow the Unions' appeal with costs throughout and suspend the declaration of invalidity for one year. I would dismiss the appeal in respect of *The Trade Union Amendment Act, 2008* but, in the circumstances, without costs.

The reasons of Rothstein and Wagner JJ. were delivered by

ROTHSTEIN AND WAGNER JJ. —

I. Introduction

[104] This case requires the Court to consider whether the right to strike is constitutionally protected under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*. The appellant unions challenge Saskatchewan's *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 ("*PSESA*"), which restricts the ability of public sector workers who provide essential services to strike. The majority finds that these workers do have a constitutional right to strike. We disagree.

[105] McLachlin C.J. and LeBel J., writing for a unanimous Court in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, cautioned that

> [j]udging the appropriate balance between employers and unions is a delicate and essentially political matter. Where the balance is struck may vary with the labour climates from region to region. This is the sort of question better dealt with by legislatures than courts. Labour relations is a complex and changing field, and courts should be reluctant to put forward simplistic dictums. [para. 85]

Thirteen years later, the majority in this case ignores this sage warning in reaching its conclusion. Our colleagues have taken it upon themselves to determine "the appropriate balance between employers and unions", despite the fact that this balance is not any less delicate or political today than it was in 2002. In our respectful view, the majority is wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike.

[106] In the Labour Trilogy, this Court firmly rejected the proposition that the right to strike in Canada is constitutionally entrenched (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"); *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460 (collectively, the "Labour Trilogy")). Then, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, despite the evolution in the s. 2(*d*) jurisprudence, this Court rejected the idea that there is a constitutional right to a dispute resolution process. The majority (at para. 1) now casts off these and other precedents and injects a one-sided view of "workplace justice" into s. 2(*d*) of the *Charter*. The majority has so inflated the right to freedom of association that its scope is now wholly removed from the words of s. 2(*d*).

[107] The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees, and the public. Providing for a constitutional right to strike

not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained. We are compelled to dissent.

II. Analysis

A. *There Is No Right to Strike Under Section 2(d) of the Charter*

[108] The majority purports to recognize a violation of s. 2(*d*) of the *Charter* only where a "prohibition on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment amounts to a substantial interference with [the] right to a meaningful process of collective bargaining" (para. 2). It attempts to minimize the impact of its decision by stating that the right to strike is only protected where it interferes with the right to meaningful collective bargaining, a right which has already been recognized in *Health Services*, *Fraser*, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1. But our colleagues' reasons, in their entirety, reveal the true ambit of this decision: they have created a stand-alone constitutional right to strike.

[109] The majority's reasons include numerous references to the right to strike as being "essential" to, "crucial", and an "indispensable" component of meaningful collective bargaining. The majority describes the right to strike as "vital to protecting the meaningful process of collective bargaining within s. 2(*d*)" (para. 24). If the right to strike is a necessary element of meaningful collective bargaining, it will not only

apply on a case-by-case basis; logically, any limitation on the right to strike will infringe s. 2(*d*) of the *Charter*. With respect, to accept this decision as simply an espousal of the right to meaningful collective bargaining disregards the substance of the majority's reasons.

(1) The Historical Right to Strike That the Majority Invokes Does Not Justify Constitutionalizing the Modern, Statutory Right to Strike

[110] The majority attempts to ground its new-found constitutional right to strike in the long history of strikes. There is no dispute that, at common law, employees are permitted to refuse to work (see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at ¶11.90; H. W. Arthurs, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship" (1960), 38 *Can. Bar Rev*. 346, at p. 349).

[111] But the majority conflates this common law right to withdraw labour with the modern, statutory right to strike, which imposes obligations on employers: "Historically, there was no legal 'right' to strike at common law, entailing a correlative obligation on an employer to refrain from retaliatory measures, but rather a common law 'freedom' to do so" (B. Oliphant, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard Under 2(d) & Saving the Freedom to Strike" (2012), 70:2 *U.T. Fac. L. Rev*. 36, at p. 41). Thus, at common law, employers are not obligated to refrain from terminating striking workers or from hiring replacement employees to perform their functions (see B. Langille, "What Is a Strike?" (2009-2010), 15 *C.L.E.L.J.* 355, at pp. 368-69).

[112] This historical common law right to strike is a fundamental component of our legal system insofar as it reflects the idea that employees have no obligation to continue to work under conditions they consider to be unsatisfactory: no legislature can force an individual or a group into servitude. The majority correctly remarks that "[t]he ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions" (para. 54). The majority, however, is not constitutionalizing this fundamental historical right. Rather, it constitutionalizes a *duty* on employers not to terminate employees who have withdrawn their labour, nor to hire replacement workers.

[113] In the words of Justice Richards of the Saskatchewan Court of Appeal (as he then was) the majority invokes "the *contemporary* right to strike, a right significantly bound up with, integrated into, and defined by a specific statutory regime" (2013 SKCA 43, 414 Sask. R. 70, at para. 61 (emphasis in original)). This statutory regime is not found in s. 2(*d*) of the *Charter* or anywhere else in Canadian constitutional law.

(2) Courts Must Demonstrate Deference in the Field of Labour Relations

[114] While *Charter* rights must be interpreted generously, this Court has cautioned that it is nevertheless "important not to overshoot the actual purpose of the right or freedom in question": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. (See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 19, *per* Abella J.). Our colleagues assert that

affording deference to legislative choices erodes the role of judicial scrutiny (para. 76). In so doing, they overlook that within the Canadian constitutional order each institution plays a unique role. The exercise of judicial restraint is essential in ensuring that courts do not upset the balance by usurping the responsibilities of the legislative and executive branches.

[115] This Court has long recognized that it is the role of legislators and not judges to balance competing tensions in making policy decisions. As this Court recognized in *Vriend v. Alberta*, [1998] 1 S.C.R. 493:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts. [Emphasis added; para. 136.]

[116] This is particularly true in the area of socio-economic policy. The legislative branch requires flexibility in this area to deal with changing circumstances and social values. Canadian labour relations is a complex web of intersecting interests, rights, and obligations, and has far-reaching implications for Canadian society. Our colleagues clearly believe that providing an affirmative right to strike, with protection for the striking workers' positions, is a worthy policy choice. But it is not the role of this Court to transform all policy choices that the majority deems worthy into constitutional imperatives. The majority here sets aside the legislature's

choice regarding the right to strike and, in so doing, it imposes constitutional burdens on third party employers and limits their rights. It restricts the ability of governments to balance the competing interests of employers, employees, and the public. Relying on a constitutional freedom to impose restrictions on third parties in the absence of clear constitutional wording to that effect threatens to undermine Canada's constitutional order.

[117] The majority's justification for disturbing the government's policy choices fails to acknowledge the constitutional guarantees that already exist to protect employees. Reaching back to Dickson C.J.'s concerns in the Labour Trilogy (and even further to 19th century French novelists), the majority ignores significant evolution in the jurisprudence of s. 2(*d*) of the *Charter*. This Court has asserted on numerous occasions that s. 2(*d*) guarantees *meaningful* collective bargaining (see *Health Services*, *Fraser* and *Mounted Police*). Therefore, a right to collective bargaining without a right to strike cannot possibly be "meaningless", as the majority states (para. 24). This constitutional right had not been recognized when Dickson C.J. wrote his reasons in the Labour Trilogy, and certainly not in *fin de siècle* France. What the majority is constitutionalizing is a particular policy, which cuts directly against this Court's approach to s. 2(*d*) most recently stated in *Mounted Police*: ". . . th[e] right is one that guarantees a process rather than an outcome or access to a particular model of labour relations" (para. 67).

[118] Democratically elected legislatures are responsible for determining the appropriate balance between competing economic and social interests in the area of labour relations. Strike action is one of many constituent elements factored into this statutory balance of power. There is always a public interest in avoiding protracted labour disputes, and the public interest in labour relations is amplified where the government or private sector delivers essential services, and indeed in all cases where the government is the employer.

[119] The majority reasons, in describing the impact of public sector strikes in Saskatchewan prior to the enactment of the *PSESA*, illustrate the potentially devastating results of strikes in the area of essential services on the health and safety of individuals (para. 6). Because the government bears the responsibility to protect the public interest, and is responsible to the electorate for doing so, it is reasonable that a legislative regime limit such detrimental strikes. The importance of such legislation is underscored by the government's constitutional commitments. The federal and provincial governments have committed to "providing essential public services of reasonable quality to all Canadians" (s. 36(1)(*c*) of the *Constitution Act, 1982*). In constitutionalizing a right to strike, the majority restricts governments' flexibility and impedes their ability to balance the interests of workers with the broader public interest.

[120] Over time governments have adapted and modified labour relations schemes to fit changing circumstances. The majority's decision to constitutionalize a

particular conception of a strike imposes obligations on others and ignores the public interest. In so doing, it interferes with the proper role and responsibility of governments. Governments, not courts, are charged with adapting legislation to changing circumstances in order to achieve a balance between the interests of employers, employees, and the public. Constitutionalizing selected aspects of the modern, statutory right to strike denies governments the flexibility they require to effectively adapt labour relations legislation.

[121] Statutory collective bargaining regimes in Canada are modelled on the American *National Labor Relations Act*, 49 Stat. 449 (1935), 29 U.S.C. § 151-169 (the "*Wagner Act*"). Governments adopted this model in response to an "unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively" (*Health Services*, at para. 54). Wagner model legislation imposes limitations on workers' ability to strike in exchange for alternative processes that ensure greater stability and predictability. For example, the freedom to engage in recognition strikes was replaced with a democratic union certification process, and the ability to strike during the life of an employment contract was replaced with a process of binding arbitration through which the terms of the agreement could be enforced. Legislatures created, and have since refined, a balance between competing interests in the labour relations sphere by imposing constraints on all parties involved.

[122] Canadian labour relations are heavily regulated and nowhere is this more evident than in the ability of workers to strike. In most Canadian labour relations regimes, employees are only permitted to strike in very specific circumstances. For example, in the *Canada Labour Code*, R.S.C. 1985, c. L-2, strikes are generally only permitted where the term of a collective agreement has elapsed, the union has given notice to the employer, there has been a failure to negotiate or a failure to reach a collective agreement, the Minister of Labour has received a notice of dispute or taken certain prescribed actions, the prescribed time period has elapsed, and the union has held a vote by secret strike ballot where a majority of employees voting approve the strike (see ss. 88.1 and 89). The result of these conditions is that actions such as recognition strikes or sympathy strikes are not permitted.

[123] Constitutionalizing a right to strike introduces great uncertainty into labour relations. In Canada, the ability of workers to strike and the limits placed on this ability are essential to the balance between employers, employees, and the public interest. The majority's reasons will make all statutory limits on the right to strike presumptively unconstitutional, a significant concern since all labour relations statutes contain extensive limits on the conditions under which workers may strike. Will governments be forced to defend all of these limits under s. 1 of the *Charter*, no matter how ingrained they may be in Canadian labour relations? What is the true scope of this new, constitutionalized right to strike? Despite our general understanding of *Charter* rights applying broadly to all Canadians, has the majority now created a fundamental freedom that can only be exercised by government

employees and the 17 percent of the private sector workforce that is unionized?: R. J. Adams, *Labour Left Out: Canada's Failure to Protect and Promote Collective Bargaining as a Human Right* (2006), at p. 19. Are workers without collective agreements able to exercise this new right? The majority sidesteps these fundamental questions.

[124] These unanswered questions reveal why courts must be deferential. The unbridled right to strike that the majority endorses has far-reaching consequences that are difficult to predict and even more difficult to address once that right is constitutionalized. By constitutionalizing this broad conception of the right to strike, the majority binds the government's hands and limits its ability to respond to changing needs and circumstances in the dynamic field of labour relations.

(3) The Court Must Not Constitutionalize Particular Political Positions in Labour Relations

[125] Under the rubric of "workplace justice", our colleagues, relying on a 19th century conception of the relationship between employers and workers, enshrine a political understanding of this concept that favours the interests of employees over those of employers and even over those of the public. While employees are granted constitutional rights, constitutional obligations are imposed on employers. Employers and the public are equally as entitled to justice as employees — true workplace justice looks at the interests of all implicated parties.

[126] As Binnie J. cautioned in *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465, "[c]are must be taken . . . not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually" (para. 57). This echoes the Court's holding in *Pepsi-Cola* quoted above. Similarly, McIntyre J.'s warning in the *Alberta Reference* about the danger of excessively restricting the legislature's discretion in the field of labour law is as true today as it was in 1987:

> Labour law . . . is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour — a very powerful socio-economic force — on the one hand, and the employers of labour — an equally powerful socio-economic force — on the other. The balance between the two forces is delicate and the public-at-large depends for its security and welfare upon the maintenance of that balance. . . . There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken . . . in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day. [Emphasis added; p. 414.]

The majority ignores these wise admonitions.

[127] In the private sector, strikes operate as an economic weapon, a stand-off as to whether employers can forgo or limit carrying on business for longer than employees can forgo wages. In the public sector, strikes are a political tool. The public expects that public services, and especially essential services, will be delivered. Thus unions attempt to pressure the government to agree to certain

demands in order that these services be reinstated. Public sector labour disputes are also unique in that the government as employer must take into account that any additional expenditures incurred to meet employee demands will come from public funds. To hold that s. 2(*d*) of the *Charter* protects a particular economic or political weapon of employees, the right to strike together with employer obligations and demands on public resources, plainly tips the balance of power against employers and the public and fails to respect the important role played by democratically elected legislators in balancing the complex competing interests at stake in labour relations. Under a statutory scheme, the legislature is able to make adjustments in appropriate circumstances (e.g. back-to-work legislation or restrictions on strikes by essential service workers). When the right to strike is constitutionalized, elected legislators are faced with an unwarranted hurdle that interferes with their ability to achieve this balance.

(4) The Right to Strike Is Not an Indispensable Component of Collective Bargaining as Defined by This Court

[128] The majority finds that "the right to strike is an essential part of a meaningful collective bargaining process" and that "[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right" (para. 3). Such statements expressly contradict the right to meaningful collective bargaining as it was so recently recognized and defined by this Court in *Health Services* and *Fraser*.

[129] In *Fraser*, the majority explains that s. 2(*d*) of the *Charter* protects a right to collective bargaining, that is, "a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion" (para. 54). Nothing in the concept of collective bargaining, as this Court has defined the term, includes a constitutional right for employees to strike with a concomitant constitutional obligation on employers to not hire replacement workers or to take the employees back at the end of the strike.

[130] The majority in *Fraser* found a constitutionally protected dispute resolution process unnecessary. The Court interpreted the Ontario *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*"), as including a requirement that employers consider employee representations in good faith. The Court noted that "the Minister . . . stated that the *AEPA* was not intended to 'extend collective bargaining to agricultural workers'", but said that this statement

> may be understood as an affirmation that the *AEPA* did not institute the dominant Wagner model of collective bargaining, or bring agricultural workers within the ambit of the [*Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A], not that the Minister intended to deprive farm workers of the protections of collective bargaining that s. 2(*d*) grants. [para. 106]

Despite the fact that the *AEPA* contained no dispute resolution mechanism, only a bare requirement that employers consider employee representations in good faith, the Court concluded that the Act did not violate s. 2(*d*) of the *Charter* (para. 107).

[131] The majority's reasons overlook this Court's findings in *Fraser*. The trial judge in this case held, and the majority agrees, that without the right to strike "a constitutionalized right to bargain collectively is meaningless" (2012 SKQB 62, 390 Sask. R. 196, at para. 92; majority reasons, at para. 24). With respect, this is plainly incorrect — it is not the threat of work stoppage that motivates good faith bargaining. Before *Health Services*, there was a legal duty on employers to bargain in good faith under various labour relations statutes (see, e.g., the current duty in the *Canada Labour Code*, s. 50(*a*); Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 17; Saskatchewan *Trade Union Act*, R.S.S. 1978, c. T-17, s. 2(b); British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 11(1); Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 60(1)(a); Manitoba *Labour Relations Act*, C.C.S.M. c. L10, s. 62; Quebec *Labour Code*, CQLR, c. C-27, s. 53; Newfoundland and Labrador *Labour Relations Act*, R.S.N.L. 1990, c. L-1, s. 71; New Brunswick *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 1(1), definition of "collective bargaining"; Nova Scotia *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 35(a) (see *Canadian Union of Public Employees v. Labour Relations Board (Nova Scotia)*, [1983] 2 S.C.R. 311); Prince Edward Island *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 22(a) (see *Perfection Foods Ltd. v. Retail Wholesale Dairy Worker Union, Loc. 1515* (1986), 57 Nfld. P.E.I.R. 147). After *Health Services*, this duty was constitutionalized. It is the statutory duty, and is now this *constitutional duty*, not the possibility of job action, that compels employers to bargain in good faith. To say that this constitutional right is meaningless without a concomitant constitutionalized dispute resolution process

would be to say that individuals can never vindicate their rights through the courts or other public institutions.

[132] The goal of strike action is not to guarantee a right that was statutory and is now constitutionally guaranteed. Instead, it is to apply economic or political pressure on employers to meet union demands. As the majority of the Court stated in *Fraser*:

> . . . legislatures are [not] 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 . . . . What is protected is associational activity, not a particular process or result. [para. 47]

[133] When the right to strike was simply statutory, both employers and employees were able to exercise economic and political power through labour action. In certain circumstances, employees had the right to strike, while employers had the right to lock out. Even when meaningful collective bargaining was constitutionalized, good faith was required of both sides of the bargaining table. In *Health Services*, the majority of the Court noted that the employees' right to collective bargaining "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" (para. 90; see also *Fraser*, at para. 40). Now, by constitutionalizing only the ability of employees to

exert economic and political pressure, the majority disturbs the delicate balance of labour relations in Canada and impedes the achievement of true workplace justice.

[134] The majority asserts that employees must have some "means of recourse should the employer not bargain in good faith" (para. 29). In the event that bargaining does not occur in good faith, workers *have* recourse: they can bring a claim under the relevant statutory provision or, in some cases, directly under s. 2(*d*) of the *Charter*, which is precisely what was done in *Health Services*.

[135] The majority's conclusion that the right to strike is "an indispensable component" of collective bargaining (at para. 3) does not accord with recent jurisprudence. There is nothing in the concept of collective bargaining as it has been defined by this Court in *Health Services*, *Fraser* and *Mounted Police* that would imply that employees have a constitutional right to strike and that employers have a constitutional obligation to preserve the jobs of those employees.

[136] Contrary to *Fraser*, the majority now says that "[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right" (para. 3). However, the majority also says that the right to strike is protected simply because "the right to strike is an essential part of a meaningful collective bargaining process" (para. 3). This must mean that the right is indeed derivative — a right to strike is protected only because it derives from the right to collective bargaining, a right which was itself derived from the protection of freedom of association (see *Fraser*, at paras. 46, 54, 66 and 99). As earlier noted, the result is to

inflate the right to freedom of association to such an extent that its scope is now completely divorced from the words of s. 2(*d*) of the *Charter* themselves.

(5) This Court Should Not Depart From Its Precedents in This Case

[137] In our legal system, certainty in the law is achieved through the application of precedents. To overrule a precedent is to displace community expectations founded on that decision. As the Ontario Court of Appeal aptly observed in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2006), 76 O.R. (3d) 161, *per* Laskin J.A., "[t]he values underlying the principle of *stare decisis* are well known: consistency, certainty, predictability and sound judicial administration. . . . Adherence to precedent . . . enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice" (paras. 119-20).

[138] For this reason, the threshold for overturning prior judgments is high (see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 44; *Fraser*, at para. 57). In determining whether the threshold is met, courts must balance certainty against correctness (*Bedford*, at para. 47). As Binnie J. observed in *Plourde*, "[i]t would be unfortunate, absent compelling circumstances, if the precedential value of a . . . decision of this Court was thought to expire with the tenure of the particular panel of judges that decided it" (para. 13).

[139] In reaching its conclusion, the majority departs from significant precedents of this Court. Twenty-seven years ago, in the Labour Trilogy, this Court held that s. 2(*d*) does not protect the right to strike. The majority overrules this finding (para. 77). But the Labour Trilogy's precedents are not the only ones reversed by the majority. In finding that s. 2(*d*) of the *Charter* now protects the right to a dispute resolution mechanism (strike action), our colleagues also depart from this Court's finding in *Fraser*, made less than four years ago, that freedom of association "does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse" (para. 41).

[140] Further, in its heavy-handed treatment of Saskatchewan's legislative policy choices in the field of labour relations, the majority defies this Court's cautions in *Pepsi-Cola* that legislatures, not the courts, should deal with the delicate and political balance of interests in labour relations (para. 85).

[141] In *Bedford*, this Court explained that a lower court may deviate from binding appellate jurisprudence where there is a new legal issue or a significant change in the circumstances or evidence:

> . . . a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. [para. 42]

In this case, neither developments in the s. 2(*d*) jurisprudence, nor any change in the circumstances of Canadian labour relations justifies the trial judge's departure from Supreme Court precedent.

[142] The majority concludes that the high threshold for overruling the Labour Trilogy's finding on the right to strike has been met on the basis that the "historical, international, and jurisprudential landscape" indicate that "s. 2(*d*) has arrived at the destination sought by Dickson C.J. [in dissent] in the *Alberta Reference*" (para. 75). With respect, the sources relied on by the majority to demonstrate this change in circumstances do not provide a basis to overturn the many relevant precedents of this Court.

[143] Many of the sources identified by the majority existed at the time this Court rendered its decisions in the Labour Trilogy. For instance, the history of strike activity in Canada and abroad canvassed by the majority at paras. 36 to 55 was information available to this Court when it considered the Labour Trilogy appeals. It cannot now form the basis for an entirely different result than that reached by this Court in 1987. The criterion that, in order for a precedent to be overruled, there must be "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (*Bedford*, at para. 42) is manifestly unsatisfied.

[144] While there has been an evolution in the s. 2(*d*) jurisprudence sufficient to be termed a "significant developmen[t] in the law" (*Bedford*, at para. 42), that evolution does not support departing from the Labour Trilogy's conclusion that there

is no constitutional right to strike. If anything, developments in the law since 1987 support a finding that the right to freedom of association *does not* require constitutionalization of the right to strike. This is because recent s. 2(*d*) jurisprudence has already established a right to collective bargaining that protects the ability of workers in associations "to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith" and mandates "both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (*Health Services*, at para. 90).

[145] Subsequent to the *Alberta Reference*, this Court made it clear that the right to collective bargaining under s. 2(*d*) of the *Charter* does not include a statutory dispute resolution process. Most recently, in *Fraser*, the majority affirmed:

> 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 . . . . [para. 47]

[146] The majority in this appeal states that the supposed absence of any dispute resolution mechanism in the *PSESA* "is what ultimately renders its limitations [on the right to strike] constitutionally impermissible" (para. 25).

[147] However, a finding that there is a constitutional right to strike (or to an alternative statutory dispute resolution process), is an express contradiction of this Court's ruling in *Fraser* that s. 2(*d*) of the *Charter* does not require a statutory dispute resolution process (para. 41). While s. 2(*d*) jurisprudence has evolved since 1987, such changes cannot be used to justify contradicting the decisions that brought about these very same changes.

[148] Even more puzzling, the majority claims that the Court affirmed in *Fraser* that a meaningful process under s. 2(*d*) of the *Charter* must include some "means of recourse should the employer not bargain in good faith" (para. 29). They do so despite explicit language to the contrary in that case (see *Fraser*, at para. 41). In misinterpreting the content of *Fraser*, our colleagues overrule that decision without acknowledging that they are doing so.

[149] The more "generous approach" to s. 2(*d*) of the *Charter*, referred to by the majority at para. 33, does not license this Court to indeterminately expand the scope of freedom of association. In imposing constitutional limitations on the legislature in this case, the majority disregards *stare decisis* and the certainty and predictability it is intended to foster.

(6) International Law Is Not Determinative of the Content of Section 2(*d*) of the *Charter*

[150] Contrary to the majority's approach, international law provides no guidance to this Court in determining whether the right to strike is encompassed within s. 2(*d*) of the *Charter* for at least one key reason: the current state of international law on the right to strike is unclear.

[151] Caution must be exercised where the current state of international law is subject to conflicting interpretations. As explained below, international bodies disagree as to whether the right to strike is protected under international labour and human rights instruments. Where this Court opts to rely on non-binding interpretations of international conventions, it should not cherry pick interpretations to support its conclusions.

[152] For instance, the majority invokes The International Labour Organization ("ILO") *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17 ("*Convention No. 87*"), as confirming the protection of the right to strike in international law (see para. 67), despite the fact that this right is not found in the text of the convention, nor is it found in the ILO Constitution (online) or the Declaration of Philadelphia (which concerns the aims and purposes of the ILO; see the Annex to the ILO Constitution). Article 3(1) of *Convention No. 87* protects the rights of workers' and employers' organizations to "formulate their programmes", but there is debate as to whether this includes the right to strike.

[153] ILO bodies themselves disagree on the interpretation of ILO *Convention No. 87*. The Committee on Freedom of Association ("CFA") and the Committee of Experts on the Application of Conventions and Recommendations ("COE") have endorsed a right to strike in ILO *Convention No. 87* (*Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev.) ed. 2006), at para. 520; L. Swepston, "Human rights law and freedom of association: Development through ILO supervision" (1998), 137 *Int'l Lab. Rev.* 169, at p. 187; S. Regenbogen, "The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?" (2012), 16 *C.L.E.L.J.* 385, at p. 404). However, these bodies do not perform judicial functions and do not enforce obligations under ILO conventions — the CFA is an investigative body and the COE, the first stage of the ILO supervisory process, simply provides observations (B. A. Langille, "Can We Rely on the ILO?" (2006-2007), 13 *C.L.E.L.J.* 273, at pp. 285 and 287; N. Valticos and G. von Potobsky, *International Labour Law* (2nd rev. ed. 1995), at paras. 661-62). The Conference Committee on the Application of Standards is the second stage of the ILO supervisory process. This tripartite committee consisting of government, employer, and worker representatives has not reached a consensus on whether freedom of association includes the right to strike (Regenbogen, at pp. 398-400 and 404; Valticos and von Potobsky, at paras. 663-64; International Labour Conference, 102nd Sess., *Conference Committee on the Application of Standards: Extracts from the Record of Proceedings* (2013)).

[154] The *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("*ICCPR*"), does not include an explicit right to strike. While freedom of association is protected under art. 22(1), the UN Human Rights Committee, which receives and considers complaints regarding conformity to obligations under the *ICCPR*, found that art. 22 *does not* protect the right to strike (*J.B. v. Canada*, Communication No. 118/1982 (1986), reported in UN Doc. CCPR/C/OP/2 *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. 2 (1990), p. 34, at para. 6.4). Article 22(3) does explicitly refer to ILO *Convention No. 87*, but given the lack of agreement as to whether this Convention protects the right to strike, the reference alone cannot create this right.

[155] The *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ("*ICESCR*"), in art. 8(1)(*d*), protects a qualified right to strike. Specifically, the right is subject to explicit restrictions as it applies to public sector workers. Article 8(2) states: "This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State." Even if we accept that there is a general right to strike in international law, which is far from certain, the express restriction on this right in art. 8(2) demonstrates that the measures at issue are not precluded.

[156] There is thus no clear consensus under international law that the right to strike is an essential element of freedom of association.

[157] Further, this Court has indicated that obligations under international law that are *binding* on Canada are of primary relevance to this Court's interpretation of the *Charter*. In *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, LeBel J. notes that "[i]n interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction" (para. 56 (emphasis added)). Similarly, in *Divito*, Abella J., quoting McLachlin C.J. and LeBel J. in *Health Services*, at para. 70, states that "the *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" (para. 23 (emphasis added)). While other sources of international law can have some persuasive value in appropriate circumstances, they should be granted much less weight than sources under which Canada is bound (see, e.g., P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 36-39 to 36-43; P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 395-400).

[158] The majority notes that the right to strike is contained in a number of foreign constitutions, as well as in the *European Convention on Human Rights*, 213 U.N.T.S. 221 (1950), and the *European Social Charter* (E.T.S. No. 35, 1961, revised E.T.S. No. 163, 1996) (paras. 71 and 74). However, the express inclusion of the right to strike in domestic constitutions and charters other than our own has little relevance to this Court's interpretation of "freedom of association" under s. 2(*d*). If anything, the absence of an express right to strike in the *Charter* — which was enacted

subsequent to many of the constitutions cited by the majority — indicates Parliament and the provincial legislatures' intention to exclude such a right (see *Alberta Reference*, at pp. 414-16).

[159] There is good reason to accord little weight to international instruments to which Canada is not a party. It is the role of the government to accept international obligations on behalf of Canada, not the courts (see Hogg, at pp. 11-2 to 11-4). Judicial review and the use of international law as an interpretive aid should not become a euphemism for this Court interfering in the government's prerogative over foreign affairs (see *Turp v. Canada (Justice)*, 2012 FC 893, [2014] 1 F.C.R. 439; Hogg, at p. 1-20). Moreover, their invocation of international law is particularly problematic given the unique historic context in which labour relations have developed within different countries.

[160] International law is of no help to this Court in determining whether freedom of association in s. 2(*d*) of the *Charter* includes a right to strike.

B. *The PSESA Does Not Violate Section 2(d) of the Charter*

[161] For the reasons above, s. 2(*d*) does not confer a *Charter* right to strike. The question remains whether the *PSESA* nevertheless violates the right to a process of meaningful collective bargaining protected under s. 2(*d*). In our respectful view, it does not.

[162] The majority in this appeal retreats from the test for determining whether legislation interferes with the constitutional right to collective bargaining that was emphatically established by this Court in *Fraser*.

[163] The *PSESA*'s "controlled strike" regime does not render effectively impossible nor substantially interfere with the ability of associations representing affected public sector employees to submit representations to employers and to have them considered and discussed in good faith. There are three reasons for this conclusion: there is evidence that good faith collective bargaining took place under the *PSESA* framework; *Fraser* and *Health Services* both held that there is no right to a dispute resolution mechanism; and the goal of strikes is not to ensure meaningful collective bargaining, but instead to exert political and economic pressure on employers. Moreover, insofar as the Government of Saskatchewan restricts the jurisdiction of the Labour Relations Board ("LRB"), it does so in good faith and is justified. Saskatchewan essential service workers do not require a right to strike in order to ensure that their s. 2(*d*) rights are respected.

[164] First, the *PSESA* facilitates consultation between employers and unions regarding the designation of essential services. Although the right to collective bargaining under s. 2(*d*) does not protect a particular outcome (*Fraser*, at para. 45), the fact that essential services agreements have been achieved in the provincial public sector during the currency of the *PSESA* indicates that there has been no substantial interference with the right to meaningful collective bargaining. The first collective

agreement to be signed after the *PSESA* came into force — the 2009-2012 agreement between the Public Service Commission ("PSC") and the Saskatchewan Government and General Employees' Union ("SGEU") — was signed only eight months after the preceding agreement ended, over three months faster than the average time to reach a collective agreement. Essential services agreements were also signed between the PSC and the SGEU, and between the PSC and the Canadian Union of Public Employees, Local 600. Tentative collective agreements were reached between the Saskatchewan Association of Health Organizations and each of the Canadian Union of Public Employees, the Service Employees International Union, and the SGEU in August 2010; these were later ratified.

[165] Moreover, s. 6 of the *PSESA* requires public employers to negotiate with trade unions with a view to concluding an essential services agreement. The evidence demonstrates that such good faith collective bargaining took place. For instance, the trial judge held that urban municipalities, the University of Regina, and the University of Saskatchewan all engaged in meaningful consultations with unions (para. 189). In fact, the Government of Saskatchewan *exceeded* the requirements of s. 6(3) of the *PSESA*: the PSC consulted the SGEU regarding which services (other than those relating to health and safety) would be designated as essential in the *Public Service Essential Services Regulations*, R.R.S., c. P-42.2, Reg. 1. As a result of these consultations, a number of changes were made to the *Regulations*.

[166] Second, this Court determined in both *Health Services* and *Fraser* that s. 2(*d*) does not entail a right to a dispute resolution mechanism. A violation of s. 2(*d*) cannot be found here simply on allegations that the legislation does not provide an adequate dispute resolution process. As Rothstein J. observed in dissent in *Mounted Police*, the inconsistency between the majority's position here and the Court's decision in *Fraser* is rendered all the more puzzling when one compares the vulnerability of the agricultural workers in that case, who were found not to require a dispute resolution mechanism, with the greatly enhanced position of the public service providers who now come before this Court.

[167] Finally, the appellants argue that this Court must defer to the trial judge's finding that, in absence of the ability of workers to strike, there can be no assurance that collective bargaining will occur in good faith. As discussed earlier, this mischaracterizes the primary purpose of the strike, which is to exert political and economic pressure, not to ensure good faith collective bargaining, which is protected by statute and, since *Health Services*, by s. 2(*d*) of the *Charter*.

[168] The statutory balance struck by the Government of Saskatchewan is eminently reasonable. The narrow scope of the LRB's powers of review is justifiable in the essential services context, where public health, safety, and security are at stake. As noted earlier, the Government of Saskatchewan, together with the federal and other provincial governments, has a constitutional commitment to "provid[e] essential public services of reasonable quality to all Canadians" (s. 36(1)(*c*) of the *Constitution*

Act, 1982). In view of this commitment, the Government of Saskatchewan cannot subject itself to arbitral awards that could make it unaffordable for the province to deliver on its undertaking. Yet, that is an inherent concern in constitutionalizing the right to strike and finding that a limitation to this right could only be justified if there is "a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration" (majority reasons, at para. 93). The Government of Saskatchewan was entitled to determine that compulsory arbitration could thwart the goal of the *PSESA*: assuring the continued delivery of essential services during labour actions.

[169] Governments are unlike private businesses: they cannot decide to exit a field of economic activity by no longer providing the particular essential service, they are not able to move the service to a jurisdiction with lower labour costs, and they cannot realistically declare bankruptcy and shut down all operations. Recognition of this context is essential in evaluating the Government of Saskatchewan's decision to enact some limits on the LRB's powers of review.

[170] The *PSESA* does not infringe on the right of essential service workers to meaningful, good faith collective bargaining. There is evidence of good faith collective bargaining under the *PSESA*, *Health Services* and *Fraser* confirm that s. 2(*d*) does not entail a right to a dispute resolution mechanism, and the purpose of strikes in the public sector is to exert political pressure, not to ensure meaningful collective bargaining, as meaningful collective bargaining is already statutorily and

constitutionally guaranteed. A right to strike is not required to ensure the s. 2(*d*) guarantee of freedom of association.

[171] The Government of Saskatchewan has devised a particular legislative framework in order to safeguard the continued delivery of essential services to the community during labour disputes. This Court should defer to the government's policy choices in balancing the interests of employers, employees, and the public to allow the government to meet its constitutional commitment to deliver these services.

[172] In concluding that the *PSESA* infringes the right to meaningful collective bargaining, the majority fails to apply the substantial interference standard the Court established in recent s. 2(*d*) jurisprudence. In *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, while concluding the inquiry on a standard of "substantial interference" the majority was nevertheless alive to the fact that the exercise of s. 2(*d*) rights was "all but impossible" for the appellant agricultural workers (paras. 25 (emphasis deleted) and 48). The majority in *Health Services* used similar language, concluding that "[t]here must be evidence that the freedom would be next to impossible to exercise" (para. 34). In *Fraser*, the majority of this Court held that "[i]n every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals" (para. 46). It was under these circumstances that the standard for substantial interference was developed. Our colleagues overlook this context by applying a lower standard in their constitutional analysis.

[173] Because the *PSESA* does not violate s. 2(*d*) of the *Charter*, it is unnecessary to engage in an analysis under s. 1.

C. *The PSESA Does Not Violate Section 2(b) of the Charter*

[174] The appellants have made an alternative argument under s. 2(*b*). They say that the *PSESA* violates workers' freedom of expression in limiting their ability to participate in strikes. It would not be appropriate to express an opinion on what is an undeveloped record on this point. As was the case before the Court of Appeal, the appellants' submissions on s. 2(*b*) are "very much by way of a secondary argument" (para. 72). Having pursued a detailed argument in respect of s. 2(*d*), the appellants expend little effort in their s. 2(*b*) arguments. It would be ill advised to undertake an evaluation of a *Charter* argument in the absence of substantive arguments on the issue.

D. *The Trade Union Amendment Act, 2008, S.S. 2008, c. 26, Does Not Violate Section 2(d) of the Charter*

[175] We agree with the majority that *The Trade Union Amendment Act, 2008* ("*TUAA*") does not infringe freedom of association. Amending the process for certification and decertification and allowing an employer to communicate "facts and its opinions to its employees" (*TUAA*, s. 6) does not render meaningful collective bargaining effectively impossible nor does it substantially interfere with this process.

III. Conclusion

[176] Neither the *PSESA* nor the *TUAA* infringes s. 2(*d*) of the *Charter*. We would dismiss the appeal with costs. We would answer the constitutional questions as follows:

(a) Does the *Public Service Essential Services Act*, S.S. 2008, c. P-42.2, in whole or in part, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

No.

(b) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. l of the *Canadian Charter of Rights and Freedoms*?

It is unnecessary to answer this question.

(c) Does the *Public Service Essential Services Act*, S.S. 2008, c. P-42.2, in whole or in part, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

(d) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is unnecessary to answer this question.

(e) Do ss. 3, 6, 7 and 11 of the *Trade Union Amendment Act, 2008*, S.S. 2008, c. 26, in whole or in part, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

(f) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is unnecessary to answer this question.

Appeal allowed in part with costs, ROTHSTEIN *and* WAGNER JJ. *dissenting in part*.

Solicitors for the appellants: Gerrand Rath Johnson, Regina; Victory Square Law Office, Vancouver; The W Law Group, Saskatoon.

Solicitor for the respondent: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the intervener the Saskatchewan Union of Nurses: Bainbridge Jodouin Cheecham, Saskatoon.

Solicitors for the intervener SEIU-West: Plaxton & Company, Saskatoon.

Solicitors for the interveners the United Nurses of Alberta and the Alberta Federation of Labour: Chivers Carpenter, Edmonton.

Solicitors for the intervener the Professional Institute of the Public Service of Canada: Sack Goldblatt Mitchell, Ottawa.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Air Canada Pilots' Association: Nelligan O'Brien Payne, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Moore Edgar Lyster, Vancouver.

Solicitors for the intervener Conseil du patronat du Québec: Norton Rose Fulbright Canada, Montréal.

Solicitors for the intervener the Canadian Employers Council: Fasken Martineau DuMoulin, Toronto.

Solicitors for the interveners the Canadian Union of Postal Workers and the International Association of Machinists and Aerospace Workers: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the interveners the British Columbia Teachers' Federation and the Hospital Employees' Union: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Public Service Alliance of Canada: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the intervener the Alberta Union of Provincial Employees: Nugent Law Office, Edmonton.

Solicitors for the intervener Confédération des syndicats nationaux: Laroche Martin, Montréal.

Solicitors for the interveners the Regina Qu'Appelle Regional Health Authority, the Cypress Regional Health Authority, the Five Hills Regional Health Authority, the Heartland Regional Health Authority, the Sunrise Regional Health Authority, the Prince Albert Parkland Regional Health Authority and the Saskatoon Regional Health Authority: Saskatoon Regional Health Authority, Saskatoon; MacPherson Leslie & Tyerman, Saskatoon.

Solicitors for the intervener the National Union of Public and General Employees: Champ & Associates, Ottawa.

Solicitors for the interveners the Canada Post Corporation and Air Canada: Fasken Martineau DuMoulin, Toronto.