Finally the Right to Strike: But What About Organizing?

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ABSTRACT: The *Saskatchewan Federation of Labour* decision from the Supreme Court of Canada (January, 2015) is a landmark case in that, after a twenty-eight year judicial lead-up, it finally confirms the right to strike as guaranteed by the *Charter's* Section 2(d) freedom of association. The decision found the provincial government's unilateral authority over designating essential services during a work stoppage to be unconstitutional. The decision is indeed a victory for unions that goes far beyond the particular issues in the case and will have ramifications for years to come. This paper presents a preliminary look at the decision and discusses four interrelated areas of labour law that will be affected. The downside of this decision, however, is the finding that amendments to Saskatchewan's Labour Relations Act that are designed to make organizing more difficult, are constitutional. This decision continues a trend in labour legislation that will undoubtedly help undermine the much needed organizing in Saskatchewan in the face of declining union density, particularly for the fast growing cadres of precarious workers who need unions. This aspect of the decision, which represents the loss of a rare opportunity for the Court to support organizing, will also be discussed briefly.

KEYWORDS: Right to Strike; Freedom of Association; Charter Rights; Essential Services; Back-to-Work Legislation

The Supreme Court of Canada's (SCC) *Saskatchewan Federation of Labour* (SFL) decision has been touted in the media as "a stunning victory" (Fine, G & M, 2015) for unions and their supporters, a description that is indeed justified. The purpose of this paper is to provide a preliminary look at this decision in which the Court has finally accepted the right to strike as constitutionally protected by the *Charter*. The legal impact of SFL on four interrelated areas of labour law will be explored: the designation of work as 'essential'; assessing whether legislation can clear the Section 1 (s.1) test of a justified limit to a constitutionally

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protected right; the issue of what constitutes a strike; and, perhaps most importantly, back to work and strike prohibition legislation. The evolving case law on s.2(d) in the industrial relations arena concerns the rights of union members with regard to the primary goals of their association: forming and joining unions, engaging in collective bargaining, and the focus here, striking. The facts of *SFL* involve the Saskatchewan government's legislation prohibiting certain government workers, deemed as 'essential', from striking. The decision represents the final shift in the SCC's twenty-eight year jurisprudential journey with regard to the right to strike. In 1987 the SCC held that s.2(d) only protected rights for individuals and now *SFL* has finally affirmed it protects collective rights as well. As we shall see, however, although *SFL* is a 'victory' and indeed a 'stunning' one, it does come with another message that the Court is not ready to move towards an equally important goal of helping to facilitate the much needed movement of people into unions. The decision will undoubtedly encourage ever more restrictions in the area of organizing as other provincial governments continue this decades old trend (Bartkiw, 2009/10; 2008). The Trade Union Amendement Act (TUAA) will also be briefly discussed, a ruling that certainly dampens the celebrations for *SFL* for those interested in increasing the rate of unionization.

In *SFL* the SCC states that unions must have the right to negotiate the designation of which workers are considered "essential" and therefore required to work during a strike. If negotiations break down over this issue, the decision stresses that there has to be a fair, alternate dispute resolution process that can meet the tests involved in clearing the Charter's s.1 requirements, namely that a restriction on a right must be "demonstrably justified in a free and democratic society" – a topic to which we will return shortly. *SFL*'s position on the right to strike goes far beyond the issue of essential services and, as noted, finds a *Charter* guaranteed right to strike within the context of collective bargaining. In December 2007, the newly elected conservative government, the Saskatchewan Party, introduced two pieces of legislation: *The Public Service Essential Services Act* (*PSESA*) and *The Trade Union Amendment Act* (*TUAA*). Both statutes became law on May 14, 2008. We will first explore the outcome in *PSESA* since it is with regard to this *Act* that the Saskatchewan Federation of Labour was successful. *SFL* was a much-monitored case as it made its way up the hierarchy of Canada's court system. There were fifteen Appellants along with the major litigant, the Saskatchewan Federation of Labour, twenty-seven Interveners that included six attorney generals and twenty-one union affiliates.

THE PUBLIC SERVICE ESSENTIAL SERVICES ACT

The purpose of the *PSESA* was to fill what the SCC described as a "gap" in the law in that prior to the introduction of this Act "strikes where regulated on an *ad hoc* basis" (para 5[2]). Although the Court notes a so-called "gap" in the law, in fact the province's policy represented a decision to allow an "unfettered strike" regime that permitted unions and employers to negotiate the parameters of their strikes and lockouts, rather than a "controlled strike" model in which government intervention becomes the norm (Adell, 2013). A number of prominent strikes provided the rationale for the newly elected government in Saskatchewan introducing this legislation, namely the 1999 province-wide strike by 8,400 members of the Nurses Union and a protracted strike in 2001 by health care workers. In the winter of December 2006/07 a third strike involving highway workers, snowplow operators, and correctional officers, the Court noted, "sparked concerns about public safety" (para 6). The government decided there was need for a mechanism that would help designate which employees are doing "essential" work and thus required to continue working while their co-workers are permitted to go on strike. On the question of the constitutionality of the *PSESA*, the trial judge ruled that given the SCC's recent interpretation of the scope of s.2(d) in two cases *BC Health Services* (2007) and *Fraser* (2011), "the right to strike is a fundamental freedom protected by s.2(d) of the Charter" (para 18) and further that the prohibition on this right contained in the *PSESA* "substantially interfered" with the rights of the affected employees (para 19). His reasoning was: the government of Saskatchewan failed to engage in meaningful consultation or negotiation with respect to essential services; good-faith negotiations are not possible when "one side has the capacity to impose an agreement"; the definitions of essential services and public employers are both "overbroad"; and, finally when compared to analogous legislation in other jurisdictions, the *PSESA* is uniquely restrictive and devoid of both review mechanisms and alternate means of addressing workplace issues – such as binding arbitration (para 19).

The Saskatchewan Court of Appeal unanimously found the *PSESA* to be constitutional and concluded that "[w]hile the Court's freedom of association jurisprudence has evolved in recent years, it has not shifted far enough, or clearly enough, to warrant a ruling by this Court that the right to strike is protected by s. 2(d) of the *Charter*" (para 23). Justice Rosalie Abella writing for the 5-2 majority of the SCC stated "I agree with the trial judge", not the Court of Appeal: "… the right of employees to

2 Unless otherwise indicated all para (paragraph) references refer to the SFL decision of the SCC.

strike is vital to protecting the meaningful process of collective bargaining within s. 2(d)." As the trial judge observed, without the right to strike, "a constitutionalized right to bargain collectively is meaningless" (para 24). Abella further finds that within the context of its role in the collective bargaining process "the strike is unique and fundamental" (para 52). Following the then Chief Justice Dickson's minority opinion in *Alberta Reference* (1987), which she comments "has recently proven to be a magnetic guide" (para 63), she notes that Dickson's challenge to the majority's ruling that constitutional protection only applies to individuals, was the starting point for the judicial evolution towards the "more generous approach" in *SFL* (para 33). Dickson argued that "the very nature of a strike, and its *raison d'etre*, is to influence the employer by joint action which would be ineffective if it were carried out by an individual." Effective constitutional protection of employees in the collective bargaining process requires…"protection of their freedom to withdraw collectively their services, subject to s.1 of the Charter" (para 49 & 59).

Alberta Reference is one of a the original so-called "Labour Trilogy", a set of 1987 SCC decisions, including *RWDSU v Saskatchewan* a case involving back to work legislation in the dairy sector, and *PSAC v Canada*, which involved a challenge to the federal government's imposition of wage restraint legislation. These three cases found that s.2(d) contained neither a right to bargaining collectively nor a right to strike.[3] Bernard Adell, proposed another "Labour Triolgy", consisting of: *Dunmore* (2001), *Health Services* (2007) and *Fraser* (2011) – the three decisions that were relied upon in *SFL* to shift the jurisprudence toward the final ruling on s.2(d) (Adell, 2013, 415). Indeed many observers now refer to the three January 2015 decisions, *Meredith, Mounted Police*, and *SFL* as the 'latest Trilogy' that has, after twenty-eight years, established a clear *Charter* guarantee of a right to strike. Robert J. Sharpe and Kent Roach (2013, 193-204), Panitch and Swartz (2003,51-83), and Paul Cavalluzzo (Faraday, et. al., 2012) provide excellent overviews of the jurisprudence leading up to SFL, a full survey of which is beyond the scope of this paper. As we shall see, the issues in the four areas of labour law that will be significantly impacted by this decision are quite closely interrelated and have been isolated for the purpose of exploring the particular issue under discussion.

3 The 'Labour Trilogy' generated a great deal of legal analysis. See Harry Arthurs, Paul Cavalluzzo, Geoffrey England, and Judy Fudge in *Queen's Law Journal*, 13 (1988).

THE DEFINITION OF AN ESSENTIAL SERVICE

The *PSESA* mandates that a public employer and the union are to negotiate an "essential services agreement" to govern how public services are to be maintained in the event of a work stoppage. If negotiations break down the public employer has the authority "to unilaterally designate, by 'notice', which public services it considers to be essential" along with the classifications of employees required to continue working during a strike, including the names and number of employees in each classification (para 11). A key factor in *SFL* is the fact that the *PSESA* contains, as noted, a very broad definition of "essential services", namely those whose work is necessary to enable the public employer to prevent: danger to life, health or safely; the destruction or serious deterioration of machinery, equipment, or premises; serious environmental damage; and disruption of the courts (para 9). In addition to the provincial government as employer, the statute covers all broader public sector employers including all crown corporations, health service agencies, both provincial universities and the Saskatchewan Polytechnic, and all municipalities (para10). The SCC found, again in agreement with the trial judge, that this coverage is far too broad and questioned whether, for example, a university or a polytechnic college, and every crown corporation, including the Liquor Control Board, engages in work that should be considered 'genuinely' essential.

The trial Judge thus proposed the much narrower definition commonly accepted in international law, and now definitively endorsed by the SCC:

> The jurisprudence under ILO Convention No.87, the ICSECR (sic) and the ICCPR has been consistent… Each of these instruments has been interpreted as enshrining the right to strike, and their respective supervisory bodies have insisted that the right to strike may be restricted or prohibited:
> (a) in the public service only for the public servants exercising authority in the name of the state;
> (b) in essential services *in the strict sense of the term* (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) (emphasis added); or
> (c) in the event of an acute national emergency and for a limited period of time (para 86).

This definition represents a significant shift in the Court's approach to "what is an essential service" in that it conclusively makes Canada a jurisdiction that accepts the international definition endorsed by the ILO. This move towards employing international standards was encouraged when the majority in *B.C. Health* (2007) stated that: "…the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified." (para 70).

The Court's assertion that the international definition of essential services should be used was an issue raised not just in *Alberta Reference* (1987) but in another 'Labour Trilogy' decision, *RWDSU v. Saskatchewan* (1987), which contains a significant debate between Chief Justice Dickson and Justice Wilson that will undoubtedly continue to be helpful for the ongoing discussions concerning what constitutes an essential service. Since this decision involved both legislation that temporarily prohibited strikes, as well as the "demonstrably justified" limit under s.1, it could be discussed in the two sections below on these topics, however here we want to highlight its contribution to the issue of what constitutes an essential service. Although Dickson and Wilson agreed that s.2(d) protected the right to strike, they disagreed on whether the legislation could be saved by the s.1 review. Perhaps Wilson's dissent in *RWDSU* will prove to be as 'magnetic' a guide as Dickson's minority opinion in *Alberta Reference* (1987) was for *SFL*?

Dickson argued that a ban on strikes could be justified if the potential economic harm to a third party was "so massive and immediate and very focused in its intensity" while Wilson viewed this reliance on economic harm to overreach the consensus in international law on the limits to the right to strike. She noted that the objective of the impugned legislation was to protect dairy farmers from economic harm and then cites Dickson himself in *Alberta Reference* (1987) pointing out that he supported the use of the international standard for a strike as repeatedly set out by the Committee on Freedom of Association (CFA) of the ILO. She continues that Dickson was now sanctioning:

> "…the abrogation of the freedom to strike when the economic interests of a particular group are threatened. The implications of this for the collective bargaining process are extremely far-reaching since some measure of damage to the economic interests of the parties and the public is an inevitable concomitant (of) every work stoppage. Indeed, the effectiveness of this negotiating tool depends on it (para 51)."

Wilson further notes that although she agrees that economic regulation is a significant tool for governments, if it is to be done at the expense of our fundamental freedoms, "then it must, in my view, be done in response to a serious threat to the well-being of the body politic or a substantial segment of it", again referring to the internationally accepted definition of an essential service (para 56, *RWDSU v Saskatchewan*). She argues that the evidence regarding the harm to dairy farmers falls far short of establishing economic harm of the nature needed for it to come within the ILO's definition. She is prescient in pointing out that legislative definitions of what constitutes an essential service "have gradually expanded to cover fire-fighters, and police and more recently the media, teachers" and so on, and asks whether this expansion of the definition of "essential" is "the route through which increasing government intervention in labour disputes is to be justified?" (*RWDSU* para 54-58). She further argues that she is not convinced that the "provision of milk" is an essential service. "Milk is undoubtedly an important food product but there may be other food products which are an adequate substitute" and finally that it is possible, that "milk would be imported from outside the province to supply the Saskatchewan consumer" (*RWDSU* para 71).

After *SFL* the Court will have to assess whether work is 'genuinely' essential and not a matter of inconvenience, a strategy designed to weaken the union's bargaining strength, or as Wilson suggests, the route for government to intervene in labour disputes. SFL also raises a relatively new issue in the Canadian industrial relations setting – whether workers that are designated as 'essential' should *also* have to do non-essential work when carrying out their duties during a work stoppage (para 13). As part of the *PSESA* scheme the Saskatchewan Labour Relations Board was given jurisdiction to review the number of employees required to work in a particular classification, but had no authority to review whether any service is 'genuinely essential', whether specific employees are being reasonably selected, or whether they are doing a job that is entirely or only partly "essential" (para 13). These questions will have to be addressed in any existing or future legislation of this nature.

The acceptance of the international standard of what constitutes an "essential service" represents one aspect of *SFL* that will have a lasting impact on labour law, and hopefully labour legislation, now that it has been so definitively endorsed by the Supreme Court. K.D. Ewing's recent discussion of the SFL reminds us of Canada's extremely poor record in the eyes of the International Labour Organization's (ILO) supervisory bodies particularly the Committee on Freedom of Association (CFA). He notes

that Canada has more CFA complaints launched against it than any other G7 country, which is "even more notable" since it is the country with the smallest population. There have been 98 CFA complaints against Canada for issues that include an array of alleged violations of international standards to which it is a signatory. One prominent criticism of Canada by the CFA is the banning of strikes in services that are *not* essential, such as education, ferry services, postal services, air travel, and so on. (Ewing, 2015, 546)

Panitch and Swartz also noted Canada's poor record in their *From Content to Coercion* and argued that since the Canadian state's "shift towards legislative interventions against labour rights" in the 1970s, Canada accounted for 33% of all complaints before the CFA from 1974-91, a sharp rise from the 1954-73 period in which Canada only accounted for only 4% of all complaints. (2003, 54) They also commented that: "...ILO decisions have generally been ignored by Canadian governments, a sorry testament to the degree of dissonance between Canada's formal adherence to international declarations on labour rights and their actual embodiment in the practices of the Canadian state" (2003, 58).

MEETING THE SECTION ONE CHALLENGE

A further criticism by the international labour law community has been imposing legislation that either prohibits strikes or orders strikers back to work in services that are truly essential, without an appropriate alternative dispute mechanism to replace the removal of the right to strike - precisely the case in SFL (Ewing, 2015, 546-47). The necessity of honouring international legal standards to which Canada is a signatory, was raised by Dickson's dissent in the *Alberta Reference* (1987). Meeting the requirements of s.1 would essentially involve providing an alternate, fair, and independent method of dispute resolution for those denied their constitutional right to strike. As Abella points out, *SFL* did not engage in a s.1 analysis since the full ban on striking in itself rendered the PSESA to be "substantially interfering" with the guarantee of freedom of association. She does note, however, that when essential services legislation provides for such a mechanism "*it would more likely* be justified under s.1 of the *Charter*" and further that "in my view the failure of any such mechanism in the PSESA *is what ultimately* renders its constitutionality impermissible" (para 25, emphasis added).

One of the clear impacts of *SFL* on future litigation will be to move the focus to s.1. Governments both as employers and legislators will have to meet the onus of ensuring that these alternate methods, primarily systems of compulsory interest arbitration, will be implemented in such a

manner that they will be found to be in compliance with the standards set for s.1 - not always an easy task. The first question that must be answered under the *Oakes* test (1986) that sets out how the SCC implements s.1, is whether the purpose of the legislation or provision is "pressing and substantial." If it is found to be, then the court or tribunal will consider the next question - whether the reason for overriding a constitutional freedom is "proportional" and "rationally connected" to the pressing and substantial purpose. In other words whether the legislation/provision is "minimally impairing" or could the objective of the legislation be achieved with less restriction on guaranteed rights or does it "overreach."

It is also noted in *SFL* that alternate dispute resolution mechanisms have not been considered "as sensitive to the associational interests of employees as the traditional strike/lock-out mechanism" (para 60 citing Dickson in *RWDSU v. Saskatchewan*, pp. 476-77) and such imposed settlements decrease the effectiveness of the collective bargaining process over time since they do not tend to be regarded as accepted by employees when compared to those that are collectively bargained (para 60 citing Adell, Grant and Ponak, 2001). Further there is also the belief that strikes are essentially good for democracy. Pierre Verge, for example, has argued that the right to strike is fundamentally important to "collective autonomy … and the democratic vitality of society as a whole" (cited in translation, Adell, 2013, 414). Indeed the theme of democracy runs throughout *SFL* particularly with regard to the assessment of s.1 solutions for denying the *Charter* right to strike in that these must be "demonstrably justified in a free and democratic society." Jamie Cameron has argued that despite the Court having been "notoriously rigid" about the *Oakes* test and its "status as a universal standard of reasonable limits", it has been "applied flexibly from case to case and guarantee to guarantee." She suggests that the Court should develop "customized standards" such as ones that would apply a specific test to determine whether a restriction on the right to strike is justified. (Cameron, 2019/10, 310-11)

Wilson's dissent in another labour trilogy decision, *PSAC v. Canada* (1987), will hopefully offer another guide on the issue of meeting the s.1 challenge. This case involved the implementation of the wage restraint legislation by the federal government. Wilson points out that, on the government's own admission, the legislation had no direct effect on or causal link to inflation, but was passed "to persuade the general public to enter voluntarily into employment agreements" that provided for a wage increase no more than 6% in the first year and 5% in the second. She argues that the legislation, although its purpose was to induce 'voluntary'

compliance, did so by 'mandatory' measures that not only removed the employees' potential to voluntarily comply, but violated their fundamental rights (para 61-62) by imposing restrictions. She stresses that the *Oakes* test requires that legislation must be "carefully designed to achieve the objective in question" and concludes that the legislative measures it used were "arbitrary and unfair in that they were imposed upon a captive constituency", were not "expected to have any direct effect on inflation", and could not "constitute an example of voluntary compliance" (para 66-67).

WHAT IS A STRIKE?

The question of "what is a strike" could also become a key issue in the aftermath of *SFL*. In referring to a number of constitutions, including those of France, Italy, Portugal, South Africa and Spain, all of which Abella notes contain a right to strike - although not primarily within the strict context of collective bargaining that the SCC clearly has in mind in *SFL*. However, the strong language supporting the right to strike could also be seen to protect political strikes more typical in Europe. In Canada rallies and marches such as events like the "Days of Protest" in opposition to Ontario's Conservative government in the late1990s raise questions about what is an "illegal strike" (an untimely, ie. mid-term cessation of work) rather than what is a strike. Labour lawyer Paul Cavalluzo has argued however, the Wager model must be seen as a "whole package" that has been long accepted as effective in Canada. He warns against tampering with the system for such objectives as parlaying the protected right to strike from the workplace into the political arena (Cavalluzzo, 2015).

The question of what will be considered a strike when further judicial treatment of this issue unfolds, as Brian Langille argues, will be far from an easy task. He notes that there is a mistaken assumption in Canadian labour law that there is an objective definition of the right to strike, namely "any concerted cessation of work". He maintains that the definition is overbroad and a narrower, subjective definition based on the reason/s for the work stoppage must be found. (Langille,2009/10, 355-56) The collective refusal to do overtime or calling in sick, a slowdown or speed-up, and so on, have all been treated as 'illegal strikes' by labour boards and courts if done in an 'untimely' manner, namely during the life of a collective agreement. Langille points out that there are many concerted cessations of work, however, that are not strikes, such as a group of employees 'playing hooky' to go and see a baseball game – done with no intent to pressure their employer to reach an agreement or for any

immediate workplace matter (361).

Langille also raises the concern about what the right to strike will mean for those excluded from the statutory schemes set out in labour legislation. There is indeed an accepted common law right to strike, yet there is no protection against an employer's retaliation of dismissal for those who have taken strike action. Employees covered by labour legislation are protected by a further set of employee rights, such as unfair labour practices and the right to retain their status as employees while on strike and thus have the right to their job back within certain time parameters. There are also statutory duties imposed on employers who must refrain from interfering with a right to strike (368-69). Although those outside the statutory protection will not be able to look to any rules on striking, they, however, do not have all the restrictions the Wager scheme imposes. They will be able to strike for recognition and engage in collective work cessations. With these seeming 'advantages' will come much uncharted territory such as will they need to take a strike vote, engage in conciliation? Will their collective agreements set in place by a successful strike be binding, as so on? As Langille comments that for courts to undertake such explorations will be "to enter a world without end." (371)

PROHIBITING STRIKES AND BACK-TO-WORK LEGISLATION

Back to work legislation has been described as an "immensely intolerant and uniquely Canadian" practice. (Ewing, 2015, 546). There has been a long-standing domestic critique of this practice (Panitch & Swartz: 2003, 3rd ed.). As touched upon earlier, there has been a running dispute between the ILO's Committee on Freedom of Association (CFA) and the Ontario government about the use of back to work legislation particularly in the educational sector which, the CFA repeatedly points out is *not* an essential service "as normatively determined by the ILO supervisory bodies." In 2004 the CFA commented in one of its decisions concerning a teachers' strike that although it "recognizes that unfortunate consequences may flow from a strike in an non-essential service", these do not warrant intervention in the right to strike until these become so serious "as to endanger the life, personal safety or health of the whole or part of the population." (CAF, 2004, para 505, cited in Ewing, 2015, 547). Again this stresses the importance of moving to the internationally accepted definition of essential services, as has been discussed, since it is only in essential services that back to work legislation and an outright ban on strikes is appropriate if s.1 requirements are to be satisfied.

The CFA has pointed out that the province's repeated recourse to back-to-work legislation has been used in an "inpatient and disproportional" manner at early stages of a dispute. For example, in the case of a BC ferry dispute, (again not an essential service) the CFA argued that back-to-work legislation was employed "as a first rather than a last resort" during a legal strike "that had barely lasted 48 hours". The Committee pointed out the repeated use of this type of legislation in the Ontario educational sector, four times from 1998 to 2011, creating a situation where teachers "theoretically have a legal right which, in practice however, is taken away from them when they exercise it." (Ewing, 2015, 547-48)

In recent years the federal Conservatives have repeatedly implemented back-to-work legislation in, for example, both Air Canada and Canada Post and legal challenges pending will likely now have successful results for the unions. Statutes such as the *Protecting Air Service Act* (2012), designed primarily to prevent strikes, will have to be revised. Governments will now have to be very careful about how they draft no-strike provisions and alternate dispute resolution mechanisms such as binding interest arbitration in the light of the heightened scrutiny in s.1 reviews. Since the introduction of Saskatchewan's PSESA in 2007 the federal government and other provinces have continued the long-term trend of introducing and/or modifying their essential service legislation. For example, Nova Scotia amended their *Trade Union Act* to replace the right to strike for firefighters and police officers with interest arbitration. Nova Scotia's recent (2014) *Essential Health and Community Services Act* mandates "a binding method of resolving the issues in dispute" between the parties (s.15). Similarly Manitoba passed a relatively recent (2011) *Essential Services Act* that specifies which public sector employees must continue to work during a strike and includes a broad array of services that the government considers essential – without regard to the internationally accepted definition of an essential service. Quebec, P.E.I., Alberta, New Brunswick, Newfoundland and Labrador, Ontario, the Northwest Territories, and Nunavut all have public service legislation which contain various restrictions on the right to strike that will have to be reviewed.

It is interesting to note that the Conservative federal government amended a number of statutory provisions in several Acts including the *Public Service Labour Relations Act* (*PSLRA*) as part of its *Bill C-4, Economic Action Plan Act* (2013). In the "Frequently Asked Questions" document outlining the changes, the Q & A section announces that going forward "The employer has the *exclusive right* to determine which services

are essential for the safety or security of the public" and further that "Employees occupying positions designated essential are required to report to work during a strike." Question # 7 of this document asks: "Why is the designation of essential services now exclusively determined by the employer?" – the answer – "The *employer is in the best position* to determine the number of employees required to maintain delivery of essential services within its organizations" (emphasis added). With such a unilateral scheme in place, there is no doubt that the federal government's *PSLRA* will be one of the first statutes on the chopping block once the many legal ripples from *SFL* start to roll out. Now that the right to strike has become a guaranteed freedom under the *Charter*, it will hopefully be far more difficult to prevent workers from exercising this right. As suggested much current legislation will have to be revised or face judicial challenge that will hopefully be more rigorous than in the past forty years. Panitch and Swartz, well over a decade ago, noted Canadian legislatures' and the courts' lack of respect and compliance with international law and asked whether governments "could hardly ignore so readily" the freedom of association in the *Charter*? Now that finally, after twenty-eight years, the right to strike is actually 'enshrined' in the *Charter*, a question that still remains (2003:58).

THE TRADE UNION AMENDMENT ACT, 2008: WHAT ABOUT ORGANIZING?

SFL has a lot to say about power inequalities in the workplace, and by extension, in society. In addressing her colleagues in dissent in *SFL*, Wagner and Rothstein, Abella argues that they essentially ignore "the fundamental power imbalance which the entire history of the modern industrial relations has been scrupulously devoted to rectifying" (para 56). She then points out that the SCC has "long recognized the deep inequalities" that characterize relations between employers and employees and again refers to Dickson in *Alberta Reference* who comments "Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers." (para 55 citing p. 368). *Mounted Police*, also stresses that the goal of s.2(d) protection is to empower "vulnerable groups" and "help them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society" (para 53). *Mounted Police* also notes: "Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banning together in collective bargaining associations, thus strengthening their bargaining power with the employer, can they meaningfully pursue their workplace

goals (para 55)."

With all this focus on vulnerable and powerless groups it is unfortunate that the SCC did not take the opportunity to comment more fully on the necessity of preserving clauses in the Saskatchewan Labour Relations Act that have the potential to offer clear workplace protection to one of the most disadvantaged groups in society today - precarious workers. This outcome, it has to be said, came after the Appellants' essentially declined to fully argue the case after clear defeats at both the trial and Court of Appeal. Whatever the reason, it is unfortunate since the opportunity to hear the SCC on this crucial issue comes so rarely. The part of *SFL* decision that was not successful was the finding that The *Trade Union Amendment Act* (*TUAA*) is constitutional. This statute represents a serious loss for the trade union movement in Saskatchewan at a time when unionization could benefit so many low-waged workers. In finding that the *TUAA* did not breach s. 2(d) the trial judge acknowledged that the changes to the certification process had the effect of *reducing the success rate of union applications for certification* yet he argued that s. 2(d) does not require legislation that "ensures unions *succeed easily* in their efforts to be certified", but it "precludes the enactment of legislation that *interferes with* the freely expressed wishes of employees in the exercise of their s. 2(d) rights" (para 22 – emphasis added).

TUAA was clearly designed to make it more difficult to organize unions and introduced more "restrictive requirements" for certification. First it requires the "written support", (signed union cards), increase from 25% to 45% before a certification vote can take place; it reduces the time for union organizers to collect cards from six months to three; and eliminates the automatic certification that used to be available when over 50% of employees signed union cards - indeed a feature that has always had a positive impact on the certification process for unions wherever it has been part of the industrial relations regime. In addition, the discretion that the Labour Board had to decide whether a representation vote was needed, was also eliminated (para 14) and a vote is now mandatory. The *Act* also decreased the level of "advanced written support" required for decertification from 50% plus one, to 45% and the period within which the written support for decertification has to be submitted is reduced from six to three months – amendments that make decertification faster and easier.

The most significant amendment, and certainly a serious barrier for those interested in promoting unionization, is the employers' new right to communicate "facts and its opinions to its employees" during an organizing drive. This practice will no longer be considered an unfair

labour practice and will only be reviewable by the Labour Board if the communication is done in a manner that "does not infringe on the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes" (para 101). This qualification presents a new terrain for union organizers and labour lawyers to sort out, without reference to a comprehensive jurisprudence from the Labour Board, when this activity can be considered an unfair labour practice (para 22). The Saskatchewan Court of Appeal unanimously found that the *TUAA* did not violate s.2(d) of the *Charter*, and the SCC's majority also agreed that the *Act* "does not substantially interfere with the freedom to freely create or join associations" (para 100). Abella points out the trial judge's conclusion was partly based on a review of comparable labour relations schemes and found that the right to organize was not substantially interfered with when the *TUAA* is compared to other labour legislation in Canada (para 100). Legislation, it has to be noted, that has been seriously undermined for at least three decades by neoliberal governments whose goal has been decreasing the rate of unionization.

The majority in *SFL* also agreed with the trial judge that permitting an employer to communicate "facts and opinions" to its employees is constitutional. It is important to point out that the trial judge's reasoning around this issue was that such a finding "is consistent with the employers' freedom of expression under s. 2 (b) of the *Charter*" (para 21). Balancing an employer's freedom of expression against the freedom of association of hundreds of workers in a potential bargaining unit is for many an extremely unfortunate feature of *Charter* litigation. Seeing the "corporation as person" with essentially an individual's rights, has long been critiqued by social justice advocates as one of the fundamental flaws with our common law system as a whole (Bakan, 2000). The result of this amendment will undoubtedly see employers bombarding workers with their "opinions" about how they will go bankrupt and everyone will lose their jobs if a union is certified. The outcome of this all too typical behaviour on the part of employers will be more lengthy and costly litigation and as the certification process drags on, enthusiasm for the new union will tend to wane.

Sid Ryan, president of the Ontario Federation of Labour and presenter at Ontario's 2015 review of both the *Employment Standards Act* (*ESA*) and the *Ontario Labour Relations Act* (*OLRA*) commented that the shift from a regime of card based organizing drives and automatic certification to one that mandates a vote gives employers "more opportunity to target organizers." He also cited a survey of managers in Canadian workplaces where union drives have occurred that found: "94

per cent had used anti-union tactics and 12 per cent admitted to using what they believed to be illegal practices to stop the union." (*Toronto Star*, June 15, 2015). The six changes in Saskatchewan's *TUAA* will make it considerably more difficult to organize vulnerable workers and could likely, as mentioned earlier, set a new low standard for labour codes across the country. As neoliberal governments slowly but surely chip away at the ability to organize, the industrial relations landscape will have an ever more restrictive framework within which to meet the challenge of organizing the unorganized. When does making the certification process so difficult that it "substantially interferes" with organizing unions? What threshold must be crossed before the Court recognizes that restrictions placed on unions are seriously hindering organizing drives to the extent that people are being effectively denied their right to be represented by a bargaining agent and thus unable to exercise all the rights now confirmed by s.2(d)? The protected right to strike, after all, comes with being in a union in the first place, and government assistance with certification was part of the Wagner model compromise. If unionization is made more difficult it could mean many will not be able to access the "self-fulfillment and the collective realization of human goals, consistent with democratic values" now assumedly even more clearly promised by s.2(d) (para 30).

In the review of Ontario's *ESA* and *OLRA* noted above, the hearings have revealed a serious and growing lack of compliance on the part of employers with regard to even the most minimum employment standards the ESA offers. This is partly due to the rapid growth of low-waged, part-time work in the past decade that makes monitoring workplaces an overwhelming task, particularly with cut-backs that have reduced the number of compliance officers. One clear solution for vulnerable workers would be to increase the rate of unionization among this group and rely on unions to ensure at least minimum standards are met. As Sheila Block, a senior economist at the Canadian Centre for Policy Alternatives comments from her study done for the Centre that the share of Ontario workers who make minimum wage is now five times higher than in 1997. She suggests that the Ontario government "has to look at how (to) increase access to union membership for low-wage precarious workers" and notes that "having a trade union right in your workplace is really a very effective way to ensure that your rights are enforced" (*Toronto Star*, 2015).

As noted, the adoption of the *Wagner Act* model of industrial relations from the US in 1935 has been recognized as a 'compromise' since the limitation on the right to strike during the life of an agreement is tempered with the right to enforce the terms of the agreement through

grievance arbitration (para 44). The Wagner model is also seen to have solved the need for recognition strikes by implementing a government run union certification process, along with enforcing 'closed shop' and automatic dues check-off provisions. See Fudge and Tucker for a comprehensive discussion of the history of the right to strike in Canada in which we are reminded that "when legislatures restricted the freedom to strike they also gave the workers something in exchange." Yet, as pointed out, in the past three decades since the expansion of collective bargaining under the *Charter* one or more of the freedoms to form and join unions, collectively bargain, and strike "have increasingly been suspended or limited, without giving them any compensating rights" as in *SFL* (2009/10, 352-53; see also Panitch and Swartz, 2003). It can be argued that the certification process, since it is part of the compromise regime under the Wagner model, should be protected and encouraged and indeed labour boards should function to *facilitate* organizing. In fact they should '*make it easy*' in the words of the trial judge, for unions to promote access to such important fundamental *Charter* rights.

WHAT LIES AHEAD?

What lies ahead is surely litigation, litigation and more litigation. We have briefly touched on only four areas in which *SFL* will have a major impact on the law. What about injunctions against striking? Or limitations placed on the scope of remedies an arbitrator can consider – such as no monetary items? How about restrictions on picketing and the right of unions to their s.2(b) right to 'express' their demands to the public in the hopes of gaining support for their cause? Does *SFL* modify the law on secondary picketing (Adell, 2003)? Must an appeal process be included in 'binding arbitration' since it is replacing a constitutional right? And on and on. Unfortunately there is little hope of avoiding extensive litigation now that the array of *Charter* rights for unions under 2(d) seem almost fully in place. The hope is likely that after a certain point the need for turning to the courts will diminish, however, this is likely wishful thinking.

In commenting on the Court's description of the strike as an "affirmation of the dignity and autonomy of employees in their working lives" (para 54) Charles Smith, who has written extensively on unions and the Charter has noted: "To my knowledge, never before in its history has the SCC shown such sympathy for the *collective* actions of workers to further workplace democracy" (2015, 5). Perhaps this is also a victory in *SFL* – the clear, definitive and quite inspirational words throughout the decision about correcting power imbalances and supporting the right of

people to come together to pursue their workplace rights. Such words, coming from the highest court in the land, would likely be impressive and persuasive in organizing drives for nervous and reticent potential members who are worried about their employers' reactions if they sign on with the union.

REFERENCES

Adell, B. Grant, M. and A. Ponak. (2001). *Strikes in Essential Services*. Kingston: IRC Press.

Adell, B. (2003). Secondary Picketing after 'Pepsi-Cola': What's Clear and What Isn't. *C.L.E. L.J.*, 10,135-159.

Adell, B. (2013). Regulating Strikes in Essential (and Other) Services after the "New Trilogy". *C.L.E. L.J.*, 17, 413-447.

Bakan, J. (2003). *Corporation: The Pathological Pursuit of Profit and Power.* Toronto: Penguin.

Bartkiw, T. J. (2010). Proceed with Caution, or Stop Wherever Possible? Ongoing Paradoxes, in Legalized Labour Politics, *C.L.E.L.J.*, 15 (1), 77-100.

Bartkiw, T.J. (2008). Manufacturing Dissent? Labour Law and Union Organizing in the Province of Ontario. *Canadian Public Policy*, 34(1), 111-131.

Cameron, J. (2009-10). The Labour Trilogy's Last Rites: 'B.C. Health' and a Constitutional Right to Strike. *C.L.E.L.J.*, 15(1), 297-313.

Canada. (2013). *Bill C-4, Economic Action Plan 2013 Act*. In "Frequently Asked Questions." http://laws-lois.justice.gc.ca/eng/acts/P-33.3/

Cavalluzzo, P. (2015, April 24). *The Impact of Saskatchewan Federation of Labour on Future Constitutional Challenges*, Queen's University's Law in the Contemporary Workplace Symposium on Saskatchewan Federation of Labour Case.

Ewing, K.D. (2015).“The Lady Doth Protest Too Much, Me thinks:” The Right to Strike, International Standards and the Supreme Court of Canada. *C.L.E.L.J.*, 18, 517-534.

Ewing, K.D. (2013). Myth and Reality of the Right to Strike as a ‘Fundamental Labour Right’. *International Journal of Comparative Labour and Industrial Relations*, 29(2), 145-166.

Faraday, F and E. Tucker. (2014). “Who Owns Charter Values? A Mobilizing Strategy for the Labour Movement.” In Matthew Behrens ed., *Union Matters: Advancing Democracy, Economic Equality, and Social Justice* (pp.125-138). Toronto, Between the Lines Press.

Faraday, F. J. Fudge and E. Tucker, eds. (2012). *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*. Toronto: Irwin Law.

Fine, S. (2015). Court protects public sector workers’ right to strike. *Globe & Mail*, January 31, A14.

Fudge, J. and E. Tucker. (2010). The Freedom to Strike, in Canada: A Brief Legal History. *C.L.E.L.J.*, 15(1), 333-53.

Hepple, B. (2009/10). The Right to Strike in an International Context. *C.L.E.L.J.*, 15, 133-146.

Langille, B. (2010). What Is a Strike? *C.L.E.L.J.*, 15(1), 355-374

Langille, B. (2009-10). Why Are Canadian Judges Drafting Labour Codes – And Constitutionalizing the Wager Act Model? *C.L.E.L.J.*,15(1), 101-129.

Panitch, L. and D. Swartz. (2003). *From Consent to Coercion, 3rd edition*. Toronto: Garamond Press.

Servais, J.M. (2009/10). ILO Law and the Right to Strike. *C.L.E.L.J.*, 15(1), 147-168

Sharpe, R.J. and K. Roach. (2013). *The Charter of Rights and Freedoms*, 5th edition. Toronto: Irwin Law.

Smith, C. (2011). "The 'New Normal' in Saskatchewan: Neoliberalism and the Challenge to Workers' Rights." In David McGrane, ed., *New Directions in Saskatchewan Public Policy* (pp.121-152): Regina, Saskatchewan. Regina University Press.

Smith, C. (2012). "Labour, Courts and the Erosion of Workers' Rights in Canada." In S. Ross and L. Savage, eds., *Rethinking the Politics of Labour in Canada* (184-197). Halifax, Fernwood Publishing.

Smith, C. (2015). *The Politics of the Right to Strike*. http://rankandfile.ca/2015/02/03/the-politics-of-the-constitutional-right-to-strike/

Toronto Star. (2015, June 15). Eye-popping' shift to low wages demands change, report says. A1 & 9.

Toronto Star. (2015, June 17). Lessons on precarious work from across the city. Section GT, 2.

CASES CITED

Dunmore v. Ontario (Attorney General), 2001 SCC 94, [2001] 3 S.C.R. 1016.

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007, SCC 27, [2007] 2 S.C.R. 391.

Meredith, 2015, SCC.

Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1.

Ontario, (Attorney General) v. Fraser, 2011 SCC 20, [2011] 2 S.C.R. 3.

PSAC v. Canada, [1987] 1 S.C.R. 424.

Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home (1983), 4 D.L.R. (4th) 231.

R v. Oakes, [1986] 1 SCR 103.

Reference Re Public Service Employees Relations Act (Alberta), [1987] 1 S.C.R 313 [Alberta Reference].

RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460 [Dairy Workers].

Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4.