THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2013 SKCA 43 Date: 2013-04-26

Between:

Docket: CACV2242

Her Majesty the Queen, in Right of the Province of Saskatchewan

Appellant (Respondent by Cross-Appeal)
(Defendant)

- and -

The 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; Communications, Energy and Paperworkers' Union of Canada and its Locals; Construction and General Workers' Union, Local 180; Grain Services Union; Health Sciences Association of Saskatchewan; International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of U.S., its territories and Canada and its Locals 295, 300 and 660; International Brotherhood of Electrical Workers, Local 2067; Saskatchewan Government and General Employees' Union; Saskatchewan Joint Board; Retail, Wholesale and Department Store Union; United Mineworkers of America, Local 7606; United Steel, Paper, Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Locals; University of Regina Faculty Association; Larry Hubich; Bob Bymoen; Garry Hamblin; Saskatchewan Provincial Building & Construction Trades Council; Canadian Union of Public Employees, Local 7 and 4828; and Teamsters, Local 395

Respondents (Appellants by Cross-Appeal)
(Plaintiffs)

- and -

Advanced Employees' Association and its Locals 101 and 102; Construction and General Workers' Union Local 180; Grain Services Union; International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 771; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179; and United Brotherhood of Carpenters and Joiners of America, Local 1985

Respondents
(Plaintiffs)

- and -

Attorney General of Canada; Saskatchewan Union of Nurses; Canadian Union of Public Employees; SEIU-West; Saskatchewan Government and General Employees' Union; Regina Qu'Appelle Regional Health Authority; Cypress Regional Health Authority; Five Hills Regional Health Authority; Saskatoon Regional Health Authority; Heartland Regional Health Authority; Sunrise Regional Health Authority; Prince Albert Parkland Regional Health Authority; Saskatchewan Power Corporation; SaskEnergy Incorporated; Saskatchewan Association of Rural Rural Municipalities; Saskatchewan Urban Municipalities Association; City of Regina; University of Saskatchewan; University of Regina; Canadian Association of University Teachers; Canadian Civil Liberties Association; and Saskatchewan Chamber of Commerce

Intervenors

Coram:
Klebuc C.J.S., Richards, Ottenbreit, Caldwell and Herauf JJ.A.

Counsel:
Graeme Mitchell, Q.C., Barbara Mysko and Katherine Roy
for the Province of Saskatchewan
Craig Bavis and Juliana Saxberg for the Saskatchewan Federation of Labour
Larry Kowalchuk for the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union
Peter Barnacle for the Canadian Union of Public Employees

Drew Plaxton and Heather Jensen for the Service Employees International Union
Gary Bainbridge and Marcus Davies for the Saskatchewan Union of Nurses
Rick Engel, Q.C. for the Saskatchewan Government and General Employees Union
Ronni Nordal for the Canadian Association of University Teachers
Colin Feasby for the Canadian Civil Liberties Association
Kathryn Hucal and Mark Kindrachuk, Q.C. for the Attorney General of Canada
Brian Kenny, Q.C. and Courtney Keith for SaskPower and SaskEnergy
Robert Kennedy, Q.C. for the City of Regina, Saskatchewan Association of Rural Municipalities, Saskatchewan Urban Municipalities Association
Erin Kleisinger for the University of Regina
Michelle Ouellette, Q.C. for the University of Saskatchewan
Leah Schatz for 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
Evert Van Olst for Saskatoon Regional Health Authority
Lauren Wihak for the Saskatchewan Chamber of Commerce

Appeal:

From:	2012 SKQB 62
Heard:	November 27, 28, 29, 2012
Disposition:	Appeal re *Essential Services Act* - Allowed
	Appeal re *TUA Amendment Act* - Dismissed
Written Reasons:	April 26, 2013
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Chief Justice Klebuc
	The Honourable Mr. Justice Ottenbreit
	The Honourable Mr. Justice Caldwell
	The Honourable Mr. Justice Herauf

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Richards J.A.

I. Introduction

[1] This appeal concerns the constitutional validity of two pieces of Saskatchewan labour legislation, both proclaimed in 2008.

[2] *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (the "*Essential Services Act*") introduced restrictions on the ability of public sector workers to engage in strike activity. *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26 and c. 27 (the "*TUA Amendment Act*") changed provincial labour legislation so as to make it somewhat more difficult for unions to obtain certification as bargaining agents. It also liberalized the scope of permissible communications between employers and their employees.

[3] Both enactments were opposed by the labour movement. The Saskatchewan Federation of Labour ("SFL") and various unions commenced proceedings in the Court of Queen's Bench to have the *Acts* declared unconstitutional. Their key submission was that the legislation unjustifiably infringes employees' freedom of association as guaranteed by s. 2(d) of the *Charter*.

[4] The trial judge accepted the arguments advanced by SFL and the unions in relation to the *Essential Services Act* and declared it to be of no force or effect. He found that the right to strike is protected by s. 2(d) and that the restrictions placed on that right by the *Act* could not be justified as being reasonable within the meaning of s. 1 of the *Charter*. The trial judge rejected the attack on the *TUA Amendment Act*. While accepting that the legislative changes in issue would reduce the success rate of union applications for

certification, he found that those changes did not violate the freedom of employees to bargain collectively through a union of their own choosing.

[5] These results led both sides of the controversy to appeal to this Court. The Province says the trial judge erred in striking down the *Essential Services Act*. SFL and the unions say he erred in failing to strike down the *TUA Amendment Act*.

[6] I conclude, for the reasons set out below, that the Province's appeal with respect to the *Essential Services Act* must be allowed. In 1987, the Supreme Court ruled that freedom of association does not comprehend the right to strike. Its decisions on this point have never been overturned. While 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*. Nor does the *Essential Services Act* offend any of the other *Charter* provisions referred to by SFL and the unions. It follows that the *Act* is constitutionally valid.

[7] I also conclude that SFL's appeal concerning the *TUA Amendment Act* must be dismissed. The trial judge correctly found that, even though the *Act* makes certification somewhat more difficult, it does not offend the *Charter*. Simply put, the *Act* does not substantially impair the exercise of associational freedom or offend any other feature of the *Charter*. It too is constitutionally valid.

[8] It is necessary to consider the status of these two pieces of legislation separately. I will begin with the *Essential Services Act*.

II. The Validity of the *Essential Services Act*

A. The Content of the *Act*

[9] The *Essential Services Act* does not eliminate the right to strike. Rather, it establishes a regime for limiting the number of employees who are allowed to refuse to work in the event of a strike. In other words, the *Act* implements a "designated or controlled strike" approach to the regulation of the withdrawal of services by employees.

[10] The *Essential Services Act* applies only to "public employers" in Saskatchewan. This term is defined in s. 2(i) of the *Act* to include the Government of Saskatchewan, Crown Corporations, regional health authorities and their affiliates, the Saskatchewan Cancer Agency, the Universities of Regina and Saskatchewan, the Saskatchewan Institute of Applied Science and Technology, municipalities, police boards, and any other agency or body providing essential services to the public that is prescribed by regulation.

[11] The regime implemented by the *Act* is grounded in the concept of ensuring the provision of "essential services". In relation to public sector employers other than the Government, that term is defined as follows in s. 2(c)(i):

> 2 In this Act:
>
> ...
>
> (c) "essential services" means:
>
> (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;.

[12] Section 2(c)(ii) speaks to "essential services" provided by the Government. It reads as follows:

(c) "essential services" means:

. . .

(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;

[13] The services and programs provided by the Government which are prescribed as being essential are found in *The Public Service Essential Services Regulations*, R.R.S. c. P-42, Reg 1, O.C. 539/2009.

[14] The *Essential Services Act* contemplates that public sector employers and the unions representing their employees will negotiate essential services agreements. These agreements are intended to flesh out both the particulars of the services to be maintained during a strike and, as well, to identify the employees who will provide those services. Section 7(1) reads as follows:

7(1) An essential services agreement must include the following provisions:

(a) in the case of an employer other than the Government of Saskatchewan, provisions that identify the essential services that are to be maintained;

(b) provisions that set out the classifications of employees who must continue to work during the work stoppage to maintain essential services;

(c) provisions that set out the number of employees in each classification who must work during the work stoppage to maintain essential services;

(d) provisions that set out the names of employees within the classifications mentioned in clause (b) who must work during the work stoppage to maintain essential services;

(e) any other prescribed provisions.

[15] If a public employer and a union are unable to conclude an essential services agreement, the employer is entitled to serve a notice on the union setting out the particulars of what employees will be required to be on the job during a work stoppage. Section 9(2) of the *Act* says this:

> 9(2) A notice served pursuant to subsection (1) must set out the following:
>
> (a) the classifications of employees who must continue to work during the work stoppage to maintain essential services;
>
> (b) the number of employees in each classification who must work during the work stoppage to maintain essential services;
>
> (c) the names of employees within the classifications mentioned in clause (a) who must work during the work stoppage to maintain essential services;
>
> (d) in the case of a public employer other than the Government of Saskatchewan, the essential services that are to be maintained.

[16] A union has some scope to ask the Labour Relations Board to review a notice provided by an employer pursuant to s. 9. The procedures governing such reviews are set out in s. 10 of the *Act*:

> 10(1) If the trade union believes that the essential services can be maintained using fewer employees than the number set out in a notice pursuant to section 9, the trade union may apply to the board for an order to vary the number of essential services employees in each classification who must work during the work stoppage to maintain essential services.
>
> (2) If a trade union applies to the board pursuant to subsection (1), the trade union shall serve a written copy of the application on the public employer.
>
> (3) On receiving an application pursuant to this section, the board may hold any hearings and conduct any investigation that the board considers necessary to determine whether or not to issue an order varying the number of essential services employees in each classification who must work during the work stoppage to maintain essential services.
>
> (4) Within 14 days after receiving an application pursuant to subsection (1) or any longer period that the board considers necessary, the board shall issue an order confirming or varying the number of essential services employees in each classification who must work during the work stoppage to maintain essential services.
>
> (5) The board shall cause a copy of every order issued pursuant to this section to be served on the public employer and the trade union.

> (6) The public employer, the trade union and the employees of the public employer who are represented by the trade union are bound by an order of the board issued pursuant to this section.

[17] An employee who is required to provide services pursuant to either an essential services agreement or a notice given by an employer must, in the event of a work stoppage, continue or resume the regular duties of his or her employment. Such employees may not participate in the work stoppage. See: ss. 14 and 18.

B. The Court of Queen's Bench Decision

[18] Both the *Essential Services Act* and the *TUA Amendment Act* came into force on May 14, 2008. Shortly afterward, SFL commenced an action challenging the constitutional validity of both *Acts*. Saskatchewan Union of Nurses ("SUN"), Saskatchewan Government Employees Union ("SGEU"), Canadian Union of Public Employees ("CUPE") and Service Employees International Union ("SEIU") each launched their own proceedings aimed at overturning the *Essential Services Act*.

[19] Chief Justice Laing (as he then was) concluded that, in order to avoid unnecessary duplication and expense, the challenges to both the *Essential Services Act* and the *TUA Amendment Act* should be dealt with in a single trial. He ordered that the action commenced by SFL should be the lead case and then (a) stayed the other proceedings insofar as they related to the constitutionality of the *Essential Services Act* and the *TUA Amendment Act*, (b) ordered that SFL trial proceed on the basis of affidavit evidence, and (c) granted intervenor status to the parties in all of the proceedings that had been stayed.

[20] The trial judge rendered his decision on February 6, 2012. See: 2012 SKQB 62. In dealing with the *Essential Services Act,* he began by carefully examining the scheme of the legislation and laying out the history of the background proceedings.

[21] Next, the trial judge considered the relevant Supreme Court case law in some detail. While acknowledging that the Court has not expressly recognized a constitutional right to strike, he observed that it had "… unambiguously decided that collective bargaining does indeed fall within the protections afforded by s. 2(d) of the *Charter*." (para. 77) He also concluded that Canada was a party to international treaties and instruments which recognize and protect the freedom of workers to organize, to bargain collectively and to strike.

[22] The trial judge assessed the s. 2(d) status of the right to strike in light of its utility in the collective bargaining process. He stressed that strikes and the threat of strikes are what motivates the parties to a labour dispute to negotiate in good faith. He explained this as follows:

> 63 Labour law practitioners understand the critical role played by a strike in the collective bargaining process. They know that it exerts pressures on both sides to resolve a dispute. A strike places pressure on the striking employees because they are not entitled to be paid for the work they do not do. The longer a strike lasts, the more difficult it becomes for them to make financial ends meet. Moreover, if an employee's sense of dignity and self-worth are connected to his or her work, as they undoubtedly are, the employee finds little of either while carrying a picket sign on the street. Employees who have professional obligations may feel even more conflicted.

[23] This perspective led the trial judge to conclude that the right to strike is a necessary condition of meaningful collective bargaining. He summarized his position as follows:

> 60 The ability of employees to bargain collectively in a meaningful way requires three interdependent elements:

> (1) the right of employees to speak with one voice through a recognized bargaining representative;
>
> (2) the right of employees to bargain collectively with their employer through that representative; and
>
> (3) the right of employees to strike.

(Later, in his reasons for decision, at para. 128, the trial judge noted that a right to strike is not essential for effective collective bargaining so long as there is some other mechanism for resolving situations where employers and employees are at logger heads.)

[24] In the end, the trial judge concluded that s. 2(d) of the *Charter* encompassed the right to strike. He said this:

> 115 I am satisfied that the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively. That conclusion is grounded in Canada's labour history, recent Supreme Court of Canada jurisprudence and labour relations realities. It is also supported by international instruments which Canada has undertaken to uphold. Governments may enact laws that restrict or prohibit essential service workers from striking, but those prohibitions must be justified under s. 1 of the *Charter*.

[25] This conclusion took the trial judge to s. 1 of the *Charter* and the question of whether the limitation of s. 2(d) occasioned by the *Essential Services Act* was reasonable and justifiable within the meaning of s. 1 of the *Charter*. He found that the *Act* was aimed at a sufficiently important objective, *i.e.* the maintenance of essential services, but that it could not satisfy the "minimum impairment" wing of the test enunciated in *R. v. Oakes*, [1986] 1 S.C.R. 103. In reaching this conclusion, the trial judge focused on the features of the *Act* whereby employers could unilaterally deem employees to be "essential" without access by unions to an independent process to determine the appropriateness of such designations. He ultimately concluded that "… the provisions of the *Essential Services Act* go well

beyond what is reasonably necessary to achieve the Legislature's stated objective". (para. 222)

[26] As a bottom line, the trial judge declared the *Essential Services Act* to be unconstitutional. He then suspended the declaration for 12 months in order to give the Legislature an opportunity to act.

C. Analysis

[27] The issue at the heart of the *Essential Services Act* aspect of this appeal is whether the *Act* offends s. 2(d) of the *Charter*, the guarantee of freedom of association. However, in addition, it is argued that the *Act* also offends s. 2(b) (freedom of expression), s. 7 (life, liberty and security of the person) and s. 15 (equality rights) of the *Charter*. I will deal with each of these four *Charter* issues in turn.

1. Freedom of Association

[28] The Province's first, and central, argument with respect to the *Essential Services Act* is that the trial judge erred by failing to follow binding Supreme Court decisions to the effect that s. 2(d) of the *Charter* does not protect the right to strike. I agree with the Province's submission on this point because, while the Supreme Court's jurisprudence in this area has been evolving, its early rulings that s. 2(d) does not shelter strike activity have not been overturned. As a result, those early rulings remain controlling precedents which must be respected by this Court. In order to properly understand all of this, it is necessary to examine both the role of precedent and the Supreme Court jurisprudence concerning the constitutional status of what is often called the "right to strike".

(a) The Importance of Precedent

[29] The concept of binding precedent occupies a central place in judicial decision-making. Often referred to as the doctrine of *stare decisis* ("to stand by settled matters"), the principle requires that courts make decisions consistent with the prior decisions of higher courts.

[30] The purpose or rationale of this approach is well understood. It promotes several important values including consistency, certainty and predictability in the law. In *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), Laskin J.A. explained the significance of the principle of *stare decisis* by writing as follows:

> [119] The values underlying the principle of *stare decisis* are well known: consistency, certainty, predictability and sound judicial administration. Adherence to precedent promotes these values. The more willing a court is to abandon its own previous judgments, the greater the prospect for confusion and uncertainty. "Consistency", wrote Lord Scarman, "is necessary to certainty -- one of the great objectives of law": see *Farrell v. Alexander*, [1976] 1 All E.R. 129, [1977] A.C. 59 (H.L.), at p. 147 All E.R. People should be able to know the law so that they can conduct themselves in accordance with it.
>
> [120] Adherence to precedent also enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case. Justice Cardozo put it this way in his brilliant lectures on *The Nature of the Judicial Process* (New Haven: Yale University Press, 1960) at p. 149:
>
> > [T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.

[31] The breadth of the notion of precedent is reflected in the distinction between *ratio decidendi* and *obiter dicta*. The historical approach is that "the case is only an authority for what it actually decides". See: *Quinn v. Leathem*,

[1901] A.C. 495 (H.L.) at p. 506. More recently, in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, Justice Binnie explained the reach of Supreme Court precedents in this way:

> 57 The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* [*Sellars v. The Queen*, [1980] 1 S.C.R. 527] or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

[32] These, then, are the contours of the doctrine of *stare decisis*.

(b) The Supreme Court Jurisprudence

[33] In order to assess what *stare decisis* means for this appeal, it is necessary to briefly re-travel the road taken by the Supreme Court in applying s. 2(d) of the *Charter* to the collective actions of employees in the workplace.

[34] The journey begins with the so-called *Labour Trilogy* decided in 1987. See: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*"); *PSAC v. Canada*, [1987] 1 S.C.R. 424 ("*PSAC*"); *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. The main reasons were contained in *Alberta Reference*, a case concerning legislation providing for compulsory arbitration to resolve bargaining impasses and a ban on strikes. The majority of the Court, four of the six justices involved, held that

s. 2(d) did not protect the right to strike. Three of the six justices offered the view that collective bargaining did not come within the scope of s. 2(d). See: *Alberta Reference* at p. 390; *PSAC* at p. 453.

[35] McIntyre J., writing for himself, interpreted s. 2(d) protections as attaching to the exercise of those rights which enjoy *Charter* protection when exercised by individuals. Since the right to strike is not independently protected under the *Charter*, McIntyre J. concluded that it was not guaranteed by s. 2(d). He also found that it was apparent from the Parliamentary proceedings relating to the enactment of the *Charter* that the right to strike was not constitutionally guaranteed. Finally, he referred to various social policy considerations which were said to weigh against reading s. 2(d) as extending to the right to strike. LeDain J. (Beetz and LaForest JJ. concurring) wrote very brief reasons for decision saying that the modern rights to bargain collectively and to strike are not fundamental freedoms but, rather, the creations of complex legislative choices which reflect a particular balance of competing interests.

[36] The Court endorsed the *Labour Trilogy* in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367. In his reasons for decision, Sopinka J. summarized the reach of s. 2(d) by writing as follows at pp. 401-2:

> Upon considering the various judgments in the Alberta Reference, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.

[37] Almost a decade later, in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, the Court considered a statutory provision which expressly excluded members of the RCMP from the regular federal labour relations regime. It held that s. 2(d) does not require that RCMP members be included in any particular scheme. What s. 2(d) was said to guarantee was "the establishment of an independent employee association and the exercise in association of the lawful rights of its members". (para. 12)

[38] The Court's s. 2(d) jurisprudence took a noteworthy turn in 2001 with its decision in *Dunmore v. Ontario (A.G.)*, 2001 SCC 94; [2001] 3 S.C.R. 1016 ("*Dunmore*"). That case dealt with a circumstance where Ontario farm workers had been left entirely outside of the provincial labour relations system. The workers had sought the right to organize into employee associations and contended that, in order to do this, they needed a legislative framework which would allow them to give effect to their objective.

[39] Bastarache J., writing for the majority of the Court, held that the provisions of the provincial legislation which excluded farm workers from the general labour relations regime were unconstitutional. In his view, s. 2(d) had to be read as guaranteeing freedom of associational activity in the pursuit of individual and common goals. Those common goals were said to extend to some collective bargaining activities, including the right of employees to organize and to make submissions to their employers. In addition, Bastarache J. held that s. 2(d) can sometimes impose a positive obligation on the state to create a legislative framework which facilitates the exercise of an associational freedom. He said this:

> 30 In my view, the activities for which the appellants seek protection fall squarely within the freedom to organize, that is, the freedom to collectively embody the interests of individual workers. Insofar as the appellants seek to establish and maintain an association of employees, there can be no question that

> their claim falls within the protected ambit of s. 2(d) of the *Charter*. Moreover, the effective exercise of these freedoms may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer. These activities are guaranteed by the purpose of s. 2(d), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which recognizes the inevitably collective nature of the freedom to organize….

[40] The next step in the evolution of the Court's approach to s. 2(d) was *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 ("*Health Services*"). It concerned the validity of legislation enacted by British Columbia in the face of challenges faced by the provincial health care system. The legislation dealt with matters such as transfer rights, contracting out, lay-offs and bumping rights. In so doing, it invalidated significant provisions of collective agreements then in force and effectively precluded meaningful collective bargaining on a number of issues.

[41] McLachlin C.J. and LeBel J., speaking for the majority of the Court, framed the issue in the case as being whether the guarantee of freedom of association protected collective bargaining rights. They examined some of the reasons that the Court had offered in earlier decisions for not extending freedom of association to collective bargaining and concluded those reasons were not well-founded. In this regard, McLachlin C.J. and LeBel J. dismissed the notion that collective bargaining is a "modern right" created by legislation. They characterized it as a fundamental freedom which had been incorporated into statute. McLachlin C.J. and LeBel J. also indicated that *Dunmore* had overtaken the idea that freedom of association applies only to activities capable of being performed by individuals. They held that s. 2(d) includes "a process of collective action to achieve workplace goals" (para.

19) which features "consultation and good faith negotiation" (paras. 94, 106).

[42] That said, the right to collective bargaining endorsed in *Health Services* was subject to important limitations. First, the right in issue was described only as a "process" and not as something which guarantees any specific substantive outcome. Second, s. 2(d) was not seen as mandating any particular model of labour relations. Third, in order to constitute a breach of s. 2(d), the Court said an interference with collective bargaining must be "substantial" in the sense that it interferes with the very process that enables workers to pursue their bargaining objectives (para. 91).

[43] In the end, the Court in *Health Services* struck down several features of the British Columbia legislation on the basis that they violated s. 2(d) of the *Charter* and were not justifiable pursuant to s. 1.

[44] The final stop in the review of the Supreme Court's s. 2(d) jurisprudence is *Ontario (A.G.) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3 ("*Fraser*"). It dealt with the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16. This was Ontario's legislative response to the Court's ruling in *Dunmore*. The legislation once again excluded farm workers from the reach of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, but it granted them the right to form and join an employees' association and to make representations to their employers on the terms and conditions of their employment. It also protected employees against interference, coercion and discrimination in the exercise of those rights. In addition, the *Act* required employers to give employee associations the opportunity to make representations and to listen to, or read, those representations. It established a tribunal to adjudicate alleged contraventions of the legislation and to grant a remedy if necessary.

[45] The workers' challenge to the validity of the legislation was dismissed by the Court. McLachlin C.J. and LeBel J., again writing for the majority, emphasized that s. 2(d) protects "associational activity" only and not "a particular process or result". (para. 47) They found that, properly interpreted, the Ontario legislation did not make good faith resolution of workplace issues between employers and their employees effectively impossible. This was because the legislation (a) gave employee associations a reasonable opportunity to make representations to their employers, and (b) obliged employers to entertain those representations in good faith.

[46] This, in summary terms, is the jurisprudential background against which the s. 2(d) challenge to the *Essential Services Act* must be resolved. In my view, the relevant analysis ultimately both starts and ends with the *Labour Trilogy*. In those cases, the Supreme Court expressly held, as the *ratio decidendi* of its decisions, that freedom of association does not comprehend the right to strike. This holding has never been overturned and, in cases like *Health Services* and *Fraser* which have shifted the approach to s. 2(d), the Court has taken care to indicate that it was *not* dealing with the right to strike. See: *Health Services* at para. 19; *Fraser* at para. 25. As a consequence, and on the face of things, the controlling Supreme Court precedents are still to the effect that the right to strike does not fall within the scope of s. 2(d) of the *Charter*.

(c) The Arguments of SFL and the Unions

[47] SFL and the unions accept that the *Labour Trilogy* has not been expressly over-ruled in relation to its holdings with respect to the right to strike. However, they say *Dunmore, Health Services* and *Fraser* have eroded the foundations of the *Labour Trilogy* to such an extent that strike activity

must now be taken as being protected under s. 2(d). They contend, as a consequence, that the trial judge acted correctly in deciding as he did.

[48] This line of argument self-evidently involves a novel view of the doctrine of *stare decisis* in that it suggests a lower court need not follow the precedent of a higher court if it appears that the higher court will overrule the precedent in question when and if it has the opportunity to do so. No authority was cited by SFL and the unions in support of this proposition.

[49] I do note that the notion of what might be called "anticipatory overruling" has received some guarded academic support. See: Gibson, "*Stare Decisis* and The Action *Per Quod Servitium Amisit* - Refusing to Follow the Leader: *R. v. Buchinsky*" (1980), 13 C.C.L.T. 309. However, as Professor Debra Parkes explains, the idea of ignoring a precedent on the strength of a prediction that it will be overturned is a largely heretical notion which has no apparent basis in Canadian case law. See: Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007), 32 Man. L.J. 135. The standard approach is that a lower court will not side step a precedent on the strength of a prediction that the court which established the precedent will reverse itself. As Professor Parkes points out, this practice is consistent with the view of the United States Supreme Court. It spoke out against the concept of anticipatory overruling in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). Justice Kennedy wrote as follows at pp. 1921-1922:

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko* [*Wilko v. Swan*, 346 U.S. 427 (1953)]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

[50] Accordingly, it can be seen that, at the doctrinal level, there are considerable problems with the approach advocated by SFL and the unions.

[51] But the difficulties with the position of SFL and the unions do not end there. Even if (as a matter of principle) this Court could depart from a Supreme Court precedent on the basis that the Supreme Court would overrule it if invited to do so, I would not be inclined to move in that direction in this case. This is because, even on the approach advocated by SFL and the unions, a lower court would surely be entitled to ignore otherwise binding precedent only if there was a great deal of certainty that the higher court could be expected to reverse itself. That high level of certainty is not present here. *Dunmore*, *Health Services* and *Fraser* do, of course, go some considerable distance toward upsetting the logic underpinning what the *Labour Trilogy* had to say about the constitutional status of the right to strike. Nonetheless, the implications of those recent decisions are less than wholly clear.

[52] This lack of clarity flows in substantial part from what might be called uncertainties as to how, on any future appeal, the Supreme Court might choose to characterize the right to strike for purposes of a s. 2(d) analysis. It appears that there are two main possibilities in this regard. First, strike activity might be seen as being, in effect, an aspect or a dimension of collective bargaining and, more particularly, as being a mechanism for giving employees the economic muscle necessary to make collective bargaining meaningful. For example, and significantly, in *Alberta Reference*, *supra*, at p. 392, McIntyre J. said the issue before him was "whether the [*Charter*] gives constitutional protection to the right of a trade union to strike as an incident to collective bargaining." In the same case, summarizing his conclusions at p. 371, Dickson C.J. said "… 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*."

[53] Second, and on the other hand, the right to strike might be seen as conceptually independent of collective bargaining and, as a result, seen as something which must be analysed on its own terms. It may be useful to briefly consider each of these two approaches to the characterization of strike activity.

[54] If the right to strike is characterized as a dimension of collective bargaining -- and this is how the trial judge proceeded -- it is not at all clear that the Supreme Court's recent decisions lead to a conclusion that strike activity is protected by s. 2(d). I say this because the analysis pressed by SFL and the unions in this regard is based on the notion that meaningful collective bargaining necessarily entails the existence of some sort of mechanism for effectively *resolving* disputes between employees and their employers. The strike, so the argument goes, is that mechanism. But, at least to this point, the Supreme Court has not mapped the freedom to bargain collectively in these broad terms. Rather, it has said that collective bargaining involves only: the right of employees to organize, to make collective representations to their employers and to have those representations considered in good faith. This is clearly illustrated by *Fraser*.

[55] In *Fraser*, the Ontario Court of Appeal ruled that the *Agricultural Employees Protection Act* offended s. 2(d) because it failed to make collective bargaining meaningful. Winkler C.J.O., for the Court, held that meaningful collective bargaining was dependent on three pre-conditions:

(a) a statutorily prescribed duty to bargain in good faith, (b) a statutory recognition of the principles of exclusivity and majoritarianism in union representation, and (c) a statutorily prescribed mechanism for resolving bargaining impasses and disputes regarding the administration of collective agreements. See: *Ontario v. Fraser*, 2008 ONCA 760, 92 O.R. (3d) 481 at para. 80.

[56] The reason why the Court of Appeal for Ontario attached such significance to a "mechanism for resolving bargaining impasses" is precisely the same reason why the trial judge in this case concluded that the right to strike was comprehended by s. 2(d). In Winkler C.J.O.'s assessment, collective bargaining would simply not be productive unless there was some means of resolving disputes. He explained the point in this way:

> 82 In keeping with that goal, legislation dealing with collective bargaining must also provide a mechanism for resolving bargaining impasses. The bargaining process is jeopardized if the parties have nothing to which they can resort in the face of fruitless bargaining. There exists a broad range of collective bargaining dispute resolution mechanisms. I reiterate that the appellants have stated that they do not seek the right to strike as the dispute resolution mechanism. [*Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, 92 O.R. (3d) 481]

[57] Significantly, McLachlin C.J. and LeBel J. rejected the Ontario Court of Appeal's view of s. 2(d), saying that it constitutionalized a "full-blown Wagner system of collective bargaining". They wrote as follows:

> 47 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.

[58] McLachlin C.J. and LeBel J. grounded their approach to the case on a narrower view of s. 2(d) and held that the question was "whether the legislative scheme … renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(d) associational right" (para. 48). The Court confirmed that *Health Services* had said only that "workers have a constitutional right to make collective representations and to have their collective representations considered in good faith". (para. 51)

[59] Thus, as indicated, *Fraser* appears to say that a mechanism for *resolving* bargaining impasses (regardless of what institutional form it might take) is not part of what s. 2(d) requires in the context of collective bargaining. It would seem to follow, as a result, that the strike (a particular institutional mechanism for resolving impasses) is not comprehended by s. 2(d). At a minimum, the picture in this regard is unclear.

[60] It is not necessary to say any more than this in order to dispose of the argument advanced by SFL and the unions to the effect that the *Labour Trilogy* has been effectively overruled. The point is simple. The right to strike might be characterized as an aspect of collective bargaining and, if it is characterized in this way, the existing jurisprudence suggests that strike activity would not be seen as constitutionally protected. In my view, this possibility injects enough uncertainty into the equation that, even if it was open to this Court to take such an approach, *Dunmore*, *Health Services*, and *Fraser* should not be read as granting a licence to overturn what the *Labour Trilogy* says about the right to strike. That step, if it is to be taken, should be taken by the Supreme Court itself.

[61] Notwithstanding that it is unnecessary to do so, it may be useful to go a step further and to ask, by way of the alternative, what the situation would be if the right to strike is conceptualized in what might be called "free-standing" terms. In other words, what if strike activity is seen simply as the coordinated withdrawal of labour by employees for the purpose of obliging an employer to make concessions with respect to matters of workplace concern? It is not necessary to resolve this question one way or the other for present purposes. The important point for now is that arriving at an answer to it is not free of complications. This is because, although the Supreme Court has said that s. 2(d) does not constitutionalize any particular model or system of labour relations, the right to strike claimed by SFL and the unions is not some pure or "state of nature" entitlement to withdraw labour. Rather, it is the *contemporary* right to strike, a right significantly bound up with, integrated into, and defined by a specific statutory regime.

[62] Historically, workers have always had the root capacity to collectively down their tools in an effort to extract concessions from their employers. In this sense, the right to strike is self-evidently pre-statutory in nature. Moreover, seen from this angle, Wagner Act-type legislation like *The Trade Union Act*, R.S.S. 1978, c. T-17, operates, in many ways, to restrict and regulate the exercise of the unadorned version of the right to strike. For example, *The Trade Union Act* says a strike may not be undertaken in the absence of a vote (s. 11(2)(d)), no strike may commence unless the employer was given 48 hours' notice (s. 11(6)(a)) and no strike may be taken during the currency of a collective agreement (s. 34(1)).

[63] However, speaking practically, SFL and the unions do not wish to return to a world where employees can withdraw their labour in concert, but where

employers are not obliged to recognize unions, where union representation is based on something other than exclusive majoritarianism, where employers are not required to bargain, or to bargain in good faith, where employees who participate in strikes can be dismissed for breach of their employment contracts and so forth. The reality is that, in the year 2013, the "right to strike" which SFL and the unions seek to protect is deeply integrated into, and in many ways can be seen as a function of, a specific statutory system.

[64] A statutorily-grounded view of the right to strike immediately collides with the fact that the Supreme Court has said s. 2(d) does not contemplate any particular sort of labour relations regime. But, at the same time and cutting in the other direction, it is important to note that, at para. 25 of *Health Services*, the Court rejected the idea that collective bargaining is a "modern right" created by legislation rather than a fundamental freedom. These cross currents create at least some measure of uncertainty about how the Court might approach the right to strike even if strike action is seen as a free-standing concept and not merely as an aspect of collective bargaining.

[65] Thus, regardless of whether or not the right to strike is characterized as a feature or dimension of collective bargaining, there is some lack of clarity about how it fits with s. 2(d) of the *Charter*, as s. 2(d) has been explained in the recent cases.

[66] That said, I appreciate, of course, that it is entirely possible (some would say desirable) to define the substantive reach of s. 2(d) broadly enough to include the right to strike and to then use s.1 of the *Charter* to assess the constitutional validity of statutory qualifications imposed on strike action. This sort of approach to the scope of constitutional guarantees

has been used by the Supreme Court in relation to other s. 2 freedoms, perhaps most notably freedom of expression.

[67] Accordingly, none of what I have written above is to suggest or presume that, if again confronted directly with the issue, the Supreme Court would not bring strike activity within the ambit of s. 2(d). Such a conclusion can certainly be reached, as indeed it was reached by Dickson C.J. in the *Labour Trilogy*. My point is no more than that, in light of *Dunmore*, *Health Services* and *Fraser*, the outcome of any deliberation by the Supreme Court on this issue is not wholly clear. In other words, the Court's recent decisions have not undermined the *Labour Trilogy* to the point where, even if they were entitled to anticipate the reversal of a binding precedent, either this Court or the Court of Queen's Bench should disregard what has been decided about the relationship between the right to strike and s. 2(d) of the *Charter*.

[68] In short, any decision to overturn the *Labour Trilogy* must be left in the hands of the Supreme Court itself. This is what the doctrine of *stare decisis* demands. It follows that the *Essential Services Act* cannot be struck down on the basis that it limits strike activity contrary to s. 2(d) of the *Charter*.

(d) A Word about International Law

[69] Before moving on to the other *Charter* issues, I wish to comment briefly on the international law considerations referenced by SFL and the unions in the course of their submissions. I do this because of the considerable emphasis which they placed on these materials.

[70] SFL and the unions rely, in particular, on *ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise*; *The International Covenant on Economic and Cultural Rights* and *The*

International Covenant on Civil and Political Rights. They also point to a report from the ILO Committee on Freedom of Association which concerned the *Essential Services Act*. See: Case No. 2654 (Canada/Saskatchewan Report), Report No. 356, ILO Official Bulletin, Vol. XCIII, 2010, Series B, No. 1, 313-384. In addition, the record contains expert reports speaking to the place of the right to strike in international law.

[71] It is well established that *Charter* rights are to be construed in light of Canadian international law commitments. See, for example: *Fraser*, at para. 92; *Dunmore*, at paras. 13, 30. However, there is nothing in the relevant international law which can or should lead this Court to depart from what the *Labour Trilogy* says about the right to strike. This is evident from Dickson C.J.'s analysis in particular. There is nothing new in the arguments which SFL and the unions now bring to the table. As a result, I am not persuaded that international law considerations can have any meaningful impact on the question of whether this Court is entitled to depart from the *Labour Trilogy*. I see no need to review those considerations in detail.

2. Freedom of Expression

[72] SFL and some of the unions also submit, very much by way of a secondary argument, that the *Essential Services Act* violates employees' freedom of expression as guaranteed by s. 2(b) of the *Charter*. SFL contends that the very act of employees joining together and using the word "union" to describe their association is expressive activity which warrants constitutional protection. The *Essential Services Act* is said to limit s. 2(b) freedom because it reduces the number of employees who can participate in the expressive activity of going on strike.

[73] The Supreme Court has taken a very generous view of the scope of freedom of expression as guaranteed by s. 2(b) of the *Charter*. See, for example: *Irwin Toy v. Québec*, [1989] 1 S.C.R. 927 at p. 968; *Re ss. 193 and 195.1 of the Criminal Code (Prostitution reference)*, [1990] 1 S.C.R. 1123 at p. 1180; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at pp. 729 and 826. Nonetheless, the Court has shown no inclination to analyse labour relations issues, of the sort in question here, through the lens of s. 2(b) of the *Charter*. It has preferred, instead, to assess the constitutional status of the right to strike by reference to the *Charter's* guarantee of freedom of association. See: *Labour Trilogy*, *Dunmore*, *Health Services* and *Fraser*. This approach no doubt reflects the reality that, in relation to an inquiry into the overall validity of a statute of general application like the *Essential Services Act*, the essence of the impact of the statute is on the associational, rather than the expressive, dimension of employee conduct.

[74] I note, as well, that other appellate courts have also been reluctant to approach the sorts of issues at issue in this appeal by way of a s. 2(b) analysis. See: *Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operations, Association*, 2009 FCA 201, [2010] 3 F.C.R. 255 at paras. 88 and 91.

[75] In any event, at the end of the day, the only possible way in which the *Essential Services Act* might impact s. 2(b) freedoms is that, during the specific periods of time when they are scheduled to work, employees caught by the scheme of the *Act* would in fact be obliged to be on the job. That said, their unions would remain free at all times to speak on those employees' behalf about the issues in the labour dispute and the employees themselves would remain free to express their own views about the dispute. Accordingly,

it is not clear whether the *Act* in fact implicates the guarantee of freedom of expression.

[76] Further, SFL constructs its s. 2(b) argument, in very substantial part, on the fact that *picketing* has been recognized as involving constitutionally-protected expressive activity. See: *B.C.G.E.U. v. British Columbia*, [1988] 2 S.C.R. 214 at para. 27; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beveridge (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156 at para. 32. But, this argument mixes apples and oranges. The *Essential Services Act* does not purport to limit picketing in any way. Even those employees who are precluded from engaging in strike activity by virtue of the operation of the *Act* would be free, when not working, to join a picket line if they so chose.

[77] By way of a bottom line, I am not persuaded that s. 2(b) of the *Charter* affords SFL and the unions an effective basis for overturning the *Essential Services Act*.

3. Life, Liberty and Security of the Person

[78] By way of further argument, SFL and some of the unions submit that the *Essential Services Act* violates s. 7 of the *Charter*. Section 7 reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[79] The two-stage analysis mandated by s. 7 is well known. In *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, Abella J., writing for the majority of the Supreme Court, summarized it as follows:

> 37 The analysis under s. 7 proceeds in two stages: Is there a deprivation of life, liberty and/or security of the person? If so, does the deprivation accord with

> principles of fundamental justice? If there has been a deprivation that does not accord with principles of fundamental justice, a violation of s. 7 has occurred.

[80] As with *Charter* claims generally, the onus is on the claimant to demonstrate a violation of s. 7 on a balance of probabilities. This amounts, as is obvious, to proving both a deprivation of life, liberty and/or security of the person *and* showing that the deprivation is not in accordance with principles of fundamental justice.

[81] The argument advanced by SFL is that the *Act* anticipates the identification of individual employees who will be required to continue working during a strike. This is a reference to s. 18(2) of the *Act* which provides as follows:

> 18(2) If there is a work stoppage, no essential services employee shall, without lawful excuse, fail to continue or resume the duties of his or her employment with the public employer.

[82] SFL contends that designated employees would be forced, under pain of sanction, to continue working regardless of illness or injury. All of this is said to implicate both liberty and security of the person interests. Indeed, SFL goes so far as to suggest the *Essential Services Act* is contrary to Canada's international obligation to eliminate slavery.

[83] I see no merit in this line of argument. First, no reasonable reading of s. 18(2), and its express use of the phrase "without lawful excuse", can involve the notion that an employee would be required to continue to work even if he or she is genuinely ill or injured. Second, even if the *Act* is taken to implicate life or security of the person interests, SFL has not attempted to satisfy the second wing of s. 7, *i.e.* the requirement that, in order for there to be a breach of the section, the denial of life, liberty or security of the person

must occur in a manner which is inconsistent with principles of fundamental justice.

4. Equality Rights

[84] The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWDSU") contends that the *Essential Services Act* offends s. 15 of the *Charter*. Section 15 speaks to equality rights in the following terms:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[85] RWDSU's arguments on this point are not particularly well developed. I understand them to be that limitations on strike action will make unions less effective and that this will negatively affect segments of society already facing social and economic disadvantage.

[86] I am not persuaded by this submission. Section 15 of the *Charter* is aimed at limiting discrimination on grounds such as race, religion and sex. Laws that perpetuate disadvantage and prejudice, or that single out individuals or groups for adverse treatment on the basis of distinctions grounded in these types of characteristics, are violative of s. 15. See, for example: *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670 at paras. 38-39. The *Essential Services Act* does, of course, apply only to public sector employees, but I am unable to see how it draws distinctions on any of the bases which animate s. 15. "Public sector employee" is not a prohibited ground of discrimination.

[87] I note that, in *Health Services*, the Supreme Court rejected the idea that the legislation in issue there offended s. 15. It had been challenged on the basis that it discriminated "against health care workers based on a number of interrelated enumerated and analogous grounds including, sex, employment in the health sector, and status as non-clinical workers". McLachlin C.J. and LeBel J. dismissed this claim and said:

> 165 … The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the *Act* reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.

[88] This analysis applies directly to the argument advanced by RWDSU. The *Essential Services Act* does not violate s. 15 of the *Charter*.

5. Conclusion With Respect to the *Essential Services Act*

[89] I respectfully conclude that the trial judge erred in finding that the *Essential Services Act* is constitutionally invalid. In relation to s. 2(d) of the *Charter*, the heart of this appeal, the Supreme Court's decisions in the *Labour Trilogy* are still the controlling authorities. The right to strike does not attract *Charter* protection. The arguments advanced by SFL and the unions in reliance on ss. 2(b), 7 and 15 of the *Charter* must also be rejected.

[90] I turn now to a consideration of the *TUA Amendment Act*.

III. The Validity of the *TUA Amendment Act*

A. The Content of the *Act*

[91] The *TUA Amendment Act* effected three major sets of changes to *The Trade Union Act* which are relevant here. First, it revised the manner in which a union becomes certified as a bargaining representative. Second, it modified the process for decertifying a union. Third, it amended the provisions which restrict communications by employers with their employees. Each of those points requires some further explanation.

[92] I will begin with certification. Prior to the *TUA Amendment Act,* a union hoping to be certified was obliged to file support cards with the Labour Relations Board signed by at least 25% of the employees in the proposed bargaining unit. Those cards had to have been signed within six months of the application. If more than 50% of the employees in the proposed unit indicated their support by signing cards, the union was automatically certified without a vote. If the support level was between 25% and 50%, the Board proceeded to conduct a vote.

[93] The *TUA Amendment Act* changed this framework by increasing the minimum level of support that must be shown to 45% of the employees in the proposed bargaining unit and by requiring support cards to be signed within three months of the application. It also eliminated the concept of automatic certification based on support cards. Majority employee support for certification must now be demonstrated in all cases by way of a secret ballot vote conducted by the Board.

[94] As for decertification, the situation prior to the *TUA Amendment Act* was as follows. Employees who no longer wished to be represented by a

particular union could file evidence of majority employee support with the Board so long as the relevant signatures were obtained within six months of the application. If majority support for decertification was demonstrated in this way, a vote of the employees was conducted by the Board.

[95] The *TUA Amendment Act* altered the threshold requirement for a decertification vote by decreasing the minimum level of required employee support from 50% plus one to 45%. It also required that support cards be signed within three months of the application rather than within six months. The requirement of a secret ballot vote conducted by the Board was not changed.

[96] Finally, and as indicated, the *TUA Amendment Act* also revised the rules with respect to employer communication with employees. Immediately prior to the enactment of the *TUA Amendment Act*, it was an unfair labour practice for an employer or employer's agent "in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this *Act*".

[97] The *TUA Amendment Act* repealed this provision and substituted new wording which, at least on its face, somewhat expands the scope of permissible employer communications. Section 11(1)(a) of *The Trade Union Act* now reads as follows:

> 11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
>
> > (a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees.

B. The Court of Queen's Bench Decision

[98] At trial, SFL and the unions argued that the *TUA Amendment Act* denies rights and freedoms guaranteed by s. 2(b) (freedom of expression), s. 2(c) (freedom of assembly), s. 2(d) (freedom of association), s. 7 (life liberty and security of the person) and s. 15(1) (equality) of the *Charter*. The trial judge restricted his substantive analysis to s. 2(d), holding that the evidence and arguments relating to the other *Charter* provisions did not warrant extended inquiry.

[99] In his treatment of the s. 2(d) issue, the trial judge concluded that the changes to the certification process introduced by the *TUA Amendment Act* had reduced, and would continue to reduce, the success rate of union applications for certification. However, he stressed that the real question before him was whether the s. 2(d) rights of employees had been infringed. In this regard, he emphasized that *Dunmore, Health Services* and *Fraser* did not require the erection of any particular statutory framework to give effect to the s. 2(d) freedom of employees. He also underlined that the institutional interests of unions do not always perfectly track the interests of the employees they represent.

[100] In the end, the trial judge concluded that the *TUA Amendment Act* did not infringe the freedom of employees to organize and to bargain collectively through a union of their own choosing.

C. Analysis

[101] In this Court, the aggregate effect of the various arguments advanced by SFL and the unions is to the effect that the *TUA Amendment Act* violates

ss. 2(d), 2(b), 7 and 15 of the *Charter*. I will consider each of those submissions individually.

1. Freedom of Association

[102] The principle argument advanced by SFL and the unions is that the *TUA Amendment Act* infringes employees' freedom of association. In their view, the combined impact of the changes implemented by the *Act* has substantially interfered with s. 2(d) entitlements. They emphasize, in particular: (a) the move from card-based certification to secret ballot votes, (b) the resulting delays in the certification process which are said to facilitate greater employer interference with employee choice, and (c) the liberalization of the restrictions on employer communications which are claimed to give employers increased latitude to convince employees not to support certification. It is submitted that the overall effect of these developments has altered the labour relations climate in Saskatchewan and created a situation where employees are denied the opportunity to participate in *Charter*-protected associational activities.

[103] I accept the submission that the *TUA Amendment Act* has made it somewhat more difficult for unions to be certified as bargaining agents. This seems self-evident from the face of the amendments themselves and it is borne out by the evidence and reflected in the trial judge's finding of fact on the issue. However, this is not the point which resolves this appeal.

[104] The Supreme Court has made it clear that s. 2(d) does not entrench the details of any particular labour relations regime. As a result, *The Trade Union Act*, as it read prior to the amendments in 2008, cannot be seen as somehow having defined minimum s. 2(d) entitlements with the result that

any move away from its terms amounts to a denial of freedom of association. The question to be answered in relation to s. 2(d) is not whether the *TUA Amendment Act* has made certification more difficult but, rather, whether the *Act* infringes the fundamental freedom guaranteed by s. 2(d).

[105] The Supreme Court's decision in *Health Services* indicates that the test for determining whether there has been a s. 2(d) breach in the labour context is whether the legislation being challenged "substantially interferes" with the ability of employees to organize and engage in good-faith bargaining. McLachlin C.J. and LeBel J. explained the approach, in more particular terms, as follows:

> [91] … the interference, as *Dunmore* instructs, must be substantial – so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.
>
> [92] To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining.… The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.
>
> [93] Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> [94] Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.

[106] The Supreme Court carried the concept of "substantial interference" through to *Fraser*. There, McLachlin C.J. and LeBel J. said this:

> [47] … What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(*d*) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.
>
> [48] The resolution of this appeal does not rest on stark reliance on a particular conception of collective bargaining. Rather, it requires us to return to the principles that underlie the majority rulings in *Dunmore* and *Health Services*. The question here, as it was in those cases, is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(*d*) associational right.

[107] In considering the application of this test in the context of the present appeal, it is important to remember that the freedom guaranteed by s. 2(d) establishes only the minimum substantive content of any labour relations regime. So long as that minimum standard is satisfied, the Legislature is free to arrange matters as it sees fit. This is significant because different governments will have different views of the best public policy in this area.

[108] Some governments will see unionization in positive terms and will emphasize its benefits. As a result, they will be inclined to structure *The Trade Union Act* so as to make certification easy, at least in relative terms. In the eyes of the Constitution, that is an entirely legitimate course of action. Other governments might take a less enthusiastic view of unionization, choose to stress the rights of employees as individuals and believe that, in order to maintain economic competitiveness, the hurdle for certification should be relatively high. In the eyes of the Constitution, that too is an entirely legitimate course of action. Thus, to repeat, the fact that the *TUA Amendment Act* has made it somewhat more difficult to obtain certification

does not, in and of itself, mean that s. 2(d) of the *Charter* has been breached. As indicated, the real question is whether the changes in issue substantially impair the exercise of the s. 2(d) associational right.

[109] I should note here that the Province contends that the submissions of SFL and the unions are misplaced insofar as they concern the effects of secret ballots, support thresholds for certification and the like. It says those submissions presume a very specific kind of labour relations structure or organizational regime, *i.e.*, one where there is exclusive majoritarian representation of employees by unions, where unions are recognized by way of a certification process and so forth. This, according to the Province, is off track because the Supreme Court has specifically said that s. 2(d) does not mandate any particular model of labour relations.

[110] I do not find this to be a persuasive argument. It is correct, of course, that s. 2(d) does not oblige the implementation of any particular kind of institutional arrangement with respect to labour relations. However, once the Legislature settles on a particular approach, it obviously must ensure that the approach accommodates the freedom of association enjoyed by employees under the *Charter*. I do not understand SFL and the unions to be saying anything more than that on this wing of the appeal, *i.e.*, they contend only that the *TUA Amendment Act* chokes off their ability to organize and thus infringes s. 2(d) freedoms. They are not saying that, to the exclusion of all other alternatives, the Province has some positive obligation to put in place a particular kind of labour relations regime.

[111] That having been said, it may be useful at this point to look more closely at the various concerns raised by SFL and the unions. The first is the move from card-based certification to secret ballot votes in all cases. SFL

cites studies by Michael Lynk and Chris Riddell indicating that certification is more difficult under a secret ballot regime. See: Michael Lynk, "Labour Law and the New Equality" (2009) 15 *Just Labour: A Canadian Journal of Work and Society* 125, at 135; Chris Riddell, "Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998", Volume 57, Number 4, *Indus. & Lab. Rel. Rev*. 493, at 497-98. This decrease in certification success rates is said to interfere with the freedom of association.

[112] I do not accept this submission. Section 2(d) does not oblige legislatures to build statutory schemes which make certification as easy as possible. The secret ballot, after all, is a hallmark of modern democracy. As the trial judge pointed out at para. 269 of his decision, four other Canadian jurisdictions utilize a secret ballot system: Ontario, British Columbia, Alberta and Nova Scotia. I am unable to agree that such a system for selecting union representation can be seen as something which substantially impairs s. 2(d) freedoms. Surely, in and of itself, a secret ballot regime does no more than ensure that employees are able to make the choices they see as being best for themselves.

[113] The second major concern flagged by SFL and the unions is the delay involved in conducting certification votes. They say delays create opportunities for increased employer intimidation and coercion of employees. Their concern is tied, at least in part, to the fact that the *TUA Amendment Act*, while introducing a requirement for secret votes in all certification applications, does not stipulate any time limit for the conduct of those votes. This stands in contrast to jurisdictions such as Nova Scotia, Ontario and British Columbia where the maximum periods for conducting a

vote are set at five, five and ten days, respectively, from the date the certification application is filed. See: *The Trade Union Act*, R.S.N.S. 1989, c. 475, s. 25(3); *Labour Relations Act, 1995*, S.O. 1995, c. 1, s. 8(5); *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 24(2). By way of contrast, the governing provision put in place by the *TUA Amendment Act* simply reads as follows:

> **18** The board has, for any matter before it, the power:
>
> . . .
>
> (v) to order, at any time before the proceeding has been finally disposed of by the board, that:
>
> > (i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere;
> >
> > and
> >
> > (ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;

[114] While a statutorily prescribed time limit for conducting certification votes might be the preferable approach, I am not persuaded that the failure to include such a provision in the *TUA Amendment Act* makes the *Act* itself constitutionally infirm. This is because discretionary statutory powers must be exercised consistently with the demands of the *Charter*. See: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at pp. 1078-79.

[115] This imperative suggests that if, in any particular case, the Labour Relations Board delays so long in conducting a vote that employees' s. 2(d) freedoms are demonstrably infringed, those employees would be able to obtain legal redress in relation to that specific failure of the Board. None of

this would mean, however, that the *TUA Amendment Act* itself violates s. 2(d) because it fails to prescribe a time limit for conducting votes.

[116] I turn next to the amendment to s. 11(1)(a) of *The Trade Union Act* which eased the restrictions on employers' communications with employees. As will be recalled, the *TUA Amendment Act* defined the following actions on the part of an employer as being unfair labour practices:

> (a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;

[117] SFL and the unions say that the addition of the *proviso* allowing employers to communicate "facts and opinions" to their employees means employers now have a license to deter, intimidate and confuse employees at will and to thereby interfere with employees' s. 2(d) freedoms. I am not convinced by this line of argument either.

[118] Provisions such as s. 11(1)(a) must plot a middle ground between protecting employees from intimidation, on the one hand, and preserving their legitimate entitlement to receive relevant views and information on the other. At the same time, these sorts of statutory provisions need to somehow accommodate employers' freedom of speech interests. In order to reach an acceptable policy balance, some considerable subtlety is required.

[119] I am not prepared to accept that the present version of s. 11(1)(a) throws the doors open to employer intimidation and deception. It is generally in line with similar provisions found in the *Canada Labour Code* and in various provincial jurisdictions such as Ontario, Manitoba, Alberta and British Columbia. The record does not indicate that employers in these

jurisdictions enjoy free reign to coerce or intimidate employees in some wholly unfettered way.

[120] The Labour Relations Board will have to work its way through the interpretation of s. 11(1)(a) and, in so doing, it will have to construe that provision in a manner which is consistent with the *Charter*. See: *Slaight Communications Inc. v. Davidson, supra*. This means that any ambiguities in the provision must be read so as to avoid denying employees their s. 2(d) freedoms. I agree with the trial judge when he wrote as follows:

> 278 Clearly the SLRB's interpretation and application of the amended s. 11(1)(a) of the Act will be critical to maintaining an appropriate balance in the work place. Time frames will presumably be established and enforced to minimize the opportunity for employers to interfere with employee freedoms in a manner that cannot be effectively remedied under other provisions of *The Trade Union Act*. If the SLRB is to carry out its responsibilities in an effective manner, it must have the necessary resources and the capacity to function independently from the Legislative Branch of Government. [footnote omitted]

[121] By way of conclusion on this point, I am not persuaded the trial judge erred in concluding that the *TUA Amendment Act* does not violate s. 2(d) of the *Charter*. While it makes certification somewhat more difficult, it does not substantially impair the exercise of associational freedom.

2. Freedom of Expression

[122] SFL and some of the unions also argue that the *TUA Amendment Act* denies the freedom of expression guaranteed by s. 2(b) of the *Charter*. SFL says joining a union is expressive activity and argues that, because the *Act* makes organizing more difficult, it necessarily offends s. 2(b).

[123] This argument cannot succeed. I am unable to see how the *TUA Amendment Act* infringes the s. 2(b) guarantee. The expressive dimension of

an employee's actions in relation to a certification drive would arise from the employee's indication of his or her support for certification and his or her attempts to bring a union into the workplace. For example, signing a union card might be taken to say "I support the union" or "We need a union". However, the *TUA Amendment Act* does not prevent employees from signing cards or from otherwise indicating their support for certification or taking part in certification drives. The *Act* might make certification *itself* more difficult but this does not mean that it has any impact on the freedom of employees to communicate with each other, or with the world, about the certification process or any matter related to it.

3. Life, Liberty and Security of the Person

[124] It is also contended that *The TUA Amendment Act* offends s. 7 of the *Charter*. As noted above, s.7 reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[125] This argument is advanced by RWDSU. In summary terms, it contends that the *Act*: (a) denies "liberty" interests by restricting the ability of employees to organize and by thereby preventing them from participating in defining the terms and conditions of their employment, and (b) interferes with "security of the person" interests by inhibiting employees from organizing, by exposing them to the threat of reprisals and by denying them the ability to participate in establishing health and safety conditions in their workplaces. As to the "principles of fundamental justice" wing of s. 7, RWDSU says the *TUA Amendment Act* is: (a) overbroad, (b) arbitrary and (c) unconstitutionally vague.

[126] I see no merit in this line of argument. I doubt that the *Act* engages life, liberty or security of the person interests as those concepts have been defined by the Supreme Court. Assuming *arguendo* that it does, I fail to see a deprivation of such interests which does not accord with principles of fundamental justice. Concepts such as "vagueness" and "overbreadth" are not easily engaged. See, for example: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at p. 642-43; *R. v. Lindsay and Bonner*, 2009 ONCA 532, 245 C.C.C. (3d) 301 at para. 20, leaves to appeal denied [2010] 1 S.C.R. vii and [2010] 1 S.C.R. xi. In my view, the *Act* does not run afoul of the constitutional requirements which operate in this area.

4. Equality Rights

[127] The final argument mounted against the *TUA Amendment Act* is based on s. 15 of the *Charter*. As explained above, it speaks to equality rights by providing as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[128] RWDSU suggests that the *TUA Amendment Act*, by its nature, makes union organizing more difficult and thus makes it more challenging for unions to continue their work on behalf of women, immigrants and racial minorities.

[129] This line of argument cannot succeed. The *TUA Amendment Act* is a statute of entirely general scope and it applies to all workplaces and to all sectors of the economy. The record before the Court does not establish that it reflects or is based on the sorts of stereotypes grounded on group or personal characteristics which are necessary to engage s. 15 of the *Charter*. See: *Health Services*, *supra* at paras. 162-167.

5. Conclusion With Respect to the *TUA Amendment Act*

[130] I conclude that the *TUA Amendment Act* is constitutionally valid. The trial judge correctly rejected the attacks against it which were mounted by SFL and the unions.

IV. Conclusion

[131] The Province's appeal with respect to the *Essential Services Act* is allowed. The appeal of SFL and the unions with respect to the *TUA Amendment Act* is dismissed. Both *Acts* are constitutionally valid.

[132] There will be no order regarding costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 26th day of April, A.D. 2013.

"Richards J.A."
Richards J.A.

I concur "Klebuc C.J.S."
Klebuc C.J.S.

I concur "Ottenbreit J.A."
Ottenbreit J.A.

I concur "Caldwell J.A."
Caldwell J.A.

I concur "Herauf J.A."
Herauf J.A.