The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3967, Applicant v. REGINA QU'APPELLE HEALTH REGION and THE ATTORNEY GENERAL FOR SASKATCHEWAN, Respondents

LRB File No. 124-09; February 9, 2010
Vice-Chairperson, Steven Schiefner; Members: John McCormick and Marshall Hamilton

For the Applicant:	Peter Barnacle, Adam Touet and Jodi Manastyrski
For the Respondent Employer:	Leah Schatz, Lynn Sanya and Michael Phillips
For Attorney General for Saskatchewan:	Graeme Mitchell, Q.C.

***Public Employees Essential Services Act* – Jurisdiction – Union asked Board to subject new legislation to *Charter* scrutiny – No express authority in legislation for Board to decide questions of law – Board finds that authority delegated by legislation too narrow and time frame for adjudication too short for legislature to intend Board to adjudicate questions of Constitutional compliance in adjudicating applications under the *Act* – Board concludes it does not have jurisdiction to subject the legislation to *Charter* scrutiny.**

***Public Employees Essential Services Act* – *Charter* Challenge – Union alleges that provisions of legislation violates s. 2(d) of *Charter* and the Union's right to bargain collectively – Board not satisfied that impugned provisions violate *Charter*.**

***Public Employees Essential Services Act* – Application to vary the number of employees deemed essential by Employer – Union argues that essential services can be maintained using fewer employees than that designated by Employer – Board finds that parties have not engaged in kind of negotiations and consultations anticipated by *Act* – Board provides guidance and directs parties to engage in collective bargaining.**

***The Essential Services Public Employees Act*, ss. 2(c), 7, 9, 10, 12 and 14**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** The Canadian Union of Public Employees, Local 3967 (the "Union" or the "Applicant") is the certified bargaining agent for a unit of employees of the Regina Qu'Appelle Health Region (the "Employer" or the "Respondent"). In June of 2009, the Employer serviced notices on the Union pursuant to section 9 of *The Public*

Service Essential Services Act, S.S. 2008, c.P-42.2 (the *"PSES Act"*). Pursuant to these notices, the Employer advised the Union of the classifications of employees that it deemed necessary to maintain essential services, together with the number of employees in each such classification that would be required to continue working in the event of a work stoppage (the "Section 9 Notices"). In concomitant material, the Employer also advised the Union of the names of the employees that it deemed "essential" (i.e. necessary to work in the event of a work stoppage for the purposes of maintaining essential services in accordance with the provisions of the *PSES Act*).

[2] On November 3, 2009, the Union filed an application with the Saskatchewan Labour Relations Board (the "Board) alleging that the essential services provided by the Employer could be maintained using fewer employees than the number set forth in the Employer's notices and asking the Board to exercise the authority granted to the Board pursuant to section 10 of the *PSES Act* to vary the number of employees required to work in the event of a work stoppage (the "Application").

[3] In its Application and by Notice of Constitutional Question dated November 3, 2009, the Union also challenged the "*constitutional applicability, validity and effect*" of the *PSES Act*. To say the least, the Union's concerns with respect to the *PSES Act* were multiplex, as was evident from the relief sought by the Union in its Application:

> *8. The applicant trade union therefore seeks the following relief:*
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> *(a) A declaration that the Board has the jurisdiction to identify, designate and order as follows:*
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> *(i) The essential services that are required to be maintained during a work stoppage;*
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> *(ii) The classification of employees that must continue to work during a work stoppage to maintain essential services;*
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> *(iii) The number of employees in each such classification who must work during a work stoppage to maintain essential services;*
>
> *(iv) The names of the employees within each such classification who must work during a work stoppage to maintain essential services;*
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> *(v) That such employees must only perform such duties within his or her complete range of duties as are "essential services" within the meaning of the Act, if not all of his or her duties are "essential services";*

(vi) That part-time or casual employees who are necessary to maintain essential services are not prevented from participating in a work stoppage against their employer during their off-duty hours;

(b) In the event that the Board determines that it has the jurisdiction to identify, designate and make orders as set out in paragraph 8(a) above, the applicant trade union seeks the following relief, inter alia:

(i) A declaration that the Employer has failed to comply with the notice requirements of Section 9 of the Act as follows, inter alia, the Notice did not set out the essential services that are to be maintained, as required by section 9(2)(d) of the Act;

(ii) An order that by reason of the Employer's failure as set out in paragraph 8(b)(i) above, no employees in any of the listed classifications are necessary to maintain essential services;

(iii) In the alternative to paragraph 8(b)(ii), an order:

A. Identifying the essential services that are required to be maintained during a work stoppage;

B. Identifying the classification of employees that must continue to work during a work stoppage to maintain essential services;

C. Identifying the number of employees in each such classification who must work during a work stoppage to maintain essential services;

D. Identifying the names of the employees within each such classification who must work during a work stoppage to maintain essential services;

E. That employees who are necessary to maintain essential services must only perform such duties within their complete range of duties as are "essential services" within the meaning of the Act, if not all of their duties are "essential services";

F. That part-time or casual employees who are necessary to maintain essential services are not prevented from participating in a work stoppage against their employer during their off-duty hours;

(c) In the alternative, in the event that the Board determines and declares that it does not have the jurisdiction to identify, designate and make orders as set out in paragraph 8(a) above, the applicant trade union seeks the following relief, inter alia:

(i) a declaration that The Public Service Essential Services Act, S.S. 2008, c.P-42.2 (or parts and provisions thereof) violates The Canadian Charter of Rights and Freedoms, s.2(d), and are not saved by section 1 of the Charter, on the following grounds:

A. The Act infringes the freedom of association guaranteed by s.2(d) of the Charter by, inter alia, unreasonably, indefensibly and unduly restricting, abrogating or substantially interfering with the rights and abilities of the applicant trade union and its members: (1) to engage in meaningful collective bargaining with the Employer; and (2) to exert meaningful influence and pressure on the Employer during labour disputes including by stoppage of work, picketing and other lawful strike-related activities;

B. The Act does not provide for any meaningful mechanism, procedure or relief for: (1) violation of s. 9 and other provisions of the Act by the Employer; (2) the applicant trade union to dispute the statement by the Employer of which services and duties are "necessary to maintain essential services"; (3) for the applicant trade union to dispute whether all or part of the duties of an employee in a listed classification are "necessary to maintain essential services"; (4) for the Board to declare that a listed employee is not one that performs "essential services"; (5) for the Board to declare that a listed employee need only perform those duties of his or her full range of duties that are necessary "to maintain essential services", all of which constitute substantial interference with collective bargaining and the right to strike contrary to s. 2(d) of the Charter;

C. The Act, or portions thereof, is not reasonably necessary in a free and democratic society, and the breaches identified are not saved by s. 1 of the Charter;

(ii) A declaration that the Act or portions thereof violate international law binding upon Canada and its provinces pursuant to international treaties, other international instruments and membership in the International Labour Organization;

(iii) A declaration and permanent injunction that the Act is inoperative and of no force and effect in accordance with s. 52 of the Constitution Act, 1982; and

> *(iv) Damages pursuant to s.24 of the Constitution Act, 1982, the amount of which will be determined at the hearing of this matter.* [1]

[4] The Union served its Notice of Constitutional Question on both the Attorney General for Saskatchewan (the "Attorney General") and the Attorney General for Canada. The Attorney General for Canada declined to participate in these proceedings.

[5] At the direction of the Board, the parties appeared before the Board on November 9, 2009 to discuss a number of preliminary matters, including (and of particular significance) the procedure that should be utilized by the Board in hearing the Union's application, including the Constitutional challenge to the *PSES Act* in light of the rather unique circumstances associated with the Union's application. These circumstances included the following:

1. The Union's application was the first time the Board had been called upon to exercise the authority granted to it pursuant to the *PSES Act* and, thus, there was limited practice or procedure for the parties or the Board to rely upon as to how to proceed with the Union's application;

2. It appeared to the Board that all classifications of employees whom had been identified by the Employer as "essential" (i.e. required to continue to work in the event of a work stoppage) were in dispute, involving several hundred classifications affecting the status of several thousand employees;

3. It appeared to the Board that there had been little, if any, bargaining between the parties with a view to concluding an essential services agreement within the meaning of the *PSES Act; and*

4. The time constraints placed on the Board in adjudicating applications pursuant to the *PSES Act*.

[6] On November 9, 2009, the Board heard submissions from the parties on the appropriate process to be utilized by the Board in proceeding with the Union's application. The

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[1] On January 22, 2010, during argument by the parties, the Union advised the Board that it was abandoning its claim for a declaration and a permanent injunction that the *PSES Act* was inoperative pursuant to s. 52 of the *Constitution Act, 1982* and for damages pursuant to s. 24 of the *Constitution Act, 1982*.

Union also gave the Board notice of its intention to call Michael Lynk, the Associate Dean, Academic Faculty of Law, University of Western Ontario, as an expert witness.

[7] As a result the proceedings on November 9, 2009, the Board issued the following Order dated November 10, 2009, as amended by Order of the Board dated November 18, 2009:

ORDER

THE LABOUR RELATIONS BOARD, pursuant to Section 19 of *The Public Service Essential Services Act*, S.S. 2008, c.P-42.2 and Section 18 of *The Trade Union Act*, R.S.S. 1978, c.T-17, **HEREBY ORDERS:**

1. ***That*** *the Board deems it necessary to adjourn this matter for a period of thirty (30) days for purpose of hearing evidence and argument with respect to the jurisdictional and constitutional questions set forth in the Applicant's application. Further, that this matter shall be returnable to the Board following the expiration of the said thirty (30) day period on a date to be determined by the Board Registrar or, in the event a work stoppage, upon three (3) days notice.*

2. ***That****, for the sole purpose of determining the jurisdictional and constitutional questions identified in the Applicant's application that each party may select not more than three (3) classifications of positions that shall be deemed to be in dispute for purposes of hearing evidence and argument on the said questions. Further, that the Board Registrar, Fred Bayer, Labour Relations Board, is appointed agent of the Board for purposes of assisting the parties to the extent necessary in determining the classifications of position that shall be deemed in dispute or any other matters related to hearing the said jurisdictional and constitutional questions.*

3. ***That****, for each classification of positions identified by the parties and deemed to be in dispute for purpose of the said jurisdictional and Constitutional questions, the Union shall identify the number of employees which the Applicant believes to be necessary to maintain essential services and the Applicant's rationale or reasons in coming to that conclusion.*

4. ***That*** *proceedings with respect to the classifications of position not identified by the parties for purposes of hearing the said jurisdictional and Constitutional questions shall be adjourned sine die.*

5. ***That*** *this panel remains seized with this matter and to deal with any issues arising out of implementation of this Order.*

[8] With the assistance of the Board Registrar, the Union and the Employer agreed that the following classifications of positions would be deemed to be in dispute for purposes of hearing evidence and argument on the jurisdictional and Constitutional questions:

Classifications Selected by the Union:

Staff Scheduler – 4211 Albert Street

Recreational Worker – Regina Pioneer Village

Special Care Aide – Whitewood Community Health Centre

Classifications Selected by the Employer:

Licensed Practical Nurse – Pasqua Hospital- 4C

Medical Laboratory Technologist – Chemistry – Regina General Hospital

Environmental Service Worker – Pasqua Hospital

[9] With the assistance of the Board Registrar, the matter was set down for hearing to commence on December 16, 2009. On December 14, 2009, the Board Registrar received notice from Mr. Larry Kowalchuk indicating that he represented a number of trade unions who asserted interest in these proceedings and for whom he was seeking intervenor status.

Applications for Status before the Board:

[10] At the commencement of the proceedings on December 16, 2009, Mr. Kowalchuk appeared before the Board seeking status in these proceedings on behalf of eleven (11) organizations, each of whom were alleged to have an interest in the proceedings. Specifically, Mr. Kowalchuk brought an application seeking intervenor or party status on behalf of the organizations set forth below. The respective interests of each of the organizations were summarily described by Mr. Kowalchuk as follows:

Canadian Office and Professional Employees, Local 397

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.
- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who represents employees covered by the *PSES Act*.
- Who was in the middle of negotiations under the *PSES Act* with another employer.

Canadian Union of Public Employees, Local 4828

- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.

Health Sciences Association of Saskatchewan

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.
- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who represents employees employed by the Employer covered by the *PSES Act*.
- Who was in the middle of collective bargaining and negotiations with the Employer under the *PSES Act*.

International Association of Theatrical and Stage Employees, Local 295

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.
- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who represents employees covered by the *PSES Act*.

International Brotherhood of Electrical Workers, Local 2038

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.
- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who represents employees covered by the *PSES Act*.
- Who was in the middle of negotiations under the *PSES Act* with another employer.

International Brotherhood of Electrical Workers, Local 2067

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.
- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who represents employees covered by the *PSES Act*.
- Who was in the middle of negotiations under the *PSES Act* with another employer.

Saskatchewan Joint Board, Retail, Wholesale and Department Store Union

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.

- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who represents employees employed by the Employer covered by the *PSES Act*.
- Who was in the middle of collective bargaining and negotiations with the Employer under the *PSES Act*.

Saskatchewan Provincial Building and Construction Trade Council

- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who has member trade union who represents employees covered by the *PSES Act*.

Teamsters Local 395

- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.
- Who represents employees covered by the *PSES Act*.

United Association of Plumbers and Pipefitters, Local 179

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.
- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.

United Brotherhood of Carpenters and Joiners of America

- Who was a co-complainant on a complaint having been filed by several parties with the International Labour Organization (the "ILO") challenging the *PSES Act*.
- Who was a co-plaintiff on the Statement of Claim filed in the Court of Queen's Bench for Saskatchewan challenging the validity of the *PSES Act*.

[11] Mr. Kowalchuk took the position that his clients were interested parties within the meaning of section 16 of the *Regulations and forms, Labour Relations Board* (the "*Regulations*")[2]. Mr. Kowalchuk indicated that his clients were seeking party status to enable them to call evidence and present argument relative to the Constitutional and jurisdictional arguments set forth in the Union's application. In addition, Mr. Kowalchuk indicated that his

clients were also seeking standing to advance new legal issues before the Board related to, among other things, an allegation of potential institutional bias affecting the Board.

[12] In response to Mr. Kowalchuk's application, the Union took that position that it would not object to limited standing being granted to the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and the Health Sciences Association of Saskatchewan but not any of the other organizations seeking status before the Board. Counsel for the Union expressed the concern that the parties had already embarked upon a particular process for the purposes of hearing the Union's application; a process that had resulted from prior direction of the Board and cooperation of the parties; and that his process could be prejudiced if Mr. Kowalchuk's application was granted. The Employer objected to any of the applicant organizations being granted standing.

[13] After providing the parties with an opportunity to be heard, the Board denied Mr. Kowalchuk's application and declined to grant intervenor status (or any other status) to any of the application organizations. Firstly, the Board was not satisfied that s. 16 of the *Regulations* is applicable to an application before the Board pursuant to the *PSES Act*. The Board has adopted its own *Rules of Practice and Procedure*[3] for applications under the *PSES Act*; procedures that the Board deems appropriate for the handling of essential services applications. In so doing, the Board displaced the procedural relevance of the *Regulations* (if any existed prior to the Board's *Rules of Practice and Procedure*) to applications under the *PSES Act*. Even if the Board was satisfied that s. 16 of the Regulation was applicable to an essential services application, none of the applicant organizations had a sufficiently strong interest in these proceedings that they ought to have been provided notice pursuant to the *Regulations*; certainly the Board saw no evidence that the applicant organizations represented any of the employees in the bargaining unit that was the subject matter of the Union's application. Simply put, the Board was not satisfied that the application organizations had a sufficient or direct interest in the proceedings to be granted intervenor or party status. Secondly, the Board was not satisfied that it would be appropriate to grant interested party or any other limited status to the applicant organizations in these proceedings. To which end, the Board notes that the granting of such status is a discretionary decision of the Board to be exercised based on the facts and circumstances of a particular case. In the present case, the Board was mindful that this was the Union's application and that it had

[2] Saskatchewan Regulations 163/72 (effective August 1, 1972) as amended by Saskatchewan Regulations 225/81 and 104/83.

been framed in the manner deemed appropriate by the Union. Furthermore, the parties had embarked upon a particular process deemed appropriate by the Board for purposes of hearing and determining the issues arising pursuant to that application. The parties were well-prepared and represented by experienced counsel, independently capable of advancing and arguing the complex issues arising in these proceedings. Finally, the drafters of the *PSES Act* have clearly signaled that applications pursuant to the *Act* are to be expedited to the greatest extent possible. While the Board acknowledges that the applicant organizations may have an interest in the outcome of the proceedings (as may many other parties), in the Board's opinion, that interest alone is insufficient to overcome the potentially prejudicial impact of further complicating already complicated proceedings.

Facts:

[14] The evidence in these proceedings was received by the Board on December 16, 17 and 18, 2009. For the most part, the circumstances and events leading up to the Union's Application were not in dispute and thus have been summarized below.

[15] The parties have a mature bargaining relationship, with the Union representing a unit of approximately 5,500 to 6,000 employees of the Employer working in the health care sector, including full-time, part-time and casual employees. These employees work in various facilities across the geographic region for which the Employer is statutorily responsible for providing health care services to the citizens of this province. The members of the bargaining unit work in acute care facilities, long-term care facilities, rehabilitations facilities and various other regional health facilities and sites. There are approximately 300 different classifications of positions in the bargaining unit, ranging from nursing staff to trades and maintenance personnel.

[16] The current collective agreement between the parties expired on March 31, 2008. Although each party began collecting and developing proposals earlier, the first step in collective bargaining between the parties occurred on February 25, 2009, when the Union gave notice to the Employer to commence bargaining with respect to a new collective agreement.

[17] As with many sectors, collective bargaining in the health care sector has evolved to the meet the particular interests and needs of the parties engaged therein. There are

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[3] *The Public Service Essential Services Act Rules of Practice and Procedure,* published in the Saskatchewan Gazette Part I, Volume 105, No. 25, June 19, 2009.

approximately 40,000 workers in the health care sector. The Saskatchewan Association of Health Organizations ("SAHO") represents member organizations in collective bargaining with the various trade unions that represent workers in the health care sector ("provider unions"). The province of Saskatchewan is divided into large geographic regions, with the Employer being responsible for the Regina Qu'Appelle Health Region.[4] The Employer is a member of SAHO and, thus, SAHO represents the Employer in collective bargaining with its provider unions, including the Applicant.

[18] Collective bargaining in the health care sector is accomplished through two separate, yet corollary, bargaining processes. Firstly, the parties engage in collective bargaining at individual bargaining tables, whereat each provider union individually engages in bargaining with SAHO with respect to issues specific to that particular union. As the issues at that table draw to a conclusion, the parties then move to what was referred to as the "coalition" or "common" table, whereat all provider unions negotiate collectively with SAHO on matters of mutual interest as a coalition. Since 2005, the parties no longer negotiate with respect to wages and monetary issues at the individual bargaining tables. This change occurred in the last round of collective bargaining, during which the parties agreed that substantive monetary proposals would be negotiated at the common bargaining table, whereat all provider unions would negotiate collectively with SAHO regarding wages and benefits. This change was implemented in 2005 as a means of maintaining parity across the province following the completion of a Joint Job Evaluations of health care employees. The goal of the Joint Job Evaluation was to achieve some degree of parity in wages and benefits paid to employees in the health care sector following an earlier reorganization of health care in the province. The goal of deferring monetary issues to a coalition or common table was to maintain parity in wages and benefits across the sector.

[19] As stated, collective bargaining in the health care sectors starts at an individual bargaining table (between SAHO and an individual provider union) and then later advances to the common or coalition table (between SAHO and all provider unions). For obvious reasons, there is a degree of commonality in both the individual participants and the issues being negotiated at the various (2) bargaining tables. For example, the same representative of SAHO and provider unions may be engaged at bargaining at multiple tables. As indicated, this process

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[4] Pursuant to *The Regional Health Services Act*, S.S. 2002, c.R-8.2.

of bargaining at two (2) tables was utilized by the parties during the last round of collective bargaining, the result of which was the most recent collective agreement.

[20] As is often the case, change is the only constant and, before the parties could commence collective bargaining for a new collective agreement, a new factor was introduced affecting labour relations in the health care sector in Saskatchewan. This new factor was the introduction of *The PSES Act*, which became effective on May 14, 2008. The purpose and objectives of this *Act* are discussed later in these Reasons for Decision; at this point, it is sufficient to note that Section 6 of this *Act* directed the Employer and the Union to begin negotiations with a view to concluding an agreement that would, among other things, set out the classifications of employees who must continue to work during a work stoppage to maintain essential services, together with the number (and name) of employees in each such classification who must continue to work.

[21] In July of 2008 (following passage of the *PSES Act*), SAHO wrote to the provider unions, including the Applicant, and suggested that the parties hold preliminary discussions with respect to points of agreement, challenges and discussion processes for negotiations under the *PSES Act*. The Union's response to this suggestion was that, although it acknowledged that an essential services agreement was required by the *PSES Act*, the Union expressed concern about simultaneously negotiating with respect to both a new collective agreement and an essential services agreement. The Union advised the Employer that it would prefer to focus its energy on negotiating a new collective agreement with the Employer and that it had limited resources to engage in both activities at the same time. SAHO took the position that the *PSES Act* imposed statutory obligations on the parties to negotiate an essential services agreement and, if the Union was not prepared to negotiate on both fronts at the same time, that negotiations with respect to essential services took priority.

[22] Both SAHO and the Employer made a number of requests to meet with the Union to discuss essential services. The first and only meeting between the parties with respect to negotiating an essential services agreement occurred on October 31, 2008. As a result of this meeting, the Employer agreed to provide the Union with a list of essential positions; SAHO agreed to provide answers to a number of questions posed by the Union; and SAHO concluded that it would not be participating in negotiations with respect to essentials services issues; leaving these matters to be handled directly by the parties.

[23] On November 7, 2008, SAHO wrote to the Union and provided answers to a number of questions. The relevant portions of this document are set forth below:

> *Dear Mr. Keith;*
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> *As per your request for written answers to questions posed by CUPE in our October 31, 2008 meeting regarding essential services, I provide the following:*
>
> ***Q*** ***In the event of a work stoppage will there be cancellations (example given – reduction in surgeries)?***
>
> ***A*** *Each Regional Health Authority's (RHA) essential services plan contemplates a reduction in certain services as a result of a work stoppage (this could include a reduction of surgeries). As per the legislation, employer plans will define the services which are necessary to enable the employer to prevent:*
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> 1. *Danger to life, health or safety;*
> 2. *the destruction or serious deterioration of machinery, equipment or premises;*
> 3. *serious environmental damage.*
>
> ***Q*** ***What criteria will be used for selecting employee names?***
>
> ***A*** *Employers may use more than one criterion to select which employees are to be named as an essential services employee. These may include:*
>
> 1. *the use of the confirmed/provisional schedule to determine who is normally scheduled to work;*
> 2. *who typically does the work (i.e. which employees have any specific training/orientation required to effectively and safely perform the job);*
> 3. *in the event more than one employee meets the employer's needs and both/all are normally scheduled to work the shift, the employer will select the most senior employee(s).*
>
> *To be clear I provide the following example:*
> *Five employees in the same classification all with the same training/orientation to the department/service are scheduled to work the same shift. A work stoppage occurs and the essential service agreement/notice designates the number of employees as being essential as less than five. The employer will use seniority to utilize the necessary essential service employees.*
>
> *Notwithstanding the above, Section 7(1) of the Act contemplates the negotiation of provisions that set out the names of employees within an essential services agreement. We look forward to your position regarding this issue.*
>
> *. . .*
>
> *Lastly, with respect to your request for information listing the total number of employees in all departments, including their classification, status, (PT, FT, Casual) and whether they are essential or non-essential*

> *employees, most of this information is contained within the essential services plans that will be distributed to you prior to the November 24, 25 meetings. If additional information is required regarding the number of employees within a department, their classification and/or their status, that information can be requested of the Employer as essential service discussions occur on an unit/department/facility basis.*

[24] On November 10, 2008, the Employer provided the Union with its list of essential positions through a document entitled "Essential Services by CUPE Employees (as defined by the Employer)". In the months following, the Employer continued working on its draft essential services plan. On February 25, 2009, the Employer provided the Union with a draft copy of the Notice it anticipated issuing pursuant to s. 9 of the *PSES Act* in the event of a work stoppage and renewed its offer to meet with the Union to discuss issues related to the provision of essential services.

[25] With respect to collective bargaining, the current round began with an exchange of proposals between SAHO and the Union in September of 2008 at an individual bargaining table. In the ensuing months, the parties met on numerous occasions, discussing their respective collective bargaining proposals.

[26] During a collective bargaining session on May 22, 2009, the Union advised the Employer's bargaining committee that it intended to seek a strike mandate from its membership. On the basis of this information, the Employer served notices on the Union pursuant to section 9 of the *PSES Act* (i.e. the Section 9 Notices). It is these notices that are the subject matter of the Union's application before this Board.

[27] During these proceedings, the Union submitted five (5) affidavits and called four (4) witnesses, including an expert witness on domestic and international labour law. The Employer submitted fifteen (15) affidavits and called one (1) witness. The Crown elected to call no evidence. None of the parties cross-examined on opposing affidavits.

The Union's Evidence:

[28] The Union called Ms. Sinda Cathcart, the President of the Union. Ms. Cathcart testified that, when the Union received the Employer's draft essential services list in November of 2008 (i.e. the draft list of positions that the Employer thought to be essential), it appeared to the Union that the Employer believed that "every" classification of employees was essential because

the list was so extensive. Ms. Cathcart described the information the Union received as "*a cumbersome amount of material; a real wad of documents*". Simply put, Ms. Cathcart testified that the Union was concerned because it appeared that the Employer intended to designate "*everyone in the region*".

[29] Ms. Cathcart testified that the parties continued collective bargaining over the ensuing months. While Ms. Cathcart testified that there had been some proposals agreed to by the parties, "*there had not been much*" in terms of results from their collective bargaining sessions.

[30] Ms. Cathcart testified that the Union reviewed the Employer's essential services plan and calculated that the Employer had designated approximately eighty-seven percent (87%) of the bargaining unit as essential. Ms. Cathcart expressed the conclusion, based on the quantum of employees designated as essential, that the Employer wanted a "*business as usual*" level of operations in the event of a work stoppage. Ms. Cathcart described this level of designation as "*ridiculous*" when compared to the level of service that had been deemed essential by the Union in previous work stoppages.

[31] Ms. Cathcart testified that in 1999, the Union engaged in a one (1) day strike. In anticipation of that work stoppage, representatives of the Union held discussions with the Employer regarding the provision of certain essential services (described by the witnesses as "*emergent services in the event a critical incident arose*"). For the 1999 strike, the Union had voluntarily agreed that approximately four percent (4%) of their membership would remain "*on call*" during the work stoppage. The Union provided information to local managers as to how they were to contact the "on call" staff in the event of an emergency, which process was facilitated and monitored by Union representatives. Ms. Cathcart testified that the goal of the Union in making their members available during this work stoppage was to prevent "*loss of life and limb*". Ms. Cathcart testified that, in her opinion, the same test should be applied in determining the number of employees that are designated as essential under the *PSES Act*. In response to a question from the Board, Ms. Cathcart clarified that "*loss of limb*" was a metaphor for "*serious harm from coming to anyone*".

[32] Ms. Cathcart testified that, in her opinion, because of the 1999 strike, the Union was successful in obtaining concessions from the Employer. In addition, Ms. Cathcart testified

that, following the 1999 strike, the Employer thanked the Union for agreeing to continue to provide certain essential services and tendered the following document as evidence of the past cooperation between the Union and the Employer and the nature of the essential services that were deemed to be appropriate at that time:

> *To: Bill Stevens, President*
> *CUPE Local 3967*
> *From: Don Zerr, Director*
> *Human Resources*
> *Date: April 21, 1999*
> *Re: Essential Services*
>
> *While no one wants to see strike activity, we understand that it is the Union's right. Thank you and your executive for agreeing to negotiate the continuation of certain essential services during strike activity. Your appreciation of the need to allow certain staff to continue to deliver services during a strike demonstrates an understanding of the need for immediate response to ensure, to the extent possible, that loss of life is prevented.*
>
> *I have been informed that in scope CUPE staff carrying out essential services were instrumental in saving two lives during the work stoppage on Monday. Approximately 50 staff of 1,200 scheduled to work were deemed essential. I hope you agree that the infringement on 50 members is more than balanced off by the saving of lives.*
>
> *Thanks again for the cooperation.*

[33] Ms. Cathcart testified that in 2001 the Union was involved in a six (6) day work stoppage and that similar arrangements were put in place whereby approximately four percent (4%) of the Union's membership was permitted to be "on call" in the event emergent services were required by the Employer.

[34] Based on the percentage of their membership that the Employer had designated as essential, Ms. Cathcart concluded that the *PSES Act* had taken away the Union's right to strike because, in her opinion, the legislation had removed the capacity of the Union to impose "*inconvenience on the public*" or "*pressure on management*". Nonetheless, Ms. Cathcart testified that, in June of 2009, the Union sought and obtained a strike mandate from its membership, with eighty-eight percent (88%) of its membership voting in favour of strike action.

[35] Ms. Cathcart testified that another concern the Union had with the Employer's Section 9 Notices was that they did not define the list of duties that the designated employees were required to perform in the event of a work stoppage. The Union took the position that

employees who had been designated essential ought to only be required to perform “essential” duties in the event of a work stoppage.

[36] Finally, Ms. Cathcart testified with respect to the number of employees in each classification of disputed positions that the Union believed were necessary to maintain essential services.

- With respect to the “**Staff Schedulers** – 4211 Albert Street”, Ms. Cathcart noted that the Employer had designated fourty-three (43) of these employees as essential and the Union took the position that zero (0) should be required to work in the event of a work stoppage because these employees did not provide essential services. Ms. Cathcart indicated the Union’s rationale or reason in coming to this conclusion was that Staff Schedulers do not provide services to the public.
- With respect to the “**Recreational Workers** – Regina Pioneer Village”, Ms. Cathcart noted that the Employer had designated six (6) of these employees as essential and that the Union took the position that zero (0) should be required to work because they do not provide essential services. Ms. Cathcart indicated the Union’s rationale or reason in coming to this conclusion was that the temporary loss of the services provided by Recreational Workers would not harm the residents of the Regina Pioneer Village.
- With respect to the “**Special Care Aides** – Whitewood Community Health Centre”, Ms. Cathcart noted that the Employer had designated twenty-five (25) of these employees as essential and that the Union took the position that only five (5) should be required to work in the event of a work stoppage.
- With respect to the “**Licensed Practical Nurses** – Pasqua Hospital – 4C”, Ms. Cathcart noted that the Employer had designated eleven (11) of these employees as essential and that the Union took the position that only four (4) should be required to work in the event of a work stoppage.
- With respect to the “**Medical Laboratory Technologists** – Regina General Hospital”, Ms. Cathcart noted that the Employer had designated thirty (30) of these employees as essential and that the Union took the

position that zero (0) should be required to work but that five (5) should be on-call or placed on stand-by in the event of an emergent requirement for their services during a work stoppage.

- With respect to the "**Environmental Service Workers** – Pasqua Hospital", Ms. Cathcart noted that the Employer had designated seventy-two (72) of these employees as essential and that the Union took the position that only fifteen (15) should be required to work in the event of a work stoppage.

[37] The Union called Ms. Pearl Blommaert, the president of the Canadian Union of Public Employees, Local 4980. Ms. Blommaert testified that she had been involved in collective bargaining with the Employer on behalf of provider unions for over a decade (since 1998) and was a member of the Union's bargaining committee in the current round of negotiations with the Employer.

[38] Ms. Blommaert testified that shortly after the Union's 1999 strike, the Union and the Employer reached an agreement on a new collective agreement, wherein the Union was successful in obtaining a number of concessions from the Employer related to obtaining common terms and conditions of employment for their members. Ms. Blommaert explained that, following the health care reorganization that flowed from the Dorsey Commission, the Union inherited eight (8) different collective agreements. Many of these agreement contained differences in terms and conditions of employment for similar types of positions and the Union goal in bargaining following this reorganization was to move to more common terms and conditions. Ms. Blommaert testified that the Union had some success in doing so but was required to stage a work stoppage to obtain the concessions from the Employer which the Union deemed necessary and appropriate at that time. The resultant collective agreement was for the period April 1, 1998 to March 31, 2001.

[39] Ms. Blommaert testified that, for the next round of collective bargaining with the Employer, the Union's goal was obtaining improvements in the collective agreement that would promote a better balance between work and personal life for their members. Ms. Blommaert confirmed Ms. Cathcart's testimony that the Union staged a six (6) day work stoppage in 2001, during the collective bargaining process, and testified that the Union achieved a significant number of amendments to the collective agreement, made gains on parity issues, and was

successful in obtaining concessions from the Employer intended to address the proposals advanced by the Union. The resulting agreement was for the period April 1, 2001 to March 31, 2004.

[40] Ms. Blommaert testified that, in the next round of collective bargaining, the Union conducted a strike vote. However, before any work stoppage occurred, the Union and the Employer signed a memorandum of agreement. Ms. Blommaert testified that, in that round of collective bargaining, the Union was also successful in obtaining a number of gains for their members. The resulting collective agreement was for the period April 1, 2005 to March 31, 2008.

[41] With respect to the current round of collective bargaining with the Employer, Ms. Blommaert testified that the same format was being utilized as the last round of collective bargaining; with provider unions first negotiating at individual tables and then later moving to a common or coalition table to discuss monetary items. Ms. Blommaert described the current round of collective bargaining as "*difficult*", "*confusing*" and "*disorganized*". In addition, Ms. Blommaert testified that the Employer was seeking a number of concessions from the Union, which she described as "*significant take aways from our member's rights*". Ms. Blommaert's perception was that the Employer had a "*new attitude*" during the current round of collective bargaining; that they (the Employer's bargaining committee) were "*more difficult to engage in productive bargaining"*; they were "*only interested in discussing their proposals";* that "*they had more concessions on the table than in previously rounds"*; and they had "*no difficulty saying 'no" to the Union's proposals*".

[42] Ms. Blommaert testified that, when the Union advised the Employer's bargaining committee of the results of its strike vote (i.e. that 88% had voted in favour of strike actions), the Employer "*didn't seem to have any reaction at all*". Ms. Blommaert took this reaction (or rather lack of reaction) to indicate that the Employer knew that that Union was no longer able to stage an effective work stoppage based on the level of designation contained in the Employer's Section 9 Notice.

[43] Ms. Blommaert testified that, generally speaking, the parties had been meeting for collective bargaining approximately one (1) week per month until December of 2009, when bargaining stopped; that at that time both parties continued to have a number of outstanding

proposals on the table; and that they had recently agreed to return to collective bargaining with the assistance of a conciliator.

[44] The Union called Mr. Michael Keith, a National Service Representatives for the Canadian Union of Public Employees. Mr. Keith testified that he was the lead spokesperson for the Union at the current round of collective bargaining with the Employer at the individual table and a co-spokesperson at the coalition table, together with representatives for the other provider unions.

[45] Mr. Keith also described a perceived change in the Employer's attitude at the bargaining table in the current round of negotiations. Mr. Keith described collective bargaining as "*difficult*" and indicated that the relationship between the parties was strained. In Mr. Keith's opinion, progress was slower than in previous rounds and pointed to what he perceived to be a delay in moving to the coalition table to discuss monetary issues.

[46] Mr. Keith testified that in September of 2009, the Minister of Health challenged the parties to get "*down to business*" and, in response to that challenge, the Union made what it deemed to be a significant move wherein it withdrew 16-17 of its proposals from the table. Mr. Keith testified that the Employer's response was to withdraw only 4-5 proposals, which the Union felt were insignificant items. Mr. Keith testified that, in light of the Union's move, the Union's strike mandate, and the challenge from the Minister of Health, the Union saw the Employer's lack of movement as an indication that the Employer considered itself "*bullet proof*", which explained why the Employer's bargaining committee had been taking an "*extremely rigid position*" during collective bargaining.

[47] Mr. Keith testified that, at the time of the hearing, the parties had outstanding proposals at both the individual and coalition table as follows:

Outstanding Issues:	Union (CUPE):	Employer (SAHO):
Individual Table (CUPE):	14	25-30
Coalition Table	17	10

[48] The Union called Professor Michael Lynk as an expert witness. Professor Lynk was accepted by the Board as an expert in domestic and international labour law, including

public sector labour law and essential services legislation. However, the Board did note that this was the first time that Professor Lynk had testified as an expert witness with respect to essential services legislation.

[49] Professor Lynk both testified in person and presented a report to the Board, of which pages "**Part 1 – Broadly Accepted Principles on Freedom of Association in the Workplace**" was accepted by the Board as evidence in these proceedings.

[50] Professor Lynk advised the Board that the primary source for International Labour Law was the International Labour Organization (the "ILO"), which is a specialized agency formed by the United Nations devoted to workplace and employment issues. Professor Lynk testified that Canada was founding member and has been active in the ILO since it was formed in 1919.

[51] Professor Lynk testified that the ILO has adopted two (2) conventions dealing with freedom of association: the "*Freedom of Association and Protection of the Right to Organize Convention, 1948*" (ILO Convention No. 87) and the "*Right to Organize and Collective Bargaining Convention, 1949*" (ILO Convention No. 98). In Professor Lynk's opinion, these two (2) conventions were the cornerstone documents in international law on the freedom to associate in the workplace. While Canada has signed both conventions, Canada had only ratified Convention No. 87. The distinction being that signatory countries to ILO conventions have merely agreed to the convention "in principle". Conventions are not "binding" on signatory countries unless they ratify that convention. Canada has not ratified ILO Convention No. 98.

[52] Professor Lynk testified that the ILO formed a number of committees, including the "*Committee on Freedom of Association*" and the "*Committee of Experts*". Although its decisions are non-binding on signatory countries, including Canada, Professor Lynk described the *Committee on Freedom of Association* as the most influential adjudicative body in International Law with respect to shaping the meaning of freedom of association as it pertains to the right to work. Similarly, while the reports and observations of the *Committee of Experts* are non-binding, they were acknowledged by Professor Lynk as a leading and influential source for the interpretation of ILO standards, including ILO Conventions Nos. 87 and 98.

[53] Professor Lynk summarized the leading International Labour Law principles flowing from the ILO as they relate to collective bargaining in the public sector in paragraph 18 of his report:

> *Under the standards established by the International Labour Organization through its conventions and recommendations, and its Committee on Freedom of Association through its decisions, the leading principles of collective bargaining as they pertain to the public sector include the following:*
>
> *(i) As part of the positive duty upon a state to respect, protect and promote the freedom to associate, collective bargaining is to be made available for all employees of public undertakings and autonomous public institutions. Notwithstanding this, a state would have the capacity to exclude designated groups of public sector employees – those public section employees directly engaged in the administration of the state; those working in high-level or confidential positions; police services; and the armed forces – if it decided that that would be appropriate.*
>
> *(ii) Public section employees of public undertakings and autonomous public institutions are to enjoy those same civil and political rights as other employees that are fundamental to the normal exercise of freedom of association, subject only to those justifiable restrictions pertinent to their public sector status and the nature of their work.*
>
> *(iii) Compulsory arbitration is an exception to the broad right of public sector employees to engage in free and voluntary collective bargaining. It is "one of the most radical forms of intervention by the authorities in collective bargaining.*
>
> *(iv) The removal, in whole or in part, of the right to collective bargaining by public sector employees and its substitution by compulsory arbitration or some other method short of collective bargaining can be justified only the following two permanent circumstances;*
>
> *(i) in the case of those four designated groups listed above; or*
>
> *(ii) in essential services within the strict meaning of the term;*
>
> *And the following three temporary circumstances:*
>
> *(iii) an acute national crisis;*
>
> *(iv) where the parties have freely agreed; or*
>
> *(v) where, after the protracted and fruitless negotiations, it is clear that the deadlock will only be broken through an initiative of the government/authorities, provided that the principles of free and voluntary collective bargaining have been fully satisfied up to that point.*
>
> *(v) To be compatible with the fundamental right to collective bargaining by employees, essential services are to be given a strict and purposive meaning. Essential services are those services whose interruption would endanger the life, personal safety or health of part or whole of the population.*

> *A broader or more elastic definition of essential services would be incompatible with the general right to collective bargaining by public sector employees.*
>
> *(vi) In order to gain and maintain the confidence of the industrial relations parties, any compulsory arbitration system is to be truly independent and the outcomes of arbitration should not be predetermined.*
>
> *(vii) Where a Parliament or a legislature have set targets or ceilings for wage settlements, they must nevertheless "leave a significant role or to collective bargaining." Moreover, it is essential that "workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework.*

[54] Professor Lynk described the leading principles flowing from the ILO as they relate to the right to strike in the public sector in paragraph 26 of his report:

> *The Committee of Experts has cautioned that the determination of which public sector employees would have the right to strike denied or restricted must be exercised as a limited and confined exception to the general right. The exercise in restricting access to the right must be minimal and proportional:*
>
> > *The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be denied restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.*

[55] Finally, with respect to the application of essential services legislation to the right to strike for public sector employees, Professor Lynk described the leading principles flowing from the ILO at paragraph 30 of his report:

> *A government would be entitled to legislate restrictions or even prohibitions on the right to strike for public sector employees working in essential services. However, to be compliant with the ILO standards, a government would have to ensure the following:*
>
> *(i) The public services that are targeted for the withdrawal of services genuinely meet the definition of essential services in its strict and proper sense;*
>
> *(ii) The guiding test for the restriction or prohibition of the right to strike would be based on the minimal and proportional analysis;*

> *(iii) The first permissible exception to the broad and general right to strike that is to be explored would be a partial and restricted right to strike;*
>
> *(iv) The scope for a partial and restricted right to strike is to be drawn as purposively as possible in order to establish the minimum amount of services that can be offered during a strike that are sufficient to avoid endangering the life, personal safety or health of the whole or part of the population, while allowing for as comprehensive an exercise of the right as possible in the circumstances;*
>
> *(v) A partial and restricted right to strike that compels an unnecessarily broad number of employees to continue to work and leaves only a relatively small number of employees with the ability to strike would make the exercise of the right futile, and the right to collectively bargain a hollow guarantee;*
>
> *(vi) In determining the appropriate level of minimum services for a partial and restricted strike, provision is to be made for the meaningful involvement of the trade union(s) to establish the appropriate levels;*
>
> *(vii) That, if it genuinely determined that even a partial and restricted strike would nevertheless endanger the life, personal safety or health of the whole or part of the population based on the minimal and proportional analysis, then the right to strike can be prohibited;*
>
> *(viii) Where the right to strike in an essential service cannot be permitted, then the government must erect an "adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made are fully and promptly implemented. In such mediation and arbitration proceedings, it is essential that all the members of the bodies entrusted with such functions should be impartial and seen as such by both the employers and the workers concerned.*

The Employer's Evidence:

[56] The Employer called Mr. Allan Parenteau, who was an employee of SAHO and the SAHO's chief spokesperson during the current round of collective bargaining between the Employer and the Union. Mr. Parenteau testified that he joined SAHO in 2006 and that the current round of collective bargaining had been his first experience at the table between these parties.

[57] Mr. Parenteau testified that the Union initially presented 125 proposals at the individual table and the Employer presented 87 initial proposals, with the Employer's monetary proposals being reserved for the common table. Mr. Parenteau indicated that, by the time the parties moved to the common table, they had made progress at the individual table, although the Union still had 22 outstanding proposals and the Employer had 17 items left to address.

[58] Mr. Parenteau described the current round of collective bargaining as "*long*", "*cordial at times",* but also "*confrontational*" at other times. Mr. Parenteau indicated that, other than one (1) incident, in his opinion, this current round of collective bargaining with the Union had been no more confrontational than other collective bargaining in which he had been involved. Mr. Parenteau indicated that in December of 2009, the Union placed an advertisement in the Saskatoon StarPheonix newspapers specifically naming and ascribing negative comments to an individual member of the Employer's bargaining committee. In Mr. Parenteau's experience, this was the first time that a union had publicly named an individual member of an employer bargaining committee and the Employer saw this step as very unusual and inappropriate.

[59] Mr. Parenteau testified that there had been progress at the bargaining table with the parties agreeing to over thirty (30) proposals. In response to questions by Counsel for the Attorney General, Mr. Parenteau indicated that the Employer's position on collective bargaining had not been affected by the introduction of the *PSES Act*; that the Employer had said "*no*" to the Union in the past and had done so in the current round of collective bargaining irrespective of the *PSES Act*; and that in his opinion, the Union had been the more contentious party.

Affidavit Evidence;

[60] Finally, it should be noted that both the Employer and the Union filed affidavits in support of their respective positions with respect to the number of employees in each disputed classification (i.e. the classifications of positions deemed to be in dispute for purposes of this portion of the Union's application) that were "essential" (i.e. should be required to work in the event of a work stoppage to maintain essential services). Because of our disposition of this portion of the Union's application, we have declined to comment on this evidence other than to state that we have reviewed it.

Argument of the Parties:

[61] By agreement, all parties filed written arguments and briefs of law, together with written submissions in reply to the arguments filed by other parties. In addition, the parties appeared before the Board on January 22, 2010 to make oral submissions. The Board has reviewed this material and thanks the parties for the thoroughness and thoughtfulness that went into their presentations.

[62] As indicated, the Union's application was multiplex, challenging both the *PSES Act* and the Employer's Section 9 Notice. The Union's argument in support of its application can be summarized as follows.

[63] With respect to the challenge to the *PSES Act*, the Union took the position that sections 2(c), 7(2), 9(2) to (6), 10(1), 10(4), 12(2) and 14 are in contravention of section 2(d) of the *Canadian Charter of Rights and Freedoms*; are not saved by section 1 of the *Charter*; and therefore ought to be either read down or read out by the Board in deciding the Union's Application.

[64] The Union argued that the definition of "essential services" in s. 2(c) of the *PSES Act* was too broad and, thus, constitutes a substantial interference in the Union's freedom of association and/or its right to strike. The Union argued that the definition of essential services in the *Act* should be read down so as to be consistent with the standards established by the ILO and its various committees for defining essential services in the public sector, which hold that the right to strike may only be restricted in limited and confined circumstances. For example, the definition of "essential services" must be based on a minimal and proportional analysis of the degree of probable danger to life, personal safety and health with a goal to defining a minimum level of service sufficient to avoid endangering life, personal safety or health of the public, while at the same time allowing for as comprehensive an exercise of the right to strike as possible. The Union argued the legislation, as evident by the designation by the Employer of eighty-seven percent (87%) of the Union's membership as essential, has failed to meet the requisite minimal and proportional analysis required by International Law.

[65] In regard to the remaining impugned provisions of the *PSES Act*, the Union argued that they ought to simply be read out of the *Act* on the basis that their inclusion in the *Act* constituted a substantial interference in the Union's freedom of association and/or its right to bargain collectively and/or its right to strike.

[66] Concomitant with such findings, the Union then asked the Board to make the following determinations, rulings or Orders with respect to the Employer's Section 9 Notice:

- To make a determination that the Board has the authority to define the essential services that are required to be maintained during a work

stoppage (and presumably to provide an opportunity for the parties to tender evidence to enable to the Board to make such a determination in the present application).

- To making a determination that the Board has the authority to define the classification of employees that must continue to work during a work stoppage to maintain essential services.
- To make a determination that the Board has the authority to define the names of the employees within each such classification who must work during a work stoppage to maintain essential services (and presumably to provide an opportunity for the parties to tender evidence for such a determination).
- To make a determination that designated employees are only required to perform those duties (within his or her complete range of duties) that are "essential services" within the meaning of the *PSES Act*.
- To make a determination that, in defining the number of employees who must work during a work stoppage to maintain essential services, regard should be given to the availability of management personnel to perform essential services and, in fact, a presumption should exist that management personnel, possessing sufficient qualifications, would be expected to perform essential services in the event of a work stoppage.

[67] In seeking these remedies from the Board, Counsel for the Union acknowledged that for the Board to do so, the Board must first be prepared to read down or read out the impugned provisions of the *PSES Act*, which for the most part placed restrictions on the jurisdiction of the Board. To which end, the remedies being sought from the Board by the Union were based on what was described as a *Charter* compliant *Act*, not the *PSES Act* as drafted in its present form. In other words, the Union asked the Board to read down/out the offending provisions of the *PSES Act* and to rule on the Union's Application in light of the remaining provisions of the *Act*. In which case, the Union argued the question before the Board would then be simply, "*what are the essential services provide by the Employer and who needs to provide those services during a work stoppage?"*

[68] In arguing that the provisions of the *PSES Act* ought to be read down/out, the Union relied upon the evidence of Professor Lynk and his description of the principles in

International Labour Law flowing from the ILO as they relate to collective bargaining in the public sector, the right to strike in the public sector, and the application of essential services legislation for public sector employees. The Union argued that, with respect to determining the meaning and content of the section 2(d) guarantee of the freedom of association, International Labour Law was a critical interpretive source and that the *Charter* should be presumed to provide no less protection for the freedom of association than that set out by the definitions and standards of the ILO and, in particular, the decisions and reports of the ILO's Committee on Freedom of Association and the Committee of Experts. The Union argued that, to satisfy the section 2(d) guarantee of the freedom of association, as a minimum, the *PSES Act* must be compliant with the principles described by Professor Lynk for restricting the right to strike in the public sector. In taking this position, the Union relied upon, *inter alia*, the dissent of Chief Justice Dickson (as he was then), in *Reference Re: Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313.

[69] The Union also relied upon the decision of the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S. C.R. 391, 283 D.L.R. (4th) 40, 7 W.W.R. 191, wherein the court concluded that s. 2(d) of the *Charter* provided a protection for the process of collective bargaining. The Union argued that the *PSES Act* represents a substantial interference in the Union's right of collective bargaining by interfering (fatally so, in the Union's opinion) in the ability of the Union to engage in meaningful negotiations with the Employer. The Union argued that the legislation effectively removed the ability of the Union to place meaningful pressure on the Employer through the withdrawal of the services of its members; either directly by requiring managers to perform the duties of striking members or indirectly by causing inconvenience to the public.

[70] In interfering in the process of the collective bargaining process between the parties, the Union argued that the impugned provisions of the *PSES Act* violated the Union's right of collective bargaining as defined by the Supreme Court in *B.C. Health Sciences*, supra. The Union also pointed to a number of decisions since *B.C. Health Sciences, supra*, wherein various boards and courts have dealt with the meaning of the freedom of association and its application to various circumstances, including *Confederation des syndicates nationaux v. Quebec (Procureur general), [2007] J.Q. No. 13421 (Quebec Superior Court.); Confederation des syndicates nationaux v. Quebec (Procureur general), [2008] QCCS 5076 (Quebec Superior Court); Fraser v. Ontario (Attorney General)*, [2008] O.J. No. 4543 (Ontario Court of Appeal);

Mounted Police Assn. of Ontario v. Canada (Attorney General), [2009] O.J. 1352 (Ontario Superior Court); *Canadian Union of Public Employees v. New Brunswick*, [2009] N.B.J. No. 185 New Brunswick Court of Queen's Bench); *United Food and Commercial Workers Union, Local 401 v. Old Dutch Foods Ltd., et. al.,* [2009] Alta. L.R.B.R. GE-05611 (Alberta Labour Relations Board); and *Independent Electricity Market Operator*, [2009] O.L.R.D. No. 4330 (Ontario Labour Relations Board).

[71] In addition (and potentially in the alternative), the Union argued that section 2(d) of the *Charter* also provided a limited protection for the right to strike itself. In taking this position, the Union argued that, while no tribunal or court in Canada had yet specifically pronounced that such a right existed, a limited protection for the right to strike, itself, could be inferred by the decision of the Supreme Court of Canada in *B.C. Health Services, supra,* on the basis that the protection provided to collective bargaining pursuant to s. 2(d) of the *Charter* is conceptually indistinguishable from the right to strike and that there is no basis in law for protecting one right (the right to engage in collective bargaining) pursuant to the freedom of association while not recognizing the other (the right to strike). Of particular significance, the Union pointed to the words of Otto Kahn-Freund, which were adopted by Dickson, C.J. in the *Alberta Reference*, "*if the workers could not, in the last resort, collectively refuse to work, they can not collectively bargain*". To which end, the Union argued that the *PSES Act* also results in a violation of s. 2(d) of the *Charter* by substantial interference with the Union's right to strike (by essentially the same means that the legislation is alleged to have violated the Union's right to bargain collectively) without providing another mechanism for dispute resolution (such as binding arbitration). In taking this position, the Union relies again upon the dissent of Dickson, C.J. in the *Alberta Reference, supra,* and a not insignificant volume of scholarly publications from various academics ruminating on the meaning of the freedom of association following the Supreme Court's decision in *B.C. Health Services, supra,* and whether or not the right to strike ought to be included within the protected afforded by s. 2(d) of the *Charter*.

[72] In the alternative (i.e. in the event the Union was unsuccessful in its *Charter* challenge of the *Act*), the Union asked the Board to define the number of employees who must work during a work stoppage to maintain essential services based on the evidence of Ms. Cathcart. Specifically, the Union asked the Board to vary the Employer's Section 9 Notice by:

- Reducing the number of Staff Schedulers (at 4211 Albert Street) required to work during a work stoppage from fourty-three (43) to zero (0).

- Reducing the number of Recreational Workers (at the Regina Pioneer Village) required to work during a work stoppage from six (6) to zero (0).
- Reducing the number of Special Care Aides (at the Whitewood Community Health Centre) required to work during a work stoppage from twenty-five (25) to five (5).
- Reducing the number of Medical Laboratory Technologists (at the Regina General Hospital) required to work during a work stoppage from thirty (30) to zero (0); but directing that five (5) such persons should remain on call in the event of an emergent requirement of services.
- Reducing the number of Environmental Service Workers (at the Pasqua Hospital) required to work during a work stoppage from seventy-two (72) to fifteen (15).

[73] The Employer asked the Board to dismiss the Union's challenge(s) to the *PSES Act* and to dispose of the Union's Application in accordance with the provisions of that *Act* (i.e. without amendment or alteration). The Employer's position and argument have been summarized.

[74] Firstly, the Employer took the position that the Board does not have the scope of jurisdiction to apply the *Charter* to the extent desired by the Union. Specifically, the Employer argued that the Board does not have jurisdiction to issue a declaration that the *PSES Act* is of no force and effect; nor does the Board have independent authority to issue a declaration that the legislation violates International Labour Law. While the Employer was satisfied that the Board had jurisdiction to apply and make determinations pursuant to the *Charter* in adjudicating the Union's Application, the Employer took the position that the Board's jurisdiction was limited by the scope of authority delegated to the Board pursuant to the Act; specifically, that the Board's jurisdiction to determine *Charter* issues was limited to the application of s. 10 of the *Act*. In taking this position, the Employer relied upon the decisions of the Supreme Court of Canada in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Nova Scotia (Workers Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

[75] The Employer argued that s. 10 of the *PSES Act* does not involve any violation of the *Charter*. To the contrary, the Employer argued that s. 10 is one of the features of the Act that

makes the legislation *Charter* compliant by providing an independent body to adjudicate disputes between provider unions and employers as to the appropriate level of service sufficient to avoid endangering life, personal safety or health of the public, while at the same time allowing for as comprehensive an exercise of the right to strike as possible.

[76] In addition (and potentially in the alternative), the Employer argued that none of the impugned provisions of the *PSES Act*, nor the restrictions placed therein on the Union's right to strike, results in a violation of the *Charter*. In taking this position, the Employer noted that the Supreme Court did not protect all aspects of collective bargaining in *B.C. Health Services, supra*. The Employer argued that, unlike the impugned legislation in *B.C. Health Services, supra*, the *PSES Act* does not substantially interfere with the "process" of collective bargaining as envisioned by the Supreme Court. The Employer argued that the Union's challenged to the *PSES Act* was attempting to extend the limited protection defined by the Court for collective bargaining beyond that actually granted by the Court in *B.C. Health Services, supra*. To which end, the Employer relied upon the decision of the Supreme Court of Canada in *Plourde v. Wal-Mart Canada Corp*, [2009] S.C.J. No. 54., wherein the Court cautioned that its decision in *B.C. Health Services, supra*, should not be extended beyond its natural limits.

[77] With respect to the application of International Labour Law, the Employer took the positions that the *PSES Act* complies with the obligations set forth in the conventions of the ILO which have been ratified by Canada. Even if it could be said that the *PSES Act* may be inconsistent with the definitions, values or principles flowing from the ILO, International Law is merely one of many factors that should be taken into consideration in determining whether or not the provisions of the *PSES Act* violated the *Charter*.

[78] Finally, the Employer argued that, even if it could be said that the *PSES Act* substantially interfered with the Union's right to bargain collectively contrary to s. 2(d) of the *Charter*, the infringement represented a reasonable limit in a free and democratic society so as to be saved by s. 1 of the *Charter*. The Employer argued that the continuation of essential health care services in the event of a work stoppage was a pressing and substantial concern; that the means chosen by the legislature was rationally connected to the objective of the legislation; that the *PSES Act* falls within a range of reasonable alternatives that minimally impairs the *Charter* protected rights; and that there was a proportionality between the salutary benefits of the legislation with its deleterious effects.

[79] In conclusion, the Employer asked the Board to dismiss the Union's challenge(s) to the *PSES Act* and to dispose of the Union's Application in accordance with the provisions of that *Act* as drafted by the Legislature. To which end, the Employer argued that its Section 9 Notices were compliant with the requirements of the *PSES Act* and that the Board should confirm the number of employees in each of the disputed classifications as set forth in the Employer's Section 9 Notices.

[80] The argument advanced by Counsel for the Attorney General was very similar to that advanced by the Employer with one (1) important exception. The Attorney General took the position that the Board does not have jurisdiction, either express or implied, to adjudicate the Constitutionality of the *PSES Act*. The Attorney General argued that examining the statutory scheme of the *PSES Act*, and the limited role of the Board therein, leads to the conclusions that the legislature did not intend this Board to adjudicate questions of law and, thus, questions of *Charter* compliance. The Attorney General noted the limited authority that had been delegated to the Board pursuant to the *Act*, which Counsel argued was for the Board to determine the number of employees in disputed classifications of positions that are "essential". Counsel argued that the Board's limited scope of authority was insufficient to clothe the Board in jurisdiction to adjudicate the constitutionality of the impugned provisions of the legislation. In taking this position, the Attorney General relied upon the decision of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504. Simply put, the Attorney General argued that the Board's role in the scheme of the *PSES Act* (albeit an important role within the scheme of the *Act*) was limited to determining "numbers" and that this limited authority was insufficient to give this Board the jurisdiction to answer the Constitutional questions raised by the Union's Application. As a consequence, the Attorney General argued that the Union's *Charter* challenge to the *PSES Act* should be dismissed.

[81] The Attorney General argued (in the alternative) that, if we conclude that we have authority to entertain the Applicant's constitutional questions, the Board's jurisdiction to do so is limited to the particular provisions which are relative to the outcome of the proceedings before its. In other words, the Attorney General took the position that, if the Board does have authority to apply the *Charter*, the Board's jurisdiction is limited to s. 10 of the *PSES Act* and, in particular, s. 10(3). The Attorney General argued that s. 10 provides a mechanism whereby trade unions may seek the review by an independent tribunal of the number of its members that have been

designated as essential by an employer (i.e. required to work to maintain essential services in the event of a work stoppage). The Attorney General argued that, if this Board has any jurisdiction to decide the *Charter* compliance of the *PSES Act*, our jurisdiction is limited to deciding whether or not this process is *Charter* complaint (i.e. the process of having an independent tribunal hearing and determine disputes between employers and trade unions as to the number of positions necessary to maintain essential services in the event of a work stoppage) and not the broader constitutional issues related to the larger scheme of the *Act*, including the definition of "essential services" or whether the other impugned provisions of the *Act* are consistent with the *Charter*.

[82] With respect to the *Charter* compliance of s. 10, the Attorney General argued that the provision does not involve any violation of the *Charter*. As did the Employer, the Attorney General argued that s. 10 is one of the features of the *Act* that makes the legislation *Charter* compliant by providing an independent tribunal to adjudicate disputes between the Union and Employer as to the appropriate level of service sufficient to avoid endangering life, personal safety or health of the public, while at the same time allowing for as comprehensive an exercise of the right to strike as possible.

[83] The Attorney General took the position that the province of Saskatchewan has legislative jurisdiction over labour relations and thus may design laws to reflect local issues and concerns. As did the Employer, the Attorney General noted that the Supreme Court of Canada, in *Plourde, supra*, expressly reiterated the fundamental and well-established principle that "*in a federal state there is no requirement that provincial regulatory schemes must align themselves*". In addition, the Court went on to conclude that a "*distinguishing characteristic of federalism is that in matters of provincial labour relations, the various provinces are free to strike their own balance according to their varying circumstances and attitudes*". Counsel argued that the *PSES Act* is a valid exercise of jurisdiction by the province and that, through this legislation, the legislature had struck a balance; a balance which this Board should be cautious not to interfere with.

[84] The Attorney General argued that the tenor of the evidence before the Board in these proceeds was that, although the current round of collective bargaining was difficult and prolonged, it was progressing. The Attorney General argued that there was no evidentiary basis to support a finding that the effect of the *PSES Act* was to substantial interfere with the ability of

the Union to bargain collectively with the Employer or that it was otherwise in violation of the minimal standards laid down by the Supreme Court of Canada in *B.C. Health Services, supra*.

[85] As did the Employer, the Attorney General noted that the Court in *B.C. Health Services, supra*, took pains to underscore the fact that the right to bargain collectively was confined to "*the procedural right of collective bargaining*" and not to a particular model of labour relations. To which end, the Attorney General argued that the Union was urging this Board to extend the protection afforded by the Court in *B.C. Health Services, supra*, beyond its natural limits, something that the Court in *Plourde, supra*, cautioned courts not to do. Simply put, the Attorney General argued that the right to strike has not be recognized as a Constitutionally protected right in Canada and that it would be an error of law for this Board to directly or indirectly extend the limited protection granted by the Court in *B.C. Health Services, supra,* to the right to strike, itself

[86] With respect to the application of International Law, the Attorney General cautioned that the Union appeared to be urging the Board to treat the standards of the ILO (and its various committees) as an independent source for a finding of a violation by the impugned provisions of the *PSES Act*. The Attorney General argued that, although the principles flowing from International Labour Law may be of assistance by informing *Charter* interpretation, they do not form a separate basis for a finding of a constitutional or *Charter* violation.

[87] As did the Employer, the Attorney General argued that, even if it could be said that the *PSES Act* substantially interfered with the Union's right to bargain collectively contrary to s. 2(d) of the *Charter*, the infringement represented a reasonable limit so as to be saved by s. 1 of the *Charter*. The Attorney General argued that in analyzing the constitutionality of the *Act*, the Board may rely on both direct evidence and evidence obtained through the application of common sense and inferential reasoning. The Attorney General argued that purpose and objectives of the *PSES Act* are self-evident on a plain reading of the legislation. As did the Employer, the Attorney General argued that the continuation of essential health care services in the event of a work stoppage was a pressing and substantial concern; that the means chosen by the legislature was rationally connected to the objective of the legislation; that the *PSES Act* falls within a range of reasonable alternatives that minimally impairs the Union's *Charter* protected rights; and that there was a proportionality between the salutary benefits of the legislation with its deleterious effects. To which end, the Attorney General noted that s. 10 of the *PSES Act* affords

the Union with the opportunity to challenge the numbers designated by the Employer through its Section 9 Notices and, thus, any impairment of the Union's freedom of association is mitigated by the fact that the Board, an independent tribunal, will assess the Employer's designations and determine if they are appropriate.

[88] Accordingly, the Attorney General asked this Board to dismiss the Union's *Charter* challenge to the *PSES Act*. The Attorney General took no position with respect to the other aspects of the Union's Application (i.e. whether or not the Employer's Section 9 Notice should be affirmed or varied).

Relevant statutory provision:

[89] The relevant provisions of *The Public Service Essential Services Act* are as follows:

> ***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*
>
> *…*
>
> ***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.*
> *(2) For the purposes of clause (1)(c), the number of employees in each classification who must work during the work stoppage to maintain essential services is to be determined without regard to the availability of other persons to provide essential services.*
>
> *…*

9*(1) A public employer shall serve a notice on the trade union in accordance with this section if:*

(a) there is a work stoppage or a potential work stoppage; and

(b) there is no essential services agreement concluded between the public employer and the trade union.

(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.

(3) The public employer shall notify each of the employees named in a notice served pursuant to subsection (1) that he or she must work during the work stoppage to maintain essential services.

(4) If at any time the public employer determines that more employees in one or more classifications set out in the notice served pursuant to subsection (1) are required to maintain essential services and there is no essential services agreement concluded between the public employer and the trade union, the public employer may serve a further notice on the trade union setting out:

(a) the additional number of employees in those classifications who must work during all or any part of the work stoppage to maintain essential services; and

(b) the names of the employees within those classifications who must work.

(5) The public employer shall notify each of the employees named in a notice served pursuant to subsection (4) that he or she must work during the work stoppage to maintain essential services.

(6) Every employee who is named in a notice pursuant to this section, other than a further notice served pursuant to subsection (7), is deemed to be an essential services employee.

(7) If at any time the public employer determines that fewer employees in one or more classifications set out in the notice served pursuant to subsection (1) are required to maintain essential services and there is no essential services agreement concluded between the public employer and the trade union, the public employer may serve a further notice on the trade union setting out:

(a) the number of employees in those classifications who are no longer required to work during all or any part of the work stoppage; and

(b) the names of the employees within those classifications who are no longer required to work during all or any part of the work stoppage.

(8) The public employer shall notify each of the employees named in a notice served pursuant to subsection (7) that he or she is no longer required to work during all or any part of the work stoppage.

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.

…

12*(1) If the result of an order of the board issued pursuant to section 10 or 11 is to reduce the number of essential services employees in each classification who must work during the work stoppage to maintain essential services, the public employer shall, as soon as possible after being served with the order:*

(a) vary the notice served pursuant to section 9 to comply with the order of the board;
(b) serve a copy of the varied notice on the trade union; and
(c) notify any affected employee that he or she is no longer required to work during the work stoppage.

(2) If the result of an order of the board issued pursuant to section 10 or 11 is to increase the number of essential services employees in each classification who must work during the work stoppage to maintain essential services, the public employer shall, as soon as possible after being served with the order:

(a) vary the notice served pursuant to section 9 to comply with the order of the board;
(b) serve a copy of the varied notice on the trade union; and
(c) notify any affected employee that he or she must work during the work stoppage to maintain essential services.
(3) An order of the board issued pursuant to section 10 or 11 is effective 48 hours after the public employer was served with the order.

…

14 *No essential services employee shall participate in a work stoppage against his or her public employer.*

Analysis and Conclusions:

[90] Although the Board was asked to decide a matrix of legal questions flowing from the Union's Application and the Constitutional and jurisdictional questions contained therein, because of the conclusions we have reached herein, we have decided to confine our analysis to the following questions:

- Does this Board have jurisdiction to adjudicate the Constitutional questions set forth in the Union's Application and, if so, what is the extent or scope of that jurisdiction?
- Do sections 2(c), 7(2) and 10 of the *PSES Act*, or any of them, violate s. 2(d) of the *Charter*?
- If the *PSES Act* violates s. 2(d) of the *Charter*, is such infringement a reasonable limit pursuant to s. 1 of the *Charter*?
- What is the appropriate Order of the Board?

Does the Board have jurisdiction to adjudicate the Constitutional questions set forth in the Union's Application and, if so, what is the extent or scope of that jurisdiction?

[91] Section 52 of the *Constitution Act, 1982*, states that the Constitution of Canada is the supreme law of Canada and that any law that is inconsistent with the provisions of the Constitution is, to the extent of that inconsistency, of no force and effect. The Supreme Court of Canada has affirmed that, in appropriate circumstances, an administrative tribunal has authority (and arguably an obligation) to determine if legislative provisions that arise in matters before it are constitutionally valid. See: *Douglas/Kwantlen Faculty Association v. Douglas* College, supra, and *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), supra*. The Union asked this Board to subject the province's new *PSES Act* to *Charter* scrutiny, alleging that various provisions infringe s.2(d) of the *Canadian Charter of Rights and Freedoms*. The Attorney General took the position that, in the circumstances of the *PSES Act*, this Board has no jurisdiction to entertain any of the alleged *Charter* defects in the legislation. On the other hand, the Employer argues that this Board has limited jurisdiction to entertain certain of the Union's Constitutional questions.

[92] In *Nova Scotia (Workers' Compensation Board) v. Martin, supra*, the Supreme Court of Canada summarized the legal principles relevant to the jurisdiction of administrative tribunals with respect to the application of the *Charter*. At paragraph 48, Gonther J. wrote the following on behalf of the unanimous court:

> *The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to Charter scrutiny can be summarized as follows: (1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. (2)(a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. (b) Implied jurisdiction must be discerned by looking at the*

> *statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the Charter. (4) The party alleging that the tribunal lacks jurisdiction to apply the Charter may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the Charter; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the Charter (or a category of questions that would include the Charter, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.*

[93] There is no express grant of jurisdiction for this Board to decide questions of law in the *PSES Act*. On the other hand, s. 19 provides this Board with all the powers conferred on it by *The Trade Union Act*, R.S.S. 1978, c.T-17 and it is accepted that this Board has implied jurisdiction to decide questions of law in adjudicating issues pursuant to that *Act*. Therefore, s. 19 of the *PSES Act* would appear to clothe this Board in jurisdiction to decide questions of law (and, thus questions of *Charter* compliance) in adjudicating applications pursuant to the *Act*. However, to find the requisite implied jurisdiction (i.e. absent express jurisdiction), the Board is obligated to look to the statute as a whole and not just a singular provision. In doing so, we must examine the statutory scheme to determine the legislative intent; to determine if sufficient jurisdiction has been delegated in the Board in the *PSES Act* to decide questions of law; or, conversely, if the legislature has intended to exclude questions of law, generally, or categories of questions of law, such as questions related to Constitutional compliance, from the scope of the questions intended to be addressed by the Board.

[94] Two (2) important factors are self-evident from a plain reading of the *PSES Act*. First, unlike the *Trade Union Act*, the range of issues that has been delegated to this Board to adjudicate is extremely narrow; on the face of the legislation, the Board's role (as suggested by the Attorney General) is to determine "numbers". The Union argued that, in selecting this Board, with its expertise in labour relations, the legislature intended a more expansive role in deciding issues arising out of disputes between employers and trade unions under the *PSES Act*. With all due respect, we can not accept this argument. The Board acknowledges that we have been delegated broad jurisdiction and authority pursuant to the *Trade Union Act* and that this Board

has been selected to adjudicate disputes between employers and trade unions pursuant to the *PSES Act* (with respect to the number of positions that are required to maintain essential services) and that the adjudication of these disputes will undoubtedly plays an essential component in balancing the competing goals and interests of the parties under the *Act*. That being said, a plain reading of the legislation indicates that the scope of authority delegated to the Board is very narrow and, in the Board's opinion, the statute itself should be the primary consideration for determining legislative intent.

[95] The second factor evident from the statute is that the legislature has placed very short time constraints on the adjudication of proceedings before the Board. Specifically, the legislature has directed that applications by trade unions challenging an employer's designation (i.e. of the number of positions that are essential) must be heard and determined within fourteen (14) days after receiving an application. While the Board acknowledges that the statute grants the Board the discretion to extend this period if it considers it necessary to do so, the clear intention of the legislature in placing this constraint on the adjudication of applications is expediency, as delay in hearing and adjudicating applications will generally work to the disadvantage of applicant trade unions. In our opinion, this time constraint is part of the legislative scheme; part of the balance that has been struck by the legislature and thus ought not be casually disregarded.

[96] Both the narrow scope of issue to be determined by the Board and the anticipated expediency of the Board in hearing and adjudicating applications under the *PSES Act* would not be consistent with a legislative intend that this Board entertain complex questions of law, such as subjecting the legislation to *Charter* scrutiny. To the contrary, a plain reading of the statute leads to the conclusion that this Board would not be the appropriate forum for adjudicating such questions; or, in the alternative, to a legislative intent to exclude such questions from the scope of this Board's jurisdiction in deciding applications pursuant to s. 10 (or s. 11) of the *PSES Act*.

[97] The within application is evidence of the impracticability of this Board attempting to accommodate Constitutional questions in an application pursuant to the *PSES Act*. The Union's application was filed on November 3, 2009. An expedited hearing was called by the Board for November 9, 2009 (6 days after receiving the Application). On November 10, 2009, the Board issued an Order adjourning the Application for a period of thirty (30) days. The hearing resumed on December 16, 2009 (43 days after receiving the Application) and did not

conclude until January 22, 2010 (80 days after receiving the Application). While the hearing with respect to the Union's Constitutional questions was carefully managed and expedited to the extent possible, these types of proceedings require an evidentiary foundation and, in this case, the testimony of an expert witness. In accommodating these proceedings, this Board has obviously been unable to comply with the statutory time restrictions. While doing so may have been appropriate in the circumstances (i.e. the first application under the new legislation), the Board is inescapably drawn to the conclusions that proceedings involving questions of Constitutional and *Charter* compliance are inconsistent with the type of expediency anticipated by the *PSES Act* in adjudicating essential services applications in fourteen (14) days.

[98] In coming to this conclusion, the Board also acknowledges that the Union was arguing that, in its version of a *Charter* compliant *Act*, many of the limitations on the Board's delegated authority would be read out of the *Act* and, if this Board had the more expensive scope of authority suggested by the Union, such authority would be indicative of a legislative intent sufficient for the Board to adjudicate a broader range of questions of law, including questions of *Charter* compliance. In other words, in looking for its jurisdiction, the Board should not just look to the statute as written but to what the Union described as a *Charter* compliant *Act*. With all due respect, it would be an error in law for this Board to do so. As noted by the Court in *Cuddy Chicks, supra*, the *Charter* is not an independent source of authority for this Board to consider *Charter* issues. For a tribunal to have the necessary jurisdiction, it must find its jurisdiction in its enabling statute and from the legislative intent evident therein.

[99] For the foregoing reasons, we conclude that we do not have the requisite jurisdiction to answer the Constitutional questions raised by the Union in its Application (and in its Notice of Constitutional Questions). Specifically, we have concluded that we do not have jurisdiction to subject to the *PSES Act* to *Charter* scrutiny. To which end, this aspect of the Union's Application must be dismissed. In the Board's opinion, the Union's Application must be determined based on a broad and purposive interpretation of the *PSES Act* in its present form; as drafted by the legislature.

[100] However, the Board acknowledges that there were compelling factors suggesting some scope of jurisdiction for the Board to entertain questions of law, including at least some of the Union's Constitutional questions. The Board is also aware that no deference is shown by the Courts to the decisions of administrative tribunals with respect to Constitutional questions; as the

standard of review is correctness. To which end and out of an abundance of caution, the Board has elected to proceeding with its analysis to the extent set forth herein.

[101] As stated, in our opinion, the Board does not have the jurisdiction to subject the *PSES Act* to *Charter* scrutiny. However, in the event that we are in error in this regard, in our opinion, the jurisdiction of this Board would be limited to only those provisions of the *Act* that arise by necessary implication in adjudicating an essential services application. For example, in adjudicating the Union's Application, this Board will be called upon to give consideration to s. 10 of the *Act*, as well as a number of other specific provisions therein, such as ss. 2(c) and ss. 7(2). If this Board has any jurisdiction to consider Constitutional questions, the scope of this jurisdiction would be limited to only those particular provisions which are relevant to the outcome of the proceedings and certainly not the expansive scope of jurisdiction suggested by the Union.

[102] As a consequence and only in the event we are in error as to the scope of our jurisdiction (or rather, our lack of jurisdiction), we have proceeded but restricted our analysis to those Constitutional questions which have been framed by the Board herein. The remaining questions of *Charter* compliance raised by the Union in its Application have not been addressed by this Board and, in the Board's opinion, ought to be dismissed.

Do sections 2(c), 7(2) and 10 of the *PSES Act*, or any of them, violate s. 2(d) of the *Charter*?

[103] With respect to s. 2(c), the Union argued that the definition of "essential services" in the *Act* is too broad and inconsistent with a minimal and proportional analysis (i.e. of the degree of probable danger to life, personal safety and health with a goal to defining a minimum level of service sufficient to avoid endangering life, personal safety or health of the public, while at the same time allowing for as comprehensive an exercise of the right to strike as possible). On this basis, the Union argued that s. 2(c) constitutes a substantial interference in the Union's freedom of association and/or its right to strike. The Union also argued that excluding the availability of management personnel to provide essential services from the calculation of the number of employees who are essential (i.e. required to work to maintain essential services) removes one (1) of the Union's crucial means of placing pressure on the Employer through the withdrawal of services; by inconveniencing management. To which end, the Union argued that s. 7(2) substantially interferes with the Union's right to bargain collectively. Finally, the Union argued that the narrow scope of jurisdiction delegated to the Board pursuant to s. 10 of the *Act*

also constitutes a substantial interference in the Union's right to bargain collectively by preventing the Union from challenging various aspects of the Employer's essential services plan.

[104] The thesis of the Union argument was that the definition of "essential services", the exclusion of management in the calculation of essential employees, and the limitations on the Board's jurisdiction were merely exemplary of a larger reality; that the *PSES Act* represented pernicious and unwarranted state interference in collective bargaining in the public sector. The Union relied on the evidence of Ms. Blommaert and Mr. Keith as to the alleged frustration of the collective bargaining process and pointed to the logical inability of the Union to exert any meaningful pressure on the Employer with the designation of essential employees at the level sought by the Employer (i.e. at 87%). The Union's frustration with the legislation was palpable.

[105] It is not surprising that much of the argument of the parties in dealing with the *Charter* compliance of the *PSES Act* dealt with the decision of the Supreme Court of Canada in *B.C. Health Services, supra.* Prior to this decision, the courts had consistently held that freedom of association protected by section 2(d) of the *Charter* did not extend to the right to bargain collectively through a representative trade union. However, in 2007, the Supreme Court of Canada changed the landscape of labour law through their decisions in *B.C. Health Services, supra*. In this case, the Court concluded that s. 2(d) of the *Charter* protected the capacity of a trade union to engage in collective bargaining with respect to workplace issues and terms of employment. To understand the scope of the protection recognized by the Court, it is helpful to examine the Court's analysis. At paragraphs 19, 90, 91, 92, 93 and 94, McLachlin C.J. and LeBel J. stated the following:

> *19 At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the Charter protects collective bargaining rights. We conclude that s. 2(d) of the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the Charter: Dunmore. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.*
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> . . .

90 Section 2(d) of the Charter does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity, in accordance with a test crafted in Dunmore by Bastarache J., which asked whether "excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association" (para. 23). Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? (Dunmore, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the Charter. It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

91 The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. As P.A. Gall notes, it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years ("Freedom of Association and Trade Unions: A double-Edged Constitutional Sword", in J.M. Weiler and R.M. Elliot, eds., Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986), 245, at p. 248). Finally, and most importantly, 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. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In Dunmore, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of 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.*
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> *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] Many learned academics and others who have ruminated on the scope of the protection granted by the Supreme Court in *B.C. Health Services, supra*, and speculated that the reasoning adopted by the Court in this landmark case means the right to strike will some day gain *Charter* protection as an intrinsic corollary of collective bargaining.[5] However, at this point in time, no court in Canada has yet recognized a *Charter* protection for the right to strike and, in this Board's opinion, *B.C. Health Services, supra*, does not assist the Union to the extend it may have hoped. To the contrary, in extending *Charter* protection to the right to bargain collectively, the Supreme Court cautioned that the Court saw this right (ie. the right to bargain collectively, in association) as merely a limited right; the Court described it as a procedural right. Simply put, it is a right to a general process of collective bargaining, not to a particular model of labour relations or a specific bargaining method. As a result, since the protected right is to a "process" (i.e. the ability to engage in meaningful negotiations with the Employer), it does not guarantee a certain substantive or economic outcome nor does it guarantee collective bargaining will not be, from time to time, the subject of interference by the state. Furthermore, we now have the benefit of the caution of Binnie J. in *Plourde, supra*, wherein the Court stated that the reasoning of the Court in *B.C. Health Services, supra*, should not be extended beyond its natural limits; that the Constitution does not require that legislation must always favour or protect the rights of trade unions or employees; and that, in a Federal state, the provinces are free strike their own balance for labour relations according to varying circumstances and attitudes. Simply put, the Supreme Court cautions against judicial activism in labour relations under the rubric of its decision in *B.C. Health Services, supra*.

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[5] "*Does Freedom of Association under the Charter include the Right to Strike after BC Health Services? Prognosis, Problems and Concerns*", (undated); Prof. Brian Etherington, Faculty of Law, University of Windsor (undated) and "*The Freedom to Strike in Canada: A Brief Legal History*", (December 5, 2009); Prof. Judy Fudge, Landdowne Chair in Law, University of Victoria and Prof. Eric Tucker, Osgoode Hall Law School, York University.

[107] With the words of the Court and these cautions in mind, our first inquiry focuses of the impugned provisions of the *PSES Act* and how these provisions affected the process of collective bargaining.

[108] Evidence was lead before the Board that, prior to the *PSES Act*, arrangements with respect to essential services were voluntarily made in the past by the parties in anticipation of work stoppages. In practical terms this meant that the Union in effect decided the number of employees who were essential, together with the level of service to be provided and the means of providing that service. Prior to the *Act*, the Employer had no right to appeal the Union's decision with respect to the provision of essential services. However, the Province retained the right to legislate an end to a work stoppage. Now, under the new legislation, the provision of essential services is a matter for collective bargaining by the parties. In the event that an essential services agreement can not be achieved, the Employer in effect decides the number of employees who are essential, together with the level of service to be provided and the means of providing that service. The *Act* provides the Union with a mechanism for challenging the number of employees designated as essential by the Employer and prescribes an expedited procedure for resolving such challenges.

[109] It was apparent to the Board that little, if any, collective bargaining had occurred between the parties with respect to the contents of an essential services agreement. Other than one (1) meeting on October 31, 2008, none of the negotiations anticipated by s. 6 of the *PSES* Act had occurred. The Employer offered to meet but the Union declined to do so. As a consequence, the Employer prepared its essential services plan without the benefit of input from the Union. Then, in the face of the Union seeking a strike mandate from its membership, the Employer issued its Section 9 Notices. In its essential services plan, the Employer designated approximately eighty-seven percent (87%) of the Union's membership as essential. With respect to the six (6) categories of positions deemed in dispute for these proceedings, the Employer had designated one hundred percent (100%) of the positions in each of the respective categories.

[110] The evidence with respect to the impact of the legislation on the process of collective bargaining between the parties reflected the perspectives of the participants therein. The Union's witnesses, including Ms. Cathcart, Ms. Blommaert, and Mr. Keith, indicated that *"not much had been accomplished*", that the process had been "*difficult, confusing and disorganized*"; and that the Employer appeared to have a new "*attitude*" in this round of collective bargaining,

seeking more concessions and being more willing to say "*no*" to the Union's proposals. The Union asked this Board to draw the conclusion that the *PSES Act* had substantially interfered in the ability of the Union to engage in meaningful negotiations with the Employer. In other words, the Union asked this Board to conclude that the difficulty the Union was having in this round of collective bargaining was evidence that good faith collective bargaining between the parties had been significantly and adversely impacted to the extent prohibited by the Court in *B.C. Health Services, supra*, and that the cause of this impact had been the *PSES Act*.

[111] With all due respect to the witnesses, the Union's argument fails on an evidentiary basis. Simply put, the tenor of the evidence before the Board was more consistent with hard bargaining than a denial or substantive interference with the right to meaningful collective bargaining. The Board heard evidence that progress had been achieved at the bargaining table, with some thirty (30) proposals having been agreed to. At the time of the hearing, the parties were continuing to bargain, albeit with the benefit of a conciliator. In other words, meaningful negotiations of workplace conditions and the terms of employment had occurred and would, in all likelihood, continue to occur. The tenor of the evidence with respect to this current round of collective bargaining was entirely consistent with the process of collective bargaining. Although the parties may have expectations that issues will be discussed in a particular order or that a particular result will be achieved within a particular period of time, in collective bargaining each party has the right to attempt to achieve an agreement on terms that it considers advantageous and to adopt strategies at the bargaining table intended to advance its objectives. As was apparent in this current round of bargaining by the parties (including the Union's own conduct), collective bargaining is not a process carried out in accordance with the "*Marquess of Queensbury rules*". Each round of collective bargaining is a new beginning; there can be new faces at the bargaining table (as there was in this case); and new economic realities can arise affecting either party. It would be a dangerous proposition for the Board to accept the Union's frustration and disappointment at the bargaining table as evidence of a fatal inability for the Union and its membership to come together and pursue common goals with the Employer. Even if the Board were to conclude that the introduction of the *PSES Act* had touched on collective bargaining; for example, that the Employer had been emboldened by the new legislation; was seeking concessions from the Union; and was more willing to say "no" to the Union's proposals, it would be equally a dangerous proposition for the Board to accept this as evidence that the effect of the *PSES Act* has been to remove the ability of the Union to engage in good faith negotiations with the Employer. Many external factors touch on collective bargaining, shifting

power (or more accurately, the perception of power) at the bargaining table and yet collective bargaining continues, good faith negotiations and consultation occurs, and collective agreements are achieved by parties.

[112] The Court in *B.C. Health Services, supra*, protected the procedural right of collective bargaining but did not protect a particular model of labour relations nor did it guarantee a certain economic or substantive outcome for the Union.

[113] The Board is not prepared to rely on the number of positions that have been designated essential by the Employer as evidence of significant and adverse impact on the process of collective bargaining for a number of reasons. Firstly, these numbers were arrived at without the benefit of consultation or meaning negotiations with the Union. The parties have drastically differing opinions on the level of service necessary to prevent danger to the public in the event of a work stoppage. The Employer's definition of essential services appeared to be predicated on avoiding ANY danger to the public and thus tended to subrogate the Union's ability to place pressure on the Employer through the withdraw of its services. The Union's definition of essential services (i.e. to prevent only the loss of life or serious harm from coming to anyone), certainly would have allowed for a more comprehensive withdrawal of services, but was not consistent with the definition in the legislation. In the Board's opinion, the kind of bargaining between the parties anticipated by the *Act* with respect to an essential services agreement would surely have brought the parties closer together and, in doing so, would have improved the quality of the Employer's essential services plan. Secondly, the numbers of positions that have been designated essential by the Employer may be varied by this Board. While the Board's jurisdiction to review the Employer's essential service plan is narrow (i.e. confined to determining "numbers"), such determinations provide an opportunity for the very minimal and proportional analysis that the Union alleged to be lacking in the legislation. Determining the number of positions in disputed categories of positions may be a blunt instrument (incapable of the kind of surgical determinations desired by the Union), but many of the tools available to this Board are blunt instruments. It has long been recognized that the decisions made by parties regarding the nature of their relationship and workplace issues are generally preferable to the decision of this Board; such will undoubtedly also be the case under the *PSES Act*. As a consequence, all parties subject to this new legislation will be encouraged by the Board and expected to use negotiations to attempt to strike their own balance between the need to prevent danger to life,

health and safety, while at the same time allowing for as comprehensive an exercise of the right to strike as possible. [6]

[114] For the foregoing reasons, the Board is not satisfied that the impugned provisions of the *PSES Act* violate s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

If the *PSES Act* violates s. 2(d) of the *Charter*, is such infringement a reasonable limit pursuant to s. 1 of the *Charter*?

[115] Even if it could be said that the *PSES Act* substantially interfered with the Union's right to bargain collectively contrary to s. 2(d) of the *Charter*, in the Board's opinion, the infringement represented a reasonable limit so as to be saved by s. 1 of the *Charter*. In analyzing the Constitutionality of the *Act*, the Board has relied on both direct evidence and evidence obtained through the application of common sense and inferential reasoning. See: *R. v. Scharpe*, [2001] 1 S.C.R. 45, at p.94.

[116] The Board agrees with the position of the Attorney General that the purpose and objectives of the *PSES Act* are self-evident on a plain reading of the statute. Simply put, the Board is satisfied that the continuation of health care services in the event of a work stoppage is a pressing and substantial concern within the meaning ascribed by the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103. The Board heard evidence that in 1999, two (2) lives were saved through the continuation of services during a work stoppage by the Union. The *PSES Act* seeks to ensure that an adequate level of services is maintained in the public sector during a work stoppage to prevent the enumerate harm from occurring. The importance of maintaining essential services in the health care sector is self evident. Not only are governments Constitutionally-obligated to provide health care of a reasonable standard within a reasonable time, the vulnerability of patients and those persons needing or desiring health care, in all of its various forms, is a pressing and substantial concern.

[117] The Board is also satisfied that the means chosen by the legislature is rationally connected to the objectives of the legislation. The *PSES Act* utilizes a designation process defined by the avoidance of prohibited consequences. It creates a general procedure for the

[6] It should be noted that the Board's *Rules of Practice and Procedure* require the parties to filed evidence summarizing the negotiations which have occurred between the parties toward the conclusion of an essential services

parties to identify the appropriate level of service to be provided in the event of a work stoppage. In doing so, the legislation essentially removes that capacity for either party to, *inter alia,* endanger life, health or safety in resolving their workplace issues. There is not only a rational connection between the objectives of the *Act* and the means chosen, there is a direct and linear connection.

[118] The Board is also satisfied that the *PSES Act* falls within a range of reasonable alternatives that impairs the Union's *Charter* protected rights no more than necessary having regard to the practical difficulties associated with regulating essential services. Of particular significance in satisfying this branch of the *Oakes* test is the ability of the Union to challenge the designation levels of the Employer before an independent tribunal and to do so in a timely and expeditious manner. Essential services legislation exists in every province, except Nova Scotia, as well as at the Federal level. The *PSES Act* adopts a controlled strike model, as do the other jurisdictions in Canada. Restrictions on the right to strike in the health care sector of the type provided by the *PSES Act* are permissible under the Conventions of the International Labour Organization. The Union asks this Board to judicially intervene and rewrite the *PSES Act* to make it consistent with the least invasive of various models of essential services legislation (i.e. to ensure the greatest respect for the Union's right to strike). As Binnie J. reminded us in *Plourde, supra*, the "*distinguishing characteristic of federalism is that in matters of provincial labour relations the various provinces are free to strike their own balance according to their varying circumstances and attitudes*". In the Board's opinion, by providing the Union with the ability to challenge the designation levels before an independent tribunal, the *PSES Act* falls within a range of reasonable alternatives.

[119] Finally, the Board is satisfied that there is an appropriate proportionality between the salutary benefits of the legislation and its deleterious effects. As indicated, although the Board's jurisdiction in disputes under the *Act* is narrow and our instrument may be blunt, the ability of the Board to vary the number of positions that have been designated as essential provides the means by which the legislation ensured that any impairment of the Union's freedom of association is proportional to the probable danger to life, health and safety (or any of the other enumerated goals of the *Act*). As stated by the Court in *Plourde, supra*, even with the protection granted by the Court in *B.C. Health Services,* supra, there is no Constitutional presumption that legislation must favour or always protect the rights of trade unions or employees. Through the

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agreement.

PSES Act, the legislature has struck a new balance for labour relations in the public sector. Although the Union may wish it hadn't done so (and others may equally be glad that it did), this Board must be cautious not to interfere in a balance struck by the legislature under the rubric of judicial intervention.

What is the Appropriate Order of the Board?

[120] For purposes of the Union's jurisdictional and *Charter* challenges to the legislation, these proceedings were confined to the disposition of six (6) classifications of positions. As indicated, it was apparent to the Board that little, if any, collective bargaining had occurred between the parties with respect to the contents of an essential services agreement. Furthermore, the parties have drastically differing opinions on the level of service necessary to prevent danger to the public in the event of a work stoppage. In the Board's opinion, the kind of bargaining anticipated by the *Act* with respect to an essential services agreement would have brought the parties closer together and, in doing so, would have improved the quality of the Employer's essential services plan. To which end, the parties are hereby directed to engage in negotiations with a view to concluding an essential services agreement with respect to the six (6) positions deemed to be in dispute.

[121] In so directing, the Board acknowledges that this is the first time the parties have experienced essential services legislation and that direction may be of assistance from this Board. To which end, the following general guidance is provided:

1. The *PSES Act* prevents either party from endangering life, health or safety, or causing or allowing the destruction or serious deterioration of machinery, equipment or premises, or causing or allowing serious environmental damage (the "prohibited consequences") in the pursuit of their respective collective bargaining goals. By statutory definition, the protection from prohibited consequences extends beyond "life" and "limb" and will include many aspect of health care provided by the Employer, not just those direct services that prevent an "immediate" risk of "serious" harm as suggested by the Union. Simply put, the range of prohibited consequences under the *PSES Act* is definitionally greater than that previously voluntarily provided by the Union during past work stoppages (for example, in 1999 and 2001).

2. The Board will expect that the categories of positions necessary to maintain essential services will include not only those positions directly providing health care services to the public, but also categories of positions that provide ancillary services in support of direct services to the public. Health care is a system provided by a matrix of personnel, involving both front line health care providers and ancillary support staff. On the other hand, the provision of essential services is not "business as usual" for the Employer and a demonstrable link to the avoidance of the prohibited consequences will be expected by the Board for all categories of positions deemed to be essential.

3. In an essential services agreement, the Board would expect that only the minimum level of service would be maintained to avoid the prohibited consequences. Furthermore, the Board would expect that there would be a proportionality between the severity of a prohibited consequence and level of services maintained to avoid that particular danger; such that, the more serious or grave the consequence, the greater the level of prevention. Similarly, the Board would expect there to be proportionality between the probability of a prohibited consequence and the level of service maintained to avoid that particular danger, such that an extremely remote potentiality or hypothetical scenario would not be a basis for designation. Finally, the Board will expect there to be a larger balance between the provision of essential services (i.e. the protection against the prohibited consequences) and the residual ability of the parties to exert pressure on one another to resolve collective bargaining disputes. To which end, it is not immediately apparent to the Board that the Employer's Section 9 Notices (which collectively designates approximately 87% of the Union's membership as essential) would appropriately respect this larger balance. Designation levels as high as 100% may be necessary in some classifications and, conversely zero (0) might be the right number in other classification. However, the Board would not expect to see designation levels at either extreme across the whole membership of the Union.

4. In adjudicating applications before it pursuant to the *PSES Act*, because of the short time frame for adjudication, the Board will tend to examine the evidence and

> rationale of the parties and select the position of the party that best adheres to the above stated guideline. In other words, in deciding the number of employees which the Board deems is necessary to maintain essential services within disputed classifications, the Board will select the position of one (1) party or the other (not unlike pendulum or final offer arbitration, wherein the arbitrator selects the most "reasonable" of competing positions). Generally speaking, the Board will not be inclined to "split the difference", so to speak, or attempt to interpolate an alternate number with a goal of finding some theoretically-reasonable middle ground.

[122] Although not directly before the Board at this time, it would appear that our finding with respect to the positions deemed to be in dispute are equally applicable to the remaining classifications of positions in dispute in these proceedings. To which end, the parties are also encourage to engage in negotiations with a view to concluding an essential services agreement with respect to those classifications of positions as well.

Conclusion:

[123] The Union's *Charter* challenge to the *PSES Act* is dismissed.

[124] The Employer and the Union are directed to engage in negotiations with a view to concluding an essential services agreement with respect to the six (6) classifications of positions in dispute and are encourage to negotiate with respect to the remaining classifications of positions.

[125] The Employer and the Union are directed to report back to the Board Registrar every thirty (30) days with respect to the status of their negotiations. The Union's Application (i.e. that portion seeking to vary the Employer's Section 9 Notices) shall be adjourned, returnable on three (3) days notice.

[126] This panel shall remain seized with respect to these proceedings.

[127] John McCormick, Board Member, dissents from these Reasons for Decision.

DATED at Regina, Saskatchewan, this **9th** day of **February, 2010.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson

[128] **Dissent of John McCormick, Board Member**: I have read the Reasons for Decision of my colleagues and I dissent, at least partially, from these Reasons. In my opinion, *The Public Service Essential Services Act* has gone too far in interfering with collective bargaining in the public sector. While I accept that the government has the right to legislate in relation to essential services in the Province, in my respectful opinion the government went too far. For example, s. 7(2) of the *Act* excludes management from the calculation of how many members of the bargaining unit are essential. Requiring management to do the work of bargaining unit members during a work stoppage is a historic and effective means of placing pressure on the Employer. In my opinion, the legislation went too far in shifting the balance of power to the Employer, unnecessarily so in the case of s. 7(2) of the *Act*.

[129] On the other hand, I agree with my colleagues that the Employer and the Union need to return to the table and engage in good faith negotiations with respect to the definition and provision of essential services in this workplace. I also concur with the general guidance provided by my colleagues to assist the parties in these negotiations.

John McCormick, Board Member