SCC File No. 35423

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

THE SASKATCHEWAN FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE UNIONS AND WORKERS IN THE PROVINCE OF SASKATCHEWAN); AMALGAMATED TRANSIT UNION, LOCAL 588; CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 397; CANADIAN UNION OF PUBLIC EMPLOYEES, LOCALS 7 AND 4828; COMMUNICATIONS, ENERGY AND PAPERWORKERS' UNION OF CANADA; HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN; INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF U.S., ITS TERRITORIES AND CANADA, LOCALS 295, 300, AND 660; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 529, 2038, AND 2067; SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION; SASKATCHEWAN JOINT BOARD RETAIL, WHOLESALE AND DEPARTMENT STORE UNION; SASKATCHEWAN PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL; TEAMSTERS, LOCAL 395; UNITED MINEWORKERS OF AMERICA, LOCAL 7606; UNION OF NEEDLETRADES, INDUSTRIAL TEXTILE EMPLOYEES/HOTEL EMPLOYEES, RESTAURANT EMPLOYEES' UNION, LOCAL 41; UNITED STEEL, PAPER, FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; AND UNIVERSITY OF REGINA FACULTY ASSOCIATION

APPELLANTS
(RESPONDENTS/APPELLANTS BY CROSS-APPEAL)

AND:

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

RESPONDENT
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FACTUM OF THE INTERVENER
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

AND:

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PART I: OVERVIEW

1. The British Columbia Civil Liberties Association submits that the "right to strike" is guaranteed both by s. 2(b) of the *Canadian Charter of Rights and Freedoms* as an exercise of constitutionally protected freedom of expression, and by s. 2(d) as an exercise of constitutionally protected freedom of association. Both of these fundamental freedoms must be considered together in defining the nature of the conduct protected under s. 2.

2. *Charter* rights and freedoms cannot be understood in isolation. As stated by LaForest J. in *R. v. Lyons*, [1987] S.C.J. No. 62, "the *Charter* protects a complex of interacting values". Each enumerated right or freedom "imbues our understanding of the value structure sought to be protected by the *Charter*". (para. 21)

3. While every protected right and freedom must be defined and understood in the context of the other rights and freedoms protected under the *Charter*, freedom of expression and freedom of association are particularly intertwined and interdependent, especially in relation to the expressive activities of groups of people, such as trade unions.

4. This Court recently recognized in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 (CanLII) (Appellants' Book of Authorities ("ABoA") Vol. I, Tab 1) that freedom of expression and freedom of association are inextricably linked in the labour relations context, and in particular, in the context of collective bargaining:

> Expressive activity in the labour context is directly related to the Charter protected right of workers to associate to further common workplace goals under s. 2(d) of the Charter: *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII), 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 38. As the International Labour Organization observed, "[t]he exercise of freedom of association and collective bargaining is dependent on the maintenance of fundamental civil liberties, in particular, . . . freedom of opinion and expression": *Report of the Director-General: Freedom of association in practice: Lessons learned* (2008), at para. 34 (para. 30).

5. By collectively withdrawing their labour in order to further their common goals, workers are engaging in conduct that is both associational and expressive in nature. They are banding together, in pursuit of their common interests. That is associational. And in doing so, they are,

among other things, communicating a position to their employer, and perhaps others, such as members of the public, and seeking to persuade them to accept their collective bargaining goals. That is expressive. Both aspects must be considered, and considered together, in order to properly appreciate and articulate the essential nature of strike activity and why it is constitutionally protected activity under s. 2 of the *Charter*.

PART II: BCCLA'S POSITION ON THE CONSTITUTIONAL QUESTIONS

6. The Chief Justice has stated the following constitutional questions:

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

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

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

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

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

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

7. The BCCLA confines its submissions to the first and third constitutional questions. The BCCLA submits in response to those questions that the *Public Service Essential Services Act*, by prohibiting or severely limiting workers' right to strike, infringes both s. 2(b) and s. 2(d) of the

Charter. Our focus shall be upon s. 2(b), and its relationship to s. 2(d), and the interpretive approach appropriate to both, rather than on s. 2(d) as an independent basis for the right to strike, an issue upon which we adopt the submissions of the Appellants and the Interveners in support of the Appellants on that point. For the purposes of this intervention, the BCCLA takes no position on the remaining constitutional questions stated.

PART III: ARGUMENT

A. The right to strike is a protected exercise of expressive association.

8. This Court has long recognized that freedom of expression and freedom of association are both essential to the ability of workers to achieve their common work-related goals, to achieve self-fulfillment, and to participate fully in Canadian society.

9. Thus, for example, in *UFCW, Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 (ABoA Vol. II, Tab 28), the Court considered whether leafleting activity carried out by a union in support of its position in a labour dispute was constitutionally protected under s. 2(b). It held that leafleting was constitutionally protected expressive conduct. In doing so, the Court stated:

> The importance of work for individuals has been consistently recognized and stressed…As well, the vulnerability of individual employees, particularly retail workers, and their inherent inequality in their relationship with management has been recognized…It follows that workers, particularly those who are vulnerable, must be able to speak freely on matters that relate to their working conditions. For employees, freedom of expression becomes not only an important but an essential component of labour relations. It is through free expression that vulnerable workers are able to enlist the support of the public in their quest for better conditions of work. Thus their expression can often function as a means of achieving their goals. (para. 25)

10. In *KMart*, this Court recognized that employment provides not only economic benefits but also:

> …fulfills significant social and psychological needs. For workers, a form of expression which deals with their working conditions and treatment by their employer is a statement about their working environment. Thus, it relates to their well-being and dignity in the work place. (para. 29)

11. This Court reiterated and expanded upon the critical function freedom of expression plays for workers seeking to achieve their goals in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada*

Beverages (West) Ltd., [2002] 1 S.C.R. 156 (ABoA Vol. II, Tab 28). In that case, the Court accepted that "picketing, however defined, always involves expressive action. As such, it engages in one of the highest constitutional values: freedom of expression enshrined in s. 2(b) of the *Charter*". (para. 32)

12. In *Pepsi-Cola*, this Court recognized the critical importance of free expression for workers involved in labour disputes, in particular how free expression may play a significant role in alleviating the inherent power imbalance between employers and workers. This Court stated:

> It is through free expression that employees are able to define and articulate their common interests and, in the event of a labour dispute, elicit the support of the general public in the furtherance of their cause. (para. 34)

13. In upholding the expressive and thus constitutionally protected nature of picketing in *Pepsi-Cola*, the Court explicitly situated picketing within the context of labour disputes, and the pressure each side may bring to bear to persuade the other to accept their position in the case of an impasse:

> When this happens, it has come to be accepted that, within limits, unions and employers may legitimately exert economic pressure on each other to the end of resolving their dispute. Thus, employees are entitled to withdraw their services, inflicting economic harm directly on their employer and indirectly on third parties that do business with their employer. (para. 24)

14. Picketing is not, in the context of a labour dispute, a free-standing expressive act. It is not a theoretical or academic exercise in expressing oneself, nor is it solitary activity. It is a collective exercise, engaged in for the purposes of furthering the workers' aims in a labour dispute. Picketing is inextricably linked with the underlying strike activity it supports. They are both means by which the workers communicate and seek to persuade others. As such, they are both forms of collective expression engaged in in support of a trade union's associational aims.

15. This inherent connection between freedom of expression and freedom of association was recognized by this Court in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, *supra*, in which the Court stated "expressive activity in the labour context is directly related to the *Charter* protected right of workers to associate to further common workplace goals under s. 2(d) of the *Charter*". (para. 30)

16. The British Columbia Court of Appeal has recognized that strike action is expressive conduct protected by s. 2(b): *British Columbia Teachers' Federation v. British Columbia Public School Employer's Assn.*, 2009 BCCA 39 (CanLII) (ABoA Vol. I, Tab 5), paras. 35-38.

17. While all strikes are expressive, their expressive nature may be particularly significant in the case of public sector workers, such as those affected by the *Public Service Essential Services Act*. By striking, public sector workers may be seeking, not only to put direct pressure on their employer to agree to their collective bargaining goals, but also to influence public opinion, and thereby put indirect pressure on the employer. The goals of such strike activity may include both political and more purely economic ends: *British Columbia Teachers' Federation*, *supra*, para. 37.

18. The act of striking, that is the collective decision on the part of workers to withdraw their labour to further their common goals, is at one and the same time both expressive and associational. It would be wholly artificial to attempt to understand or analyze striking without a consideration of both its expressive and associational aspects. As such, it can be termed an exercise in "freedom of expressive association".

19. The concept of freedom of expressive association was developed in the United States in the absence of any constitutional provision explicitly protecting freedom of association. As discussed by Dickson C.J. in *Reference Re Public Service Employees Relations Act (Alta)*, [1987] 1 S.C.R. 313 (ABoA Vol. II, Tab 25) (the "*Alberta Reference*"), paras. 47-49, the United States Supreme Court has recognized that the First Amendment protects freedom of association.

20. The concept of freedom of expressive association finds its origin in *NAACP v. Alabama*, 357 U.S. 449 (1958), 357 U.S. 449, a case in which the NAACP resisted the production of its membership lists, arguing that the compelled disclosure of those lists would abridge the right of its members to engage in lawful association in support of their common beliefs. The Court accepted the Petitioners' argument, holding:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly…Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action

> which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. (pp. 460-461)

21. Later, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the United States Supreme Court discussed its body of jurisprudence deriving from *NAACP v. Alabama*, under which:

> The Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. (p. 618)

22. The Court went on to state:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed… According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority…Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends…. (p. 622)

23. The American jurisprudence is noteworthy in that United States Supreme Court has recognized freedom of association in the absence of any explicit reference to it in its Constitution on the basis of its intrinsic relation to First Amendment rights, in particular freedom of expression. Unlike under the United States Constitution, freedom of association is explicitly protected under the *Charter*, and is not derivative of freedom of expression. Further, due to the existence of s. 1 of the *Charter*, internal limits, as discussed below, should not be imposed on either freedom. But, in our respectful submission, and notwithstanding these differences, the same close connection between these two fundamental freedoms ought to be recognized under s. 2 of the *Charter*, which explicitly recognizes both freedom of expression and freedom of association.

24. Further, the exercise of the right to strike, or more properly understood, the freedom to strike, must be recognized as a core element of the protected activity under ss. 2(b) and 2(d). Striking forms part of a continuum, together with the expressive associational conduct of

picketing and leafleting, that has already recognized by this Court. Striking, like leafleting and picketing, is essential to workers' ability to overcome the power imbalance between them and their employers, to inform coworkers, the public and the employer of their collective bargaining goals, and to persuade others to assist them or agree to their collective bargaining demands.

B. Sections 2(b) and 2(d) must be interpreted in a consistent and coherent manner.

25. This dual nature of strike activity, encompassing both expressive and associational conduct, underscores the necessity that the interpretation and application of ss. 2(b) and 2(d), and indeed of all of the fundamental freedoms protected under s. 2 of the *Charter*, be undertaken in a coherent and consistent manner.

26. To date, this Court's jurisprudence has defined the scope of protected conduct under ss. 2(a) and (b) of the *Charter* broadly, leaving it to the Government to justify any such infringement under s. 1. For example, in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 (CanLII), [2011] 1 SCR 19, para. 38, the Court summarized the established test for determining if s. 2(b) is infringed:

> In sum, to determine whether an expressive activity is protected by the *Charter*, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? (*Criminal Lawyers' Association*, at para. 32, summarizing the test developed in *City of Montréal*, at para. 56). (para. 38)

27. Under this test, all activity which has expressive content is protected under s. 2(b), unless there is something about the method or location of the activity (*e.g.* its violent character) to take it outside of the scope of s. 2(b). Any government act having the purpose or effect of limiting expressive activity is an infringement of s. 2(b).

28. In *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 SCR 467, the Court held that the Saskatchewan *Human Rights Act* prohibition on hate speech constituted a *prima facie* infringement of the respondent's freedom of religion and expression. In doing so the Court emphasized the broad protection provided under both s. 2(a) and s. 2(b):

> Just as the protection afforded by freedom of expression is extended to all expression other than violence and threats of violence, in my view, the protection provided under s. 2(a) should extend broadly. As stated by La Forest J., writing also on behalf of Gonthier and McLachlin JJ. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 109, "[t]his Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the Charter; see *R. v. Jones*, [1986 CanLII 32 (SCC), [1986] 2 S.C.R. 284]". Given the engagement of freedom of expression, freedom of religion and equality rights in the present context, a s. 1 analysis is the appropriate procedural approach under which to evaluate their constitutional interplay.
>
> An infringement of s. 2(a) of the *Charter* will be established where: (1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs: *Hutterian Brethren of Wilson Colony*, at para. 32; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 46 and 56-59; and *Multani*, at para. 34. The interference must be more than trivial or insubstantial, so that it threatens actual religious beliefs or conduct. (paras. 154-55)

29. Under this test, any non-trivial interference with a sincerely held religious belief or practice will be an infringement of s. 2(a).

30. By contrast to this large and liberal approach under ss. 2(a) and 2(b), this Court has tended to narrow the scope of the protection afforded by s. 2(d) of the *Charter*. Thus, for example, in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII), [2011] 2 SCR 3 (ABoA Vol. II, Tab 17), the majority of the Court stated the test for an infringement of s. 2(d) in these terms:

> If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.
>
> … The question here, as it was in those cases, is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(d) associational right. (paras. 47-48)

31. Thus, while in considering alleged infringements of s. 2(a) or s. 2(b), this Court has taken a large and liberal approach, under which it has "consistently refrained from formulating internal limits", under s. 2(d) this Court has tended to formulate internal limits on the freedom, requiring,

as in *Fraser*, that the legislation render association "impossible" or that it "substantially impair" the exercise of the associational right, in order for s. 2(d) to be infringed.

32. The BCCLA submits that there is no principled justification for treating freedom of association differently, and more narrowly, than the other fundamental freedoms. In all cases, a liberal and purposive approach must be taken to defining the scope of the protected freedom, and internal limits on the freedom should be avoided. To do otherwise is to absolve the government from its burden of justifying the infringement of *Charter* rights and freedoms under s. 1.

33. This point is underscored by considering ss. 2(b) and 2(d) together. By striking, workers act collectively to withdraw their labour. Doing so reinforces their association by defining the group commitment to that meaningful activity. Doing so also conveys meaning to the employer, to other workers, and to the public at large. Strike activity is expressive activity that manifests and is predicated upon acting in association. There is nothing about the nature of non-violent strike activity that would exclude it from protection under s. 2. Legislation which limits strike activity has the purpose and the effect of limiting workers' freedom of expression and association. As such, non-violent striking is conduct which *prima facie* falls within the protected scope of both s. 2(b) and s. 2(d) of the *Charter*. Any government action which has the purpose or effect of limiting or restricting strike activity infringes ss. 2(b) and (d), and must be justified by government pursuant to s. 1 of the *Charter*.

C. Section 2(d) must be interpreted liberally in order to protect associational activity, both in the labour relations context and at large.

34. The vast majority of the freedom of association cases that this Court has heard have arisen in the labour relations context, and have involved questions as to whether particular activities, such as organizing, collective bargaining striking, are encompassed within the freedom of association.

35. Freedom of association is of fundamental importance in a free and democratic society. It protects the freedom to associate, not only of unionized workers, but also of religious, student, political and advocacy groups, among others. In the case of unionized workers, the BCCLA has long advocated that freedom of association, must include the right to strike.

36. But freedom of association is crucial for all Canadians, not only unionized workers. The American jurisprudence, referred to above, is instructive in this regard. It was the NAACP which successfully invoked freedom of association in support of its members' rights, not only in *NAACP v. Alabama*, *supra*, but also in a line of cases referred to by Dickson C.J. in the *Alberta Reference*, para. 48. Members of vulnerable and historically disadvantaged groups and those expressing controversial or dissident views are likely to be most in need of the strength in numbers a robust interpretation of s. 2(d) will provide.

37. Placing internal limits on s. 2(d) not imposed on the other fundamental freedoms will have the unintended negative consequence of limiting the freedom of association of disadvantaged or comparatively less powerful groups. Any policy concerns unique to the labour relations context can and should be dealt with under s. 1.

38. It is respectfully submitted that a broad interpretation of freedom of association, consistent with the interpretation given by this Court to the other fundamental freedoms, is more likely to ensure that the freedom of association, not only of unionized workers, but of all Canadians, is appropriately protected, leaving the consideration of any limits on that freedom to analysis under s. 1.

PART IV: SUBMISSIONS REGARDING COSTS

39. Pursuant to the Order of the Chief Justice dated April 8, 2014, the interveners shall pay to the Appellants and Respondents any additional disbursements occasioned by their interventions. Beyond this, the BCCLA requests that no order for costs be made against it and seeks no costs.

PART V: REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

40. The BCCLA seeks leave to present ten minutes of oral argument at the hearing of the within appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 2, 2014
Vancouver, British Columbia

____
LINDSAY M. LYSTER
Counsel for the Intervener, British Columbia Civil Liberties Association

PART VI: TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s)**
Cases	
Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62 (CanLII) (Appellants' Book of Authorities Volume I, Tab 1)	4, 15
British Columbia Teachers' Federation v. British Columbia Public School Employer's Assn., 2009 BCCA 39 (CanLII) (Appellants' Book of Authorities Volume I, Tab 5)	16, 17
Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2 (CanLII), [2011] 1 SCR 19	26
Ontario (Attorney General) v. Fraser, 2011 SCC 20 (CanLII), [2011] 2 SCR 3 (Appellants' Book of Authorities Volume II, Tab 17)	30, 31
R. v. Lyons, [1987] S.C.J. No. 62	2
Reference Re Public Service Employees Relations Act (Alta), [1987] 1 S.C.R. 313 (Appellants' Book of Authorities Volume II Tab 25)	19, 36
R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156 (Appellants' Book of Authorities Volume II, Tab 28)	11, 12, 13
Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 (CanLII), [2013] 1 SCR 467	28
UFCW, Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083 (Appellants' Book of Authorities Volume II, Tab 28)	9, 10
Foreign Cases	
NAACP v. Alabama, 357 U.S. 449 (1958), 357 U.S. 449	20, 36
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	21, 22

PART VII: STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, The Constitutional Act, 1982 being schedule B to the *Canada Act 1982 (UK)*, c. 11 ss. 1, 2(a), 2(b), and 2(d)

Public Service Essential Services Act, S.S. 2008, c. P-42.2

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

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Current version: in force since Apr 17, 1985

Link to the latest version: http://canlii.ca/t/8q7l
Stable link to this version: http://canlii.ca/t/ldsx
Citation to this version: The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <http://canlii.ca/t/ldsx> retrieved on 2014-04-30
Currency: Last updated from the Justice Laws Web Site on 2014-04-23

The Constitution Act, 1982

Citation: *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

The Public Service Essential Services Act

being

Chapter P-42.2 of the *Statutes of Saskatchewan, 2008*
(effective May 14, 2008)

NOTE:
This consolidation is not official. Amendments have been incorporated for convenience of reference and the original statutes and regulations should be consulted for all purposes of interpretation and application of the law. In order to preserve the integrity of the original statutes and regulations, errors that may have appeared are reproduced in this consolidation.

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CHAPTER P-42.2

An Act respecting Essential Public Services

PART I

Short Title, Interpretation and Application

Short title

1 This Act may be cited as *The Public Service Essential Services Act.*

Interpretation

2 In this Act:

(a) **"board"** means the Labour Relations Board;

(b) **"employee"** means an employee of a public employer who is represented by a trade union;

(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; and

(ii) with respect to services provided by the Government of Saskatchewan, services that:

(A) meet the criteria set out in subclause (i); and

(B) are prescribed;

(d) **"essential services agreement"** means an agreement concluded pursuant to section 6;

(e) **"essential services employee"** means an employee who, during a work stoppage, is required to provide essential services in accordance with:

(i) an essential services agreement; or

(ii) a notice given by a public employer pursuant to section 9 or 12;

(f) **"last collective bargaining agreement"** means the collective bargaining agreement last in effect between a public employer and a trade union before a work stoppage;

(g) **"minister"** means the member of the Executive Council to whom for the time being the administration of this Act is assigned;

(h) **"prescribed"** means prescribed in the regulations;

(i) **"public employer"** means:

(i) the Government of Saskatchewan;

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

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

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

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

(vi) the University of Regina;

(vii) the University of Saskatchewan;

(viii) the Saskatchewan Institute of Applied Science and Technology;

(ix) a municipality;

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

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

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

(B) is prescribed;

(j) **"trade union"** means a trade union representing employees of a public employer;

(k) **"work stoppage"** means a lock-out or strike within the meaning of *The Trade Union Act*.

2008, c.P-42.2, s.2.

Application of Act

3 This Act applies to every public employer, every trade union and every employee.

2008, c.P-42.2, s.3.

Act to prevail

4 This Act is to prevail if there is any conflict between this Act and:

(a) any other Act or law; or

(b) any collective bargaining agreement, arbitral or other award or decision or any obligation, right, claim, agreement or arrangement of any kind.

2008, c.P-42.2, s.4.

Crown bound

5 The Crown in right of Saskatchewan is bound by this Act.

2008, c.P-42.2, s.5.

PART II

Essential Services Agreements

Negotiations for essential services agreement required

6(1) If a public employer and a trade union do not have an essential services agreement that is in effect, the public employer and the trade union shall begin negotiations with a view to concluding an essential services agreement:

(a) at least 90 days before the expiry of the collective bargaining agreement; or

(b) as soon as is reasonably possible if:

(i) on the day this Act comes into force, there are fewer than 90 days before the expiry of the collective bargaining agreement; or

(ii) there is no collective bargaining agreement in effect.

(2) On beginning negotiations pursuant to this section, a public employer other than the Government of Saskatchewan shall advise the trade union of those services of the public employer that the public employer considers as essential services for the purposes of an essential services agreement.

(3) For the purposes of an essential services agreement between the Government of Saskatchewan and a trade union, the prescribed services are the essential services for the purposes of an essential services agreement.

(4) For the purpose of facilitating the negotiation of an essential services agreement, the public employer may give a notice to the trade union setting out the information the public employer is required to provide pursuant to subsection 9(2) if:

(a) either:

(i) at any point during the 30-day period before the expiry of the collective bargaining agreement, the public employer and trade union have not concluded an essential services agreement; or

(ii) there is no collective bargaining agreement in effect and the public employer and trade union have not concluded an essential services agreement; and

(b) the public employer considers it appropriate to give the notice.

(5) For the purpose of facilitating the negotiation of an essential services agreement, the public employer shall give, as soon as is reasonably possible, a notice to the trade union setting out the information the public employer is required to provide pursuant to subsection 9(2) if:

(a) either:

(i) at any point during the 30-day period before the expiry of the collective bargaining agreement, the public employer and trade union have not concluded an essential services agreement; or

(ii) there is no collective bargaining agreement in effect and the public employer and trade union have not concluded an essential services agreement; and

(b) the trade union has requested that notice.

(6) Every employee who is covered by an essential services agreement is deemed to be an essential services employee.

2008, c.P-42.2, s.6.

Contents of essential services agreement

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.

2008, c.P-42.2, s.7.

Termination

8(1) An essential services agreement continues until it is terminated in accordance with this section.

(2) A party to an essential services agreement may terminate the essential services agreement only if:

(a) the parties have a collective bargaining agreement; and

(b) there are at least 100 days left before the expiry of the collective bargaining agreement.

(3) A party may terminate an essential services agreement pursuant to subsection (2) by giving the other party written notice.

(4) Nothing in this section affects the obligation of a public employer and a trade union to negotiate with a view to concluding an essential services agreement in accordance with section 6.

2008, c.P-42.2, s.8.

PART III

Provision of Essential Services if no Essential Services Agreement

Notice if no essential services agreement

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.

2008, c.P-42.2, s.9.

Trade union may apply to Labour Relations Board re numbers of employees

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.

2008, c.P-42.2, s.10.

Employer or trade union may apply for further orders

11(1) A public employer or trade union may apply to the board for an order to amend, vary, rescind or rescind and replace an order issued pursuant to section 10 or any further order issued pursuant to this section.

(2) If a public employer or trade union applies to the board pursuant to subsection (1), it must serve a written copy of the application on the other party.

(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 amend, vary, rescind or rescind and replace an order issued pursuant to section 10 or any further order issued pursuant to this section.

(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:

(a) confirming the order issued pursuant to section 10 or the further order issued pursuant to this section; or

(b) amending, varying, rescinding or rescinding and replacing the order issued pursuant to section 10 or the further order issued pursuant to this section.

(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.

2008, c.P-42.2, s.11.

Effect of order re number of employees

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.

2008, c.P-42.2, s.12.

PART IV

General

Obligations of public employers

13 No public employer shall authorize, declare or cause a work stoppage of essential services employees.

2008, c.P-42.2, s.13.

Obligations of employees

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

2008, c.P-42.2, s.14.

Obligations of trade union

15(1) No trade union shall authorize, declare or cause a work stoppage of essential services employees.

(2) Neither the trade union nor any person acting on behalf of the trade union shall in any manner:

(a) discipline any essential services employee for the reason that the essential services employee complies with this Act; or

(b) direct, authorize or counsel another person to discipline any essential services employee for the reason that the essential services employee complies with this Act.

2008, c.P-42.2, s.15.

No person to prevent compliance with this Act

16 No person or trade union shall in any manner impede or prevent or attempt to impede or prevent any essential services employee from complying with this Act.

2008, c.P-42.2, s.16.

No person to aid, abet or counsel non-compliance with this Act

17 No person or trade union shall do or omit to do anything for the purpose of aiding, abetting or counselling any essential services employee not to comply with this Act.

2008, c.P-42.2, s.17.

Essential services employees to continue or resume work

18(1) If there is a work stoppage:

(a) every essential services employee shall continue or resume the duties of his or her employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement, if any;

(b) the public employer shall permit each of its essential services employees to continue or resume the duties of his or her employment in accordance with the terms and conditions of the last collective bargaining agreement, if any; and

(c) every person who is authorized on behalf of the trade union to bargain collectively with the public employer shall give notice to the essential services employees that they must continue or resume the duties of their employment in accordance with the terms and conditions of the last collective bargaining agreement, if any.

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

(3) Neither the public employer nor any person acting on behalf of the public employer shall, without lawful excuse, refuse to permit or authorize, or direct or authorize another person to refuse to permit or authorize, any essential services employee from continuing or resuming the duties of his or her employment as required by this Act.

2008, c.P-42.2, s.18.

Powers of board

19(1) For the purpose of carrying out the intent of this Act, in addition to the powers conferred on it by this Act, the board has all the powers conferred on it by *The Trade Union Act*.

(2) An order made by the board pursuant to this Act or the regulations is enforceable in the same manner as an order of the board made pursuant to *The Trade Union Act*.

(3) There is no appeal from an order or decision of the board pursuant to this Act, and the proceedings, orders and decisions of the board are not reviewable by any court of law or by any *certiorari*, mandamus, prohibition, injunction or other proceeding.

(4) The chairperson of the board may make any rules of practice and procedure that the board considers necessary to carry out its responsibilities pursuant to this Act.

2008, c.P-42.2, s.19.

Offence and penalties

20(1) No person or trade union shall fail to comply with this Act, the regulations or an order of the board.

(2) Every person who or trade union that contravenes any provision of this Act is guilty of an offence and liable on summary conviction:

(a) in the case of an offence committed by a public employer or a trade union or by a person acting on behalf of a public employer or the trade union, to a fine of not more than $50,000 and, in the case of a continuing offence, to a further fine of $10,000 for each day or part of a day during which the offence continues; and

(b) in the case of an offence committed by any person other than one described in clause (a), to a fine of not more than $2,000 and, in the case of a continuing offence, to a further fine of $400 for each day or part of a day during which the offence continues.

(3) In the case of default of payment of a fine imposed on a person pursuant to this section, the convicting court shall, on the request of the Attorney General, furnish the Attorney General with a certified copy of the order of conviction and fine imposed and, on its filing in the office of the local registrar of the Court of Queen's Bench, that order is enforceable as a judgment of that court.

2008, c.P-42.2, s.20.

Regulations

21 The Lieutenant Governor in Council may make regulations:

(a) defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act;

(b) prescribing, for the purposes of this Act, services provided by the Government of Saskatchewan for the purposes of subclause 2(c)(ii);

(c) prescribing any person, agency or body, or class of persons, agencies or bodies, for the purposes of subclause 2(i)(xi);

(d) for the purposes of clause 7(1)(e) prescribing other provisions that must be included in an essential services agreement, including prescribing the contents of those provisions;

(e) prescribing any other matter or thing that is authorized or required by this Act to be prescribed in the regulations;

(f) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent of this Act.

2008, c.P-42.2, s.21.

PART V

Coming into Force

Coming into force

22 This Act comes into force on assent.

2008, c.P-42.2, s.22.

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2008

CHAPTER 26

An Act to amend *The Trade Union Act*

(Assented to May 14, 2008)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

Short title

1 This Act may be cited as *The Trade Union Amendment Act, 2008.*

R.S.S. 1978, c.T-17 amended

2 *The Trade Union Act* is amended in the manner set forth in this Act.

Section 6 amended

3(1) Subsection 6(1) is repealed and the following substituted:

"(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

"(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.

"(1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application".

(2) Clause 6(2)(b) is amended:

(a) by striking out "25%" and substituting "45%"; and

(b) by striking out "six months" **and substituting** "90 days".

(3) Clause 6(2)(c) is repealed.

Section 10.1 amended

4(1) Clause 10.1(b) is repealed and the following substituted:

"(b) there is insufficient evidence before the board that shows that 45% or more of the employees in the appropriate unit support the application".

(2) Clause 10.1(c) is repealed and the following substituted:

"(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or violation of this Act".

Section 10.2 amended

5(1) Clause 10.2(b) is repealed and the following substituted:

"(b) there is insufficient evidence before the board that shows that 45% or more of the employees in the appropriate unit support the application".

(2) Clause 10.2(c) is repealed and the following substituted:

"(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or violation of this Act".

Section 11 amended

6 Clause 11(1)(a) is repealed and the following substituted:

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

New section 12.1

7 The following section is added after section 12:

"Deadline to report unfair labour practice

12.1(1) Subject to subsection (2), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew, or in the opinion of the board ought to have known, of the action or circumstances giving rise to the allegation, unless the respondent has consented in writing to waive or extend the deadline.

(2) The board must hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (1) if the respondent has consented in writing to waive or extend the deadline".

Section 17 amended

8 Subsection 17(2) is amended by adding the following clause after clause (b):

"(c) for the purposes of subsection 6(1.2)".

Section 18 amended

9 Section 18 is amended:

(a) in clause (f) by adding "subject to the regulations made by the Lieutenant Governor in Council," **before** "to determine"; **and**

(b) in clause (g) by adding "subject to the regulations made by the Lieutenant Governor in Council," **before** "to determine".

New sections 21.1 and 21.2

10 The following sections are added after section 21:

"Deadline for board decision

21.1(1) Any decision of the board shall be provided to the parties within six months of the last day of the hearing unless the board is reasonably justified in requiring more time.

(2) Notwithstanding section 21 and subsection 40(1), any party to a proceeding before the board may apply to the Court of Queen's Bench for an order directing the board to provide its decision if the deadline in subsection (1) has not been met.

(3) Any failure to comply with subsection (1) does not affect the validity of a decision.

"Annual report

21.2(1) In each fiscal year, the board shall, in accordance with *The Tabling of Documents Act, 1991*, submit to the minister an annual report on the activities of the board for the preceding fiscal year.

(2) The minister shall, in accordance with *The Tabling of Documents Act, 1991*, lay before the Legislative Assembly each report received by the minister pursuant to this section.

(3) Notwithstanding subsection 40(1), the annual report shall include the following information:

(a) a list of all matters filed with the board;

(b) a list of all decisions rendered by the board;

(c) with respect to each decision listed:

(i) the date the matter was initially filed;

(ii) the date the matter was heard by the board;

(iii) the members of the board that heard the matter; and

(iv) the length of time between the last day of the hearing and the rendering of the decision; and

(d) a summary, by member, of:

(i) the number of decisions rendered;

(ii) the type of decision whether interim or final disposition; and

(iii) the average period between the last day of a hearing and the rendering of the decision for each type of decision".

Section 33 amended

11 Subsection 33(3) is repealed.

Coming into force

12 This Act comes into force on assent.

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