Response to
A CONSULTATION PAPER ON THE
RENEWAL OF LABOUR LEGISLATION
IN SASKATCHEWAN (2012)

Inequality has Many Faces

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This document is submitted in response to the "Consultation Paper on the Renewal of Labour Legislation in Saskatchewan May 2, 2012 and the questions posed in it. This response is submitted without prejudice to any ongoing or future legal action and/or proceedings that relate to or are derived under any labour legislation.

…labour unions should become strong in order to carry on the functions for which they are intended. This is machinery devised to adjust, toward an increasing harmony, the interests of capital, labour and public in the production of goods and services which our philosophy accepts as part of the good life; it is to secure industrial civilization within a framework of a labour-employer constitutional law on a rational economic and social doctrine.[1]

Mr. Justice Ivan Rand

[1] Ford Motor Co. v. U.A.W.-C,I,O. (1944-48), 18, 001 Canadian Wartime Labour Relations Board Decisions 159 at 160. (Rand) [Ford Motor]

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On behalf of our 29, 000 members working in a variety of public service occupations across Saskatchewan, the Canadian Union of Public Employees (CUPE) – Saskatchewan Division appreciates the opportunity to contribute to the discussion of workplace rights and protections for Saskatchewan workers as prompted by *A Consultation Paper on the Renewal of Labour Legislation in Saskatchewan* released on May 2, 2012.

In our comprehensive response to the consultation paper, CUPE proposes to preserve the original public purpose of labour laws—to provide as much as possible a social and economic balance between the rights of workers and employer prerogatives. The history of Saskatchewan's labour laws instructs us that balance can emerge from strong protections for workers against unjust treatment, providing unions and employers with a democratic and fair process to negotiate agreements free from unnecessary intervention, and safeguarding the well-being of Saskatchewan people in both prosperous and challenging economic times.

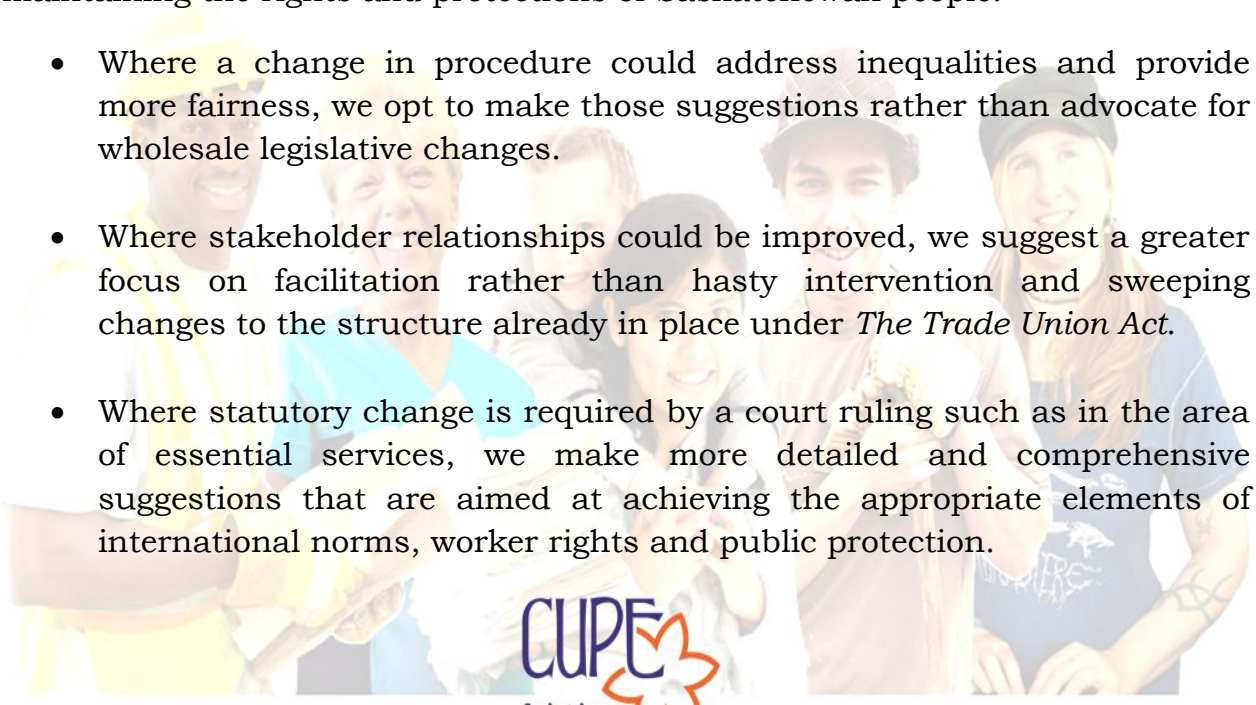
Renewal based on moderation

In our submission, CUPE advocates a moderate approach that seeks to renew Saskatchewan's labour law on the premise that balance is best achieved when changes are modest, thoughtful, gradual in implementation and dedicated to maintaining the rights and protections of Saskatchewan people.

- Where a change in procedure could address inequalities and provide more fairness, we opt to make those suggestions rather than advocate for wholesale legislative changes.

- Where stakeholder relationships could be improved, we suggest a greater focus on facilitation rather than hasty intervention and sweeping changes to the structure already in place under *The Trade Union Act*.

- Where statutory change is required by a court ruling such as in the area of essential services, we make more detailed and comprehensive suggestions that are aimed at achieving the appropriate elements of international norms, worker rights and public protection.



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Addressing persisting inequalities

We also seek to address the inequalities that persist in Saskatchewan by providing thoughtful suggestions to enhance human rights, ensure jobs keep workers out of poverty and extend minimum employment standard protections to all workers in Saskatchewan.

- **HUMAN RIGHTS** - Rebuilding a robust complaints system that includes a sufficient investigative staff at the Human Rights Commission and the restoration of the Human Rights Tribunal (pp. 38-40).

- **JOBS KEEPING WORKERS OUT OF POVERTY** – Raising the minimum wage to $10 per hour and then indexing the minimum wage with consideration given to the Low Income Cut-Off (LICO), cost of living and living wage (pp. 65-69).

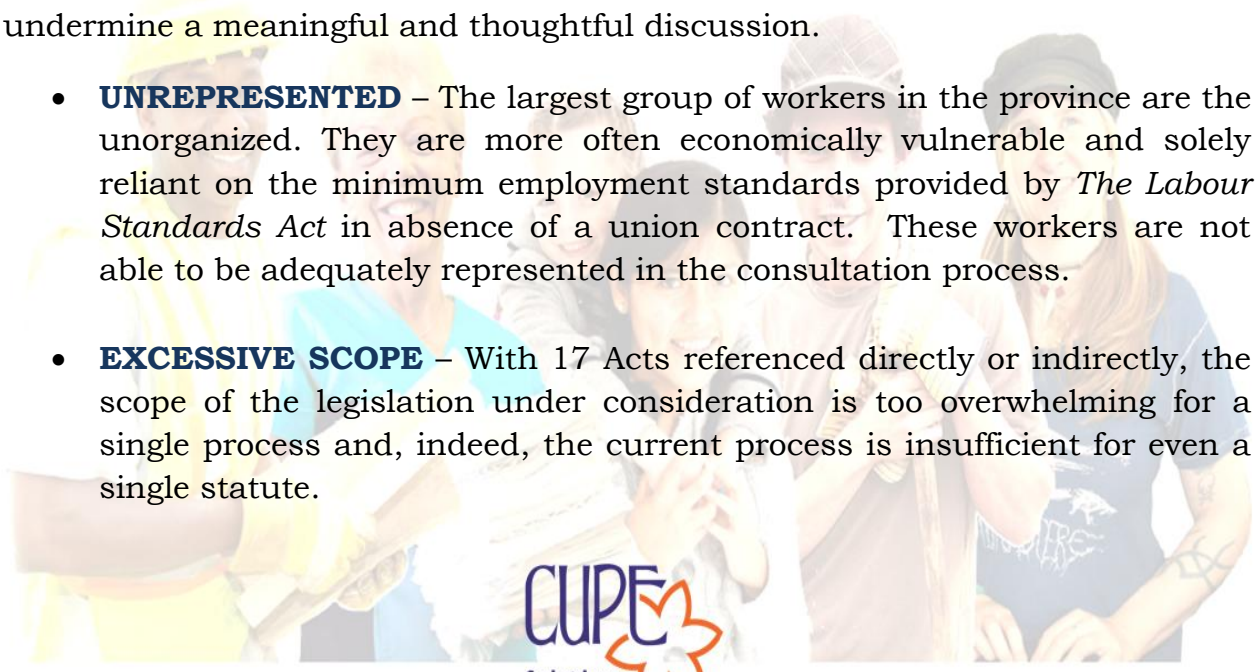
- **EXTENDING PROTECTIONS** – All Saskatchewan workers are worthy of baseline protections provided by *The Labour Standards Act* and historical exemptions are no longer supportable on principle (pp. 44-48).

Consultation process

In submitting our response to the consultation paper, CUPE identifies a number of shortcomings in the government's consultation process that undermine a meaningful and thoughtful discussion.

- **UNREPRESENTED** – The largest group of workers in the province are the unorganized. They are more often economically vulnerable and solely reliant on the minimum employment standards provided by *The Labour Standards Act* in absence of a union contract. These workers are not able to be adequately represented in the consultation process.

- **EXCESSIVE SCOPE** – With 17 Acts referenced directly or indirectly, the scope of the legislation under consideration is too overwhelming for a single process and, indeed, the current process is insufficient for even a single statute.



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- **INSUFFICIENT RESPONSE TIME** – The 90-day consultation period to submit responses to the consultation paper is unnecessarily rushed and deprives the community of opportunity to address its views and concerns in a fulsome fashion.

- **FOUNDATION OF REVIEW** – The process of the consultation does not permit the comparison of submissions or further discussion of submissions past the July 31st deadline and before new legislation is intended to be introduced.

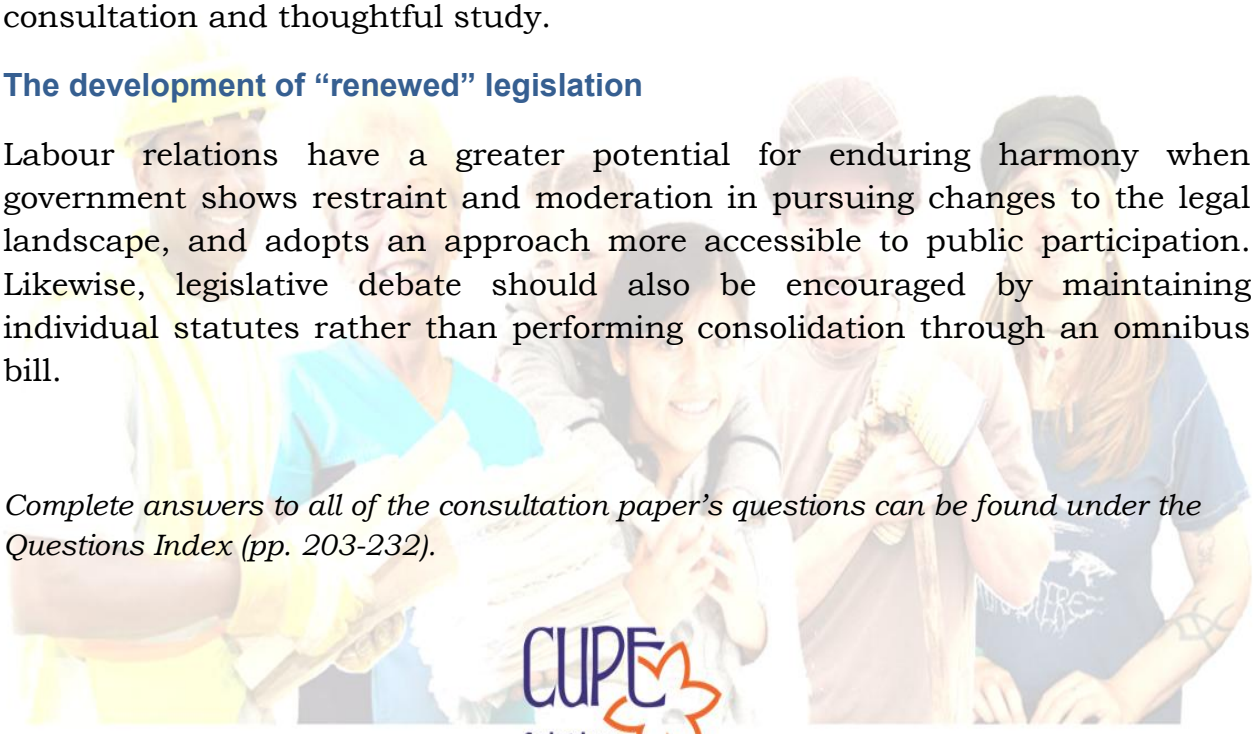
- **EXTENT OF CONSULTATION** – The breadth of review embarked upon calls for the most broadly based, comprehensive, thoughtful and considered consultation possible. These unfortunately are not features of the current process. The haste has been attributed to the need to revise essential services legislation pursuant to the decision by the Court of Queen's Bench. This imperative can be accomplished without the negative impact on the remainder of the consultation by severing essential services from the main body of the consultation agenda.

CUPE encourages the government to reconsider its hurried approach in making changes to Saskatchewan's labour laws and give additional opportunities for consultation and thoughtful study.

The development of "renewed" legislation

Labour relations have a greater potential for enduring harmony when government shows restraint and moderation in pursuing changes to the legal landscape, and adopts an approach more accessible to public participation. Likewise, legislative debate should also be encouraged by maintaining individual statutes rather than performing consolidation through an omnibus bill.

Complete answers to all of the consultation paper's questions can be found under the Questions Index (pp. 203-232).



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Introduction

While it is tempting for both labour and management to advocate for wholesale change in labour legislation, there are difficulties created by dramatic swings in a legislative framework that is designed to foster secure, enduring relationships. There are few forces so destructive to stable labour relations as wild swings in the balance the statute creates between unions and employers. Future changes to labour statutes should be moderate and measured. CUPE believes that a balance, once achieved, will be more enduring if it has been the product of broad-based consultation. This preference for moderation has been adopted by other labour law review panels.

In the 1998 review prepared in BC by the Labour Relations Code Review Committee (Section 3 committee), the committee said:

> A Section 3 committee has a significant role to play in reducing polarization between the parties. In many respects that polarization is a result of the traditional style of B. C. politics in which, labour legislation is significantly amended with each change of the government in power, which creates a "pendulum" approach that is inimical to sound labour relations. The creation of an ongoing Section 3 committee would help moderate what could otherwise be dramatic swings in the balance by ensuring that any future changes to the Code are incremental and measured…[2]

In 1993 in Saskatchewan the Priel-chaired Committee considering *The Trade Union Act* (TUA) expressed a similar view:

> Both business and labour recognize that stable labour management relations will be enhanced by avoiding radical changes to labour legislation depending upon the particular political philosophy of the Government of the day. Such changes produce a pendulum effect which is not conducive to stable labour relations.[3]

Similarly, A. Sims expressed that view in the 1995 review of federal unionized labour relations legislation:

> Our approach has been to seek balance between labour and management; between social and economic values; between the various instruments of labour policy; between rights and

[2] V. Ready, S Lanyon, M. Gropper, J. Matkin *Labour Relations Review Committee: Managing Change in Labour Relations* February 25, 1998 Executive Summary at 1

[3] L.T. Priel, Q.C., M. Carr, H. Wagner *Report of Committee Considering Proposed Amendments to the Trade Union Act,* December , 1993, p. 2

> responsibilities; between individual and democratic group rights; and between the public interest and free collective bargaining. We seek a stable structure within which free collective bargaining will work. We want legislation that is sound, enactable and lasting. We see the too frequent swinging of the political pendulum as being counter-productive to sound labour relations…[4]

Consequently, in the main, CUPE's suggestions in this response are aimed at incremental moves toward balance. The exceptions to this approach are in the areas of human rights, protecting vulnerable workers from poverty and essential services.

CUPE has concerns about the nature of the "consultation" process adopted. This process gives an insufficient voice to stakeholders.

CUPE believes that labour legislation should provide a mechanism by which labour and management can work cooperatively to meet the challenges of changing workplaces and changing economics. The TUA should be a code of conduct that fosters a relationship of cooperative participation. CUPE believes that the focus should be upon mediation and other cooperative procedures rather than intervention or processes that require government reporting stages that characterize the current conciliation board/special mediator provisions. These structures would aid the labour community to find its own creative ways to resolve disagreements and adapt to changing business realities.

CUPE believes that there should be separate mechanisms in which to focus on the relationship, not only to resolve differences, but to find common goals that are mutually beneficial. CUPE believes that Saskatchewan's legislation should put more onus on the parties as the primary authors of the resolutions to their differences without having to resort to third party intervention to assist rather than to regulate. In the long term, that is the approach that will succeed in minimizing confrontation.

It would be naive to suggest that there would not continue to be <u>any</u> differences. The inherent nature of labour relations is adversarial, with two groups having divergent ultimate interests. However, CUPE believes that if the government invests in a truly balanced legislation, that seeks to assist the parties in minimizing the points of conflict, it will reward not only labour and enterprise, but all of Saskatchewan.

[4] A. Sims, R. Blouin, P. Knopf, *Seeking a Balance: Labour Code Part I Review*, 1995 Executive Summary, p. ix

More importantly, consultation is useful because it will usually lead to an improved statutory product. [5]

Mr. Justice Ball

[5] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) at p. 38 paragraph 165

Process Shortcomings: Inequality of Access

CUPE opposes the process created by the paper in a number of respects:

The Unrepresented

The paper's distribution has not included invitations to participate by the largest groups of workers in the province – those who are not members of a union and thus are protected solely by the provisions of *The Labour Standards Act* (LSA). This group is economically more vulnerable than represented workers in as it includes those many workers working at minimum wage and marginally above, many disabled workers, many women, many single parents and many immigrant workers. These are workers who struggle with survival and thus do not have the resources to participate even if they had been invited to do so. They are the least likely to have familiarity with the cumbersome volume of legislation being discussed, or the time or facility to research the impact of various questions posed by the government. They are the group least likely to own or otherwise have access to computers. Given the absence of any public hearing component to the process, they are left without any alternative means of participation. This would be a difficult enough task for this constituency if there was a single statute under consideration, let alone the overwhelming grouping currently under review. They are consequently left without an effective voice. The inequality of opportunity to participate and articulate their issues and concerns is troubling.

Excessive Scope

The scope of the legislation under consideration is too overwhelming for a single process. Indeed, the current process is insufficient for a single statute, let alone the 17 referenced in the paper in one way or another. Each statute has a specific purpose and a specific constituency to which it applies. Each warrants its own in-depth review rather than having this process run roughshod over the unique aspects at work in each statute. It is instructive that the government did separate reviews of the two pieces of legislation dealing with employee wellness – *Workers' Compensation Board* (WCB) and *Occupational Health and Safety* (OH&S). That level of detailed review comes closer to the expectations of true consultation.

Insufficient Response Time

The process is unnecessarily rushed, thus depriving the community of a real opportunity to address its views and concerns in as fulsome a fashion as is necessary to give each piece of legislation the focused and detailed examination that it deserves. The rationale for the haste described by the Minster of Labour Relations and Workplace Safety was the need to comply with the Court of Queen's Bench direction to address the constitutional deficiencies of the *The Public Sector Essential Service's Act* (PSESA) within a year of the decision (February 6, 2012). To sever that statute from the remainder of the statutes would have permitted two objectives to be met. It would have permitted the stakeholders in the essential services review to focus on that issue and give it greater attention in the limited time available. Such severance would also have provided a consideration of the other issues raised in the paper in a timeframe that could be sensitive to the diverse spectrum of issues contained in the remaining legislation.

Foundation for Review

For a consultation to be meaningful, it must be an informed process. Each stakeholder must have access to the information upon which the other is proceeding. There is an absence of that informational foundation in the current process. What is necessary is a discussion of the problems the government seeks to resolve, and the options being considered. In the absence of that information, submissions are unavoidably going to be filled with material that is either entirely irrelevant to the government's concerns or which is responding to the submittor's imaginings of the possible range of concerns of other stakeholders. It is an exercise in tilting at windmills.

Most fundamentally, there is no discussion of options being considered by government. For a consultation to be meaningful, participants must be able to see that their views were seriously considered and demonstrably integrated into the outcome. The most evident way to demonstrate that is to compare the options considered, or the starting place of the discussion, evaluated in comparison to the outcome of the process. Where one can point to differences between the beginning point and the end point as having included matters, or revised positions on matters, raised by the stakeholders, it can be said that the contributors were truly heard and the consultation process was meaningful. When, as here, there is no starting point, such a comparison is made

impossible. Thus it is not possible for the consultation to have been meaningful.

Extent of the Consultation

There is a relationship between the scope of the issues upon which the consultation is engaged, and the level of public participation necessary to demonstrate that the consultation was meaningful. The nature of work and its role in our lives is as pervasive as nearly any statutorily governed issue could be. Every adult is concerned with their ability to maintain themselves, and the people who depend upon them. Every adult has an interest in having work be a meaningful aspect of their lives as individuals and as members of a community. Such a review calls for the most broadly based, comprehensive, thoughtful and considered consultation possible. Those are not accurate descriptors for the current process. They do, however, provide the contrast that inform our comments about the process's shortcomings.

CUPE has had the benefit of an opportunity to review the full submission of the Canadian Association of Labour Lawyers (Saskatchewan Branch) in regard to the process deficiencies and adopts their submissions in that regard.

CUPE also wishes to convey its desire to continue to be involved in the legislative review post-July 31, 2012. We request the opportunity to comment upon the submissions of others. We suggest that the government release any proposed legislative changes in draft so that stakeholders may comment, especially where the draft contains changes that stakeholder submissions did not anticipate or which are based on novel suggestions contained in the first round of submissions. This also permits comment that is more nuanced and focused on precise legislative proposals.

Whereas the Parliament of Canada desires to continue and extend its support to labour and management in the co-operative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all; [6]

[6] *Canada Labour Code*, R.S. 1985, c.L-2, Preamble.

Inequality of Prosperity Affects us All

> …the tactic of blaming union-imposed standards for the problems of the economy, or describing the province's labour laws as 'bad for business", is short-sighted and ill considered and itself becomes a negative factor in investment decisions.[7]

A notable topic absent from the questions posed by the government's paper is the purpose of labour laws in a democratic society, a society which desires economic health and prosperity for all. In numerous places, the paper does ask whether a particular law serves its purpose, but at no point does the paper seek to engage in a discussion of what purpose that ought to be, or of what economic and social gains are sought to be realized by strong labour laws. In CUPE's view, any discussion of legislative suitability must begin with a discussion of what we can achieve, and what we seek to achieve with laws that protect workers.

In his Rand Memorial Lecture at the Faculty of Law, University of New Brunswick, 2009, University of Western Ontario Associate Dean and Professor Michael Lynk described Mr. Justice Rand's objective in the Ford Motor Case:

> In the industrial sphere, he maintained, the law must curb economic power in order to ensure, if for nothing else, a measure of social stability against the spectres of inequality and depravation:
>
> > In industry, capital must in the long run be looked upon as occupying a dominant position. It is in some respects a greater risk than labour; but as industry becomes established, these risks change inversely. Certainly, the predominance of capital against individual labour is unquestionable; and in mass relations, hunger is more imperious than passed dividends.[8]

Professor Lynk discussed the impact of the philosophy of Rand and others of the time, as having compressed or reduced the inequality of income and wealth between capital and labour, thus leading the way for the emergence of a stable more densely populated middle class. He postulated that those economic shifts enabled the development of social policies Canadians now hold dear and inviolable: national, universally available, publicly-funded health care; fairness in taxation; pensions, regional disparities being equalized. Professor Lynk

[7] V. Ready, S Lanyon, M. Gropper, J. Matkin *Labour Relations Review Committee: Managing Change in Labour Relations* February 25, 1998 Responses and Observations at 6

[8] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 16.

described these as having "sustained economic growth, and in turn, reinforced the achievement of this new era of social equity".[9]

Professor Lynk describes the reversal of that compression in more recent economic developments:

> …Today, there is a growing library of economic reports which point to the unmistakable trends toward rapidly rising economic inequality in Canada, the United States, Europe and, indeed, around the world. Even as the benefits of globalization since the early 1980's have brought hundreds of millions out of poverty and created unprecedented global wealth, the flip side of the coin has been a surging tide of inequality, resulting in the benefits of globalization, both nationally and internationally, being shared in an increasingly inequitable manner. Comprehensive reports issued over the past four years by the most respected of international institutions – the World Bank, the Organization for Economic Cooperation and Development, the International Labour Organization, the UN Human Settlements Program, the World Health Organization, and the UN Development Programme, among others – have all shown that economic inequality has been steadily growing, with a host of consequential social tensions and economic fissures. The beneficiaries of this new global wealth have been overwhelmingly at the very top of the social ladder, with significant wage stagnation throughout the broad middle, and a declining share of wealth and income going to those occupying the lower social rungs…
>
> …Since the mid-1980's, we have also witnessed a steady widening of our income and wealth inequality levels, while at the same time our unionization levels in Canada have eroded, the redistributive effectiveness of labour market institutions have weakened, and our labour laws have waned in vitality. The thesis of my lecture this evening is that there is an important symmetry – here in Canada and throughout the world – between vibrant labour laws and healthy unionizations rates, on the one hand, and relative economic equality levels and social well being on the other. Strong purposive labour laws are an integral part of what Andrew Sharpe, an economist and the Executive Director of the Centre for Study of Living Standards in Ottawa, calls the virtuous circle. This circle is made up of the combination of dynamic social programs, such as the progressive fairness in our taxation system, protective labour and employments standards, and effective levels of public spending on education, health, and infrastructure. These equalizing institutions help to produce and reinforce a vibrant democracy with high civic engagement, low relative levels of poverty, social mobility into a broad and stable middle class, and an upper class that has wealth, but not so much that the rich are gated off from the rest of society. This virtuous

[9] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 17.

> circle of public policies and legislative programs that Ivan Rand played a role in creating over sixty years ago and which sustained the Great Compression for forty years, have been steadily fraying over the past quarter century in Canada.[10]

Professor Lynk also describes the reasons why such disparity in the division of income and wealth are of concern:

> Why is the issue of economic inequality so important? Simply put, because more unequal societies tend to produce greater levels of social dysfunction. They commonly exhibit more crime, higher levels of mental illness, more illiteracy, lower life expectancies, higher rates of incarceration, lower degrees of civic engagement, higher teenage pregnancy rates, diminished social mobility and opportunities, lower levels of interpersonal trust, lower levels of general health, and weaker social shock absorbers for the poor. The issue is not simply one of extremes in wealth and poverty. Higher levels of economic inequality create a continuous gradient of differential social outcomes through the separate income layers within a society, so that not only are poor people less healthy than people with middle-level incomes, but people in the middle are less healthy than those at the top. Nor does becoming a wealthier society guarantee proportionally better social outcomes simply because of its wealth. Among western industrialized societies, social progress in improving the health of its citizens flattens out once a certain level in living standards has been obtained: after reaching that level, differences in national health outcomes among wealthy countries can be explained not by comparative per capita income or wealth levels, but by domestic levels of economic egalitarianism. There is also the issue of economic inefficiencies: widening inequalities create macro-economic impediments to growth by excluding certain groups from the benefits of an expanding economy, by diminishing the purchasing power of the middle and lower income strata that sustain economic growth, by increasing the social costs of policing low-income groups, and by having economic and social policy-making captured by wealthy groups with all of its resulting misallocations.[11]

Professor Lynk referenced 2008 data from the Organization for Economic Cooperation and Development that showed that of the nations studied, Canada experienced the second fastest widening gap of income inequality since the 1990's. Statistics Canada data from 2006 showed that the widening of economic inequality was evident in both income levels and in the levels of accumulated wealth. For example the Institute for Competitiveness and Prosperity in Ontario found that corporate profits as a share of GDP were at a historical high.[12] Indeed, the Statistics Canada data shows that when the

[10] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 17-18.
[11] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 20-21.
[12] Institute for Competitiveness and Prosperity, *Prosperity, Inequality and Poverty* (Toronto ICP, 2007, Working Paper No. 10) at 25.

economy is divided into 10% groupings, only the highest 10% experienced any increase in accumulated wealth between 1984 and 2005.[13] He explained the importance of both indicators:

> Where income inequality measures income in its various forms (before and after taxation for example) and illustrates the immediate shifts in the social distribution of the outcomes in economic growth or contraction, wealth inequality measures the accumulation and retention of individual and household assets. The value of measuring wealth inequality is that it tracks the concentration and durability of economic inequality.[14]

It then follows that what this trend in wealth disparity demonstrates is that even when an economy takes steps to compress the income gap, gaps in economic prosperity will persist in that society because of the consolidation of wealth during the gap. And it demonstrates that in a period of economic contraction, only those with the wealth accumulated during the gap will be able to resist the results of the contraction.

Professor Lynk goes on to demonstrate that even where labour productivity increases, this did not account for increases in labourers' income. Rather, those increases were strongly tied to "the relative bargaining strength of employees". [15] The diminishing bargaining power of Canadian employees is the result of imbalanced labour law trends, of which Saskatchewan has the dubious distinction of having become a trendsetter. In the *SFL* case Mr. Justice Ball described the Saskatchewan essential services legislation as follows:

> [205] No further comparative analysis is required. It is enough to say that no other essential services legislation in Canada comes close to prohibiting the right to strike as broadly, and as significantly, as the PSES Act. No other essential services legislation is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential service workers and, where those designations have the effect of prohibiting meaningful strike action, an independent, efficient, overall dispute mechanism. While the purpose of all other essential services legislation is the same as the PSES Act, none have

[13] Statistics Canada, *The Wealth of Canadians: An Overview of the Results of the Survey of Financial Security 2005* (Ottawa: Statistics Canada, 2006) at 9.
[14] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 25 Fn. 39
[15] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 27, 28. A. Sharpe, J-F. Arsenault & P. Harrison, "Why Have Real Wages Lagged behind Labour Productivity Growth in Canada?" (2008), 17 *International Productivity Monitor* 16.; S. Breau "Income Inequality across Canadian Provinces in an Era of Globalization: Explaining Recent Trends" (2007) 51:1 *The Canadian Geographer* 72 ; L. Osberg, "How Much Does Employment Matter for Inequality in Canada and Elsewhere?" in D. Green and J. Kesselman (eds*) Dimensions of Inequality in Canada* (Vancouver: UBC Press . 2006)

such significantly deleterious effects on protected rights under s. 2(d) of the *Charter*.[16]

When Professor Lynk considered the impact imbalanced labour laws have upon income and wealth gaps, he said:

> In its most recent report on the global workplace, the International Labour Organization postulated that a hydraulic relationship exists between unionization and inequality. Countries that have higher unionization rates tend to have lower economic inequality patterns. And as unionization rates decline, inequality levels tend to climb. The ILO stated that recent economic trends, as illustrated by Gini coefficient measurements, show:
>
> > …a clear negative correlation between unionization and inequality: the countries in which income inequality is on average lower in the period 1989-2005 tend to be those in which a greater proportion of workers are affiliated to trade unions (52).
>
> It is not simply that trade unions raise wages and benefits for their members over the prevailing labour market rates, although they do perform this task.(53) Rather, the prevailing social science literature tells us that unions have at least four significant effects on the labour market and the broader economy that contribute to more egalitarian social outcomes. One does not have to be cheerleader for unions to acknowledge the institutional role they have historically played in democratizing the economy and stimulating the spread of social wealth and rising productivity through the middle and lower income stratums.[17]
>
> (52 *World of Work 2008, supra* note 13, at 83)
> (Income Inequalities in the Age of Financial Globalization (Geneva) ILO 2008)
>
> First, beyond improving the economic return to their own members, unions raise the wages and benefits of non-unionized workers in related industries, in part because non-unionized employers seek to dampen the appeal of unionization.(54) The best example of this can be seen in the Canadian auto and auto-parts industries, where the non-unionized Japanese car manufacturers in Ontario pay salary rates to their employees that closely parallel those paid to the unionized North American auto companies located in Ontario, precisely to maintain their non-unionized status. Second, unions tend to raise the wages for their lower paid members and compress the overall wage scales within a unionized workplace, so that the lower paid workers rise in relative terms and the wage differentials diminish.(55) This not only erodes low income levels in the unionized labour force – in 2002, a third of Canadian non-union workers were defined as low paid, but only 8 percent of unionized workers were so classified – but it also works to improve the economic wellbeing of historically disadvantaged groups such as women and visible minorities,

[16] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) at p. 38 paragraph 165
[17] *University of New Brunswick Law Journal* Vol 58 2008 p. 13 at 83

who are disproportionately found at the lower end of the Canadian labour market.(56)

A third significant contribution of unions towards greater economic egalitarianism has been to dampen the differential levels between executive pay and the wage rates in the mainstream labour force. A 2007 study has concluded that unionized firms generally pay lower levels of total CEO compensation than non-unionized firms, with an increasing impact upon the very highest executive levels.(57) And fourth, unions in a dense-enough clustering within society increase the influence of other social forces – such as non-governmental organizations, liberal religous institutions, academics, policy forums and critical journalism – in favour of more egalitarian economic policies of redistribution. The recent ILO study that I quoted above has found that unionization levels are closely linked with broader virtuous social circles:

> The countries where union density rates are higher are also the ones in which union benefits are more generous, the taxation system is more progressive, collective bargaining more centralized and labour law is closer to international norms and better implemented.(58)

Thus, unions perform at the macro-social level what they also do at the workplace and sectoral level: compress overall wages and benefits, lift up the bottom, spread out the middle and dampen down the top. (59) In a recent study, the World Bank has said that this is accomplished without impairing national economic performance or social prosperity. (60)

(53 Indeed the "union premium" that labour economists frequently measure as the financial advantage that a union member enjoys over an employee in a directly comparative job employed in a non-unionized workplace is estimated to be between seven and fourteen percent in Canada: a. Fang & A. Verma, "The Union Wage Premium" (2002), 3:9 *Perspectives on Labour and Income* (Statistics Canada) 13 [Fang & Verma]. Also see E. Akyeampong, "Unionization and Fringe Benefits" (2002), 3:8 *Perspectives on Labour and Income* (Statistics Canada) 5, with respect to the benefits negotiated by unions in comparison to the non-unionized sector. For example, in 2002, 80 percent of unionized employees possessed a company pension plan, as opposed to 27 percent of non-unionized employees. The comparable figures for company-sponsored life and disability insurance plans were 78 percent and 41 percent, and for dental plans the figures were 76 percent and 43 percent.)

(54 A. Jackson, Work and Labour in Canada (Toronto: Canadian Scholars' Press Inc., 2005) [Jackson], at Chap 8.)

(55 D. Card, T. Lemiuex and W.C. Riddell, "Unionization and Wage Inequality: A Comparative Study of the U.S., the U.K. and Canada" (2004), 25 Journal of Labor Research 519.)

(56 Jackson *supra* note 54.)

(57R. Gomez & K. Tzioumis, "What do Unions do to CEO Compensation?" (2007), Centre for Economic Performance discussion Paper no. 720. Also see *World of Work 2008, supra* note 13, at Chap 2)

(58 *World of Work 2008, supra* note 13, at 86)

(59 For recent economic evidence of this thesis, see the essays in J. Bennett & B… Kaufman (eds), *What do Unions do? A Twenty Year Perspective* (New Brunswick, NJ: Transaction Publishers, 2007))

(60 A 2003 study conducted by the World Bank has found no persuasive evidence that union density impairs the economic or employment performance of Western countries. See T. Aidt and Z. Tzannatos, Unions and collective Bargaining: Economic Effects in a Global Environment (Washington: The World Bank, 2003). Also see Pontusson, supra note 34, who found a positive

> relationship between countries with strong union movements and social protection, on the one hand, and declining unit-labour costs on the other.)[18]

The presence of this contributor to the widening inequality gap is supported by Canadian findings that declining unionization rates contribute significantly to falling average wages and shrinking pension benefits coverage among workers.[19] In 1995 Saskatchewan was one of the top 5 provinces in terms of the breadth of its income gap. It is noteworthy that this statistic pre-dates the 2008 changes to the TUA and the adoption of the PSESA.

Where there is a relationship between rising inequality and falling unionization densities, Professor Lynk considers the role that the retrenchment of labour laws plays in the lower density rates. Professor Lynk observes the reduced levels of union density and uses statutory differences to assess this outcome. An example is how card signing versus mandatory votes statutes impact the outcome of certification efforts. Professor Lynk uses this as a microcosm for demonstrating that linkage. Of the reduced vigor in labour laws he says:

> This should concern us all. Labour and employment rights and the laws that buttress them are not the accumulation of privileges by a vigorous lobby of special interest, but the expression of core constitutional and human rights that benefit, directly and indirectly, the majority of citizens living in a modern democratic society. At the international level, the three foundational documents of the International Bill of Rights – the Universal Declaration of Human Rights, the International Covenant of Economic, Social and Cultural Rights, and the International Covenant of Civil and Political Rights - all promote the right of employees to a collective voice at work as a fundamental human rights guarantee. At the national level, the Canadian Parliament has stated that collective bargaining is a positive social good which ensures that the benefits of economic growth are fairly distributed to all. And constitutionally, the Supreme Court of Canada has recognized the importance of collective bargaining by sheltering it within our *Charter of Rights and Freedoms*. [20]

The construct that stronger labour laws contribute in this way to stronger economic fortitude is not new. The views of Professor Lynk had previously been shared by a 1992 legislative review by three very respected members of the Sub-Committee of Special Advisers in B. C.: John Baigent, a former LRB Vice-Chair, Vince Ready, a very well respected arbitrator and mediator practicing across the country, and Tom Roper a very senior employer counsel.

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[18] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 29-30

[19] R. Morissette, G. , Schellenberg & A. Johnson, "Diverging Trends in Unionization" (2005) 6:4 *Perspectives on Labour and Income (*Statistics Canada) 5 at 8.

[20] *University of New Brunswick Law Journal* Vol. 58 2008 p.14 at 36

The Recommendations for Labour Law Reform they authored in September 1992 took the view that strong collective bargaining prevented wage gaps and strengthened performance both economically and in terms of productivity.

> Not only is employee involvement essential from the perspective of worker satisfaction, it is also necessary if the business is to maintain the flexibility required to be competitive…While recognizing the imperative of employee involvement in workplace issues, the consensus prevails that unionization is not inconsistent with that objective and that collective bargaining is capable of addressing that imperative.
>
> In the first instance society must protect the rights of workers to organize. There is little point in developing models where collective bargaining can be more responsive if we do not first protect the right of employees to freely decide to engage in collective bargaining. Labour legislation must ensure that workers' rights to join trade unions may be exercised without interference and, if trade union representation is selected, our legislation must then ensure that the workplace encourages cooperation and flexibility….
>
> …Most western countries and many of those in direct competition with British Columbia enterprises have rejected the concept of a low wage strategy as a route to enhanced competitiveness. Commentators have noted that such a strategy implies lower and more unequal incomes with dire consequences for social and political institutions. By contrast, a high wage strategy is feasible and sustainable only with increased productivity and ingenuity in the work place. This is an achievable goal as is evident from the success of the Japanese and the Western Europeans whose wage rates equal or exceed those paid in North America. A climate favorable to collective bargaining is inconsistent with a low wage strategy but should enhance a high wage/high productivity approach… A review of econometric evidence on the subject by two Harvard economists concluded:
>
> > Modern quantitative analysis of productivity in organized and unorganized establishments and sectors offer striking new evidence on what unions do to productivity. This work in general suggests that productivity is higher in the presence of unions than in their absence….
>
> Another recent study of the impact of unions and industrial relations concludes:
>
> > Evidence regarding unions and productivity and costs is incomplete. There are a few general studies and a limited set of industry studies. These studies provide no evidence that unions per se reduce productivity: the majority of studies indicate that unions are associated with more efficient production.

> …Therefore, while labour legislation should encourage the practice and procedure of collective bargaining and provide the necessary legal protection to those who seek it, it must also ensure that the institution of collective bargaining remains viable and fluid. To that end, it should encourage a more cooperative, co-determinative approach to workplace issues.[21]

These views were mirrored in the 1998 Report of the B. C. Labour Relations Code Review Committee (Section 3 Committee):

> The social consensus that collective bargaining is desirable is reflected in international conventions, federal legislation, and in the laws of every province, including our own. The consensus in public policy is also reflected in public opinion. Our research reveals strong public support for the legitimacy of unions and their value to society as a whole. In our public opinion research, over two-thirds of the public believed unions played an important role in balancing social and economic interests, and almost three–quarters disagreed with the statement that unions are bad for business.
>
> Despite the evidence of public policy and public opinion, many unionized and non-unionized employers, both explicitly and implicitly, have questioned the relevance of collective bargaining in this economy and have challenged the view that there is a social consensus supportive of collective bargaining. We found these views disturbing. Indeed, these views have ultimately strengthened our belief that a new vision is needed in labour-management relations: a vision that focuses on the common interest of the parties and reinforces the social consensus.…
>
> …We believe that our "innovative solutions" recommendations will assist in creating more harmonious labour relations as well as begin the process of moving toward a high wage/high productivity strategy that ensures the long-term health of both the economy and the labour market. By implementing these recommendations, the government moves from its role of referee or regulator of these relationships to that of facilitator. In this way, government provides a leadership role, which acknowledges that in order to advance labour policy, government must also look outside the traditional legislative response.
>
> The high wage/high productivity strategy is the bridge between the parties' competing interest. It represents the common interest behind the present polarized positions and provides an opportunity to move toward the mutual gains of stability, security, and productivity. Both parties gain from a high wage/high productivity strategy. [22]

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[21] J. Baigent, V. Ready, T. Roper *A Report to the Honourable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform* (1992) at 10-12.

[22] V. Ready, S. Lanyon, M. Gropper, J. Matkin *Labour Relations Review Committee: Managing Change in Labour Relations* February 25, 1998 Executive Summary, at 2

The 1998 BC Review Committee commented at length about the relationship between labour and enterprise:

> …While our public opinion research shows that the general public clearly and overwhelmingly supports the role that unions play in the workplaces of our province, there is a growing and alarming trend toward anti-union posturing and rhetoric within the business community. Given this attitude, union reluctance to enter into collaboration is understandable. The employers' position is not only out of step with the public's perception, but with some leading business analysts as well. Even as impressive an authority as Peter Drucker, an internationally acclaimed management consultant, refers to unions as servicing an "essential function in industrial society". He goes on to say "Management, no matter how selected or constituted, is, and has to be, a power. Any power needs restraint and control…" (p. 174)
>
> It is clear that ideology plays a role in some of the criticism of unions by employers, but it is also clear that employers are caught in a changing structural system that forces them to compete on the wage/benefit level, and that they believe unions are resistant to recognizing this. As global influences become the dominant force in the marketplace, transnational factors begin to control the investment climate. As a consequence capital becomes more and more mobile, while labour remains immobile. Companies at the mercy of international competition for investment or trade are reduced to focusing on labour as the one factor under their control. This leaves many employers feeling that any concessions made to their employees on a local level will impede their ability to compete nationally or internationally.
>
> Although labour legislation may have some impact, it is not one of the principle factors considered by companies making investment decisions. Taxes, skills and infrastructure are the three components most often considered by the international business community in making decisions about investment. This observation is borne out by a recent KPMG study in which all of these factors played a more prominent role than did labour laws.
>
> We cannot stress too forcefully our belief in and commitment to the principle of the right of employees to organize, and our belief that collective bargaining provides three essential functions in society: a re-distributive function, a democratic function of giving voice and dignity to employees, and social cohesion. We reject the Business Council's argument that declining union density in itself reflects a lack of social consensus on collective bargaining. Social consensus is not measured by union density, but by both public policy and public opinion. The rights of free association and collective bargaining are reflected in international conventions, the Canadian *Charter of Rights*, and the laws of every province including our own.
>
> The social consensus is also reflected in public opinion, where the public not only overwhelmingly supports the role of unions in balancing social

and economic interests in society, but also believes that every employee unionized or not, benefits from the existence of unions. The public understands that the wages and benefits and working conditions secured by unions through collective bargaining continue to set standards that are reflected in the non-union sectors of the economy.

Significant parts of the business community continue to blame the economic woes of the province on union wages and benefits, despite definitive and reputable studies that show there is no correlation between unionization and lack of productivity. Studies from the United States, like those of Mishel and Voos, and Freeman and Medoff, show many union worksites to be more productive than non-union sites. While we heard from employers that they believe the reverse to be true, we did not receive any research from them to confirm their position. We think that a reasoned and researched debate on the factors that lead to a positive business climate is well worth having, and we were disappointed that the business community made no attempt to address the issue on that level. In our opinion, the tactic of blaming union-imposed standards for the problems of the economy, or describing the province's labour laws as "bad for business", is short-sighted and ill-considered, and itself becomes a negative factor in investment decisions.

We believe that there are alternatives to the downward spiral of ever more competition leading to fewer jobs and lower wages, and we explore these alternatives further in our recommendation for a high wage/high productivity strategy in Part Three of our Discussion Paper…

Business is also reacting, in some cases, to what they perceive as inflexibility and resistance on the part of unions. They point out, with some justification, that their attempts to introduce changes in the workplace in order to meet new challenges in the marketplace are often met with intransigence on the part of their unions. Unions point out that all too often management-led initiatives have been used to undermine job security through devices such as contracting out. Part of the problem lies in the short-term competing interests of the two parties. Unions are concerned about job protection and job control; employers are concerned about their ability to compete. We would point out that their long-term interests are the same. It is not in the interest of a union to place an employer in a position where it cannot compete; nor can an employer maintain productivity with a demoralized, resentful and powerless work force. It is only by moving away from entrenched positions and recognizing their mutual interests that both parties can meet their goals of productivity and job security. [23] [Emphasis Added]

Saskatchewan is not immune to the impacts of the income gap. While overall earnings through labour have increased, the gap between the earnings of the lowest and highest income earners is widening even here.

[23] V. Ready, S. Lanyon, M. Gropper, J. Matkin, *Labour Relations Review Committee: Managing Change in Labour Relations,* February 25, 1998 Responses and Observations at 6

In 2010 constant dollars, Statistics Canada compared the distribution of market income for residents of Saskatchewan over three comparison years – 2000, 2008 and 2010. They divided income earners into quintiles (20%) groupings. The total share of income shows the level of inequality of earnings earned through the labour market.

Distribution of Market Income, Saskatchewan
(2010 Constant dollars)

				% Change	
	2000	2008	2010	2000-2010	2008-2010
Average Income					
Lowest Quintile	$ 1,800	$ 3,600	$ 3,300	83.3	-8.3
Second Quintile	$ 16,100	$ 22,700	$ 24,200	50.3	6.6
Third Quintile	$ 37,000	$ 47,900	$ 49,000	32.4	2.3
Fourth Quintile	$ 63,100	$ 80,500	$ 82,400	30.1	2.4
Top Quintile	$120,500	$158,100	$162,900	35.2	3.0
Share of Total Income					
Lowest Quintile	0.8%	1.2%	1.0%		
Second Quintile	6.8%	7.2%	7.5%		
Third Quintile	15.5%	15.3%	15.2%		
Fourth Quintile	26.5%	25.7%	25.6%		
Top Quintile	50.5%	50.5%	50.6%		

[24]

The highest 20% of income earners consistently make more than 50% of the total income earned in the province. By contrast the lowest 20% hover around the 1% mark. Even taking the lowest 2 quintiles together shows the lowest 40% of the earners earn less than 7.5% of the total income. Things improve little when you consider the lowest 3 quintiles together which shows that the lowest earning 60% of the population makes less than 24% of the income earned.

Tellingly, the gap between the lowest and highest earning quintiles continues to widen. In 2000 the difference between the two was $118, 700. In 2010 that gap had spread to a difference of $159,600. If the average in those quintiles is

[24] *Source: Statistics Canada CANSIM 202-0701 The dollar figure in each quintile represents the average earnings of that quintile.*

that far apart, by necessity the actual lowest and actual highest will be farther apart.

When each quintile is compared to the top quintile, in each instance there is a growing gap. Even between the fourth quintile and the top this is so. The difference in the average earnings in 2000 between the fourth and top quintiles was $57,100. By 2008 that difference had grown to $77,600, and by 2010 to $80,500.

What is also alarming is the diminishing gap between the second and third quintiles. In 2000 the gap between the average earnings in those quintiles was $20,900. It grew to be $25,200 in 2008. However, by 2010 it had declined to $24,800. This slowing of growth for the middle class warrants further observation, as it is in this range of income and wealth that the American economy is showing dramatic effects of economic contraction.

In 2010 Saskatchewan had 9.9% of its population - nearly 100,000 people - living with incomes below the low income cutoff (generally described as the poverty line). This reality puts the issues of income gap in Saskatchewan into sharp relief.

While all facets of labour relations are keen to embrace the benefits global competition has to offer, we must also be cautious of the potential negative impacts that may attend those benefits. Our approach must be considered and thoughtful. The task force appointed to conduct a review of Part I of the Canada Labour Code in 1996 recognized that need for a long-term view of what would and would not be consistent with broader Canadian values:

> The labour component of exports is becoming increasingly important. It is easy to say that our labour relations environment must help us be competitive, both labour and management recognize that without markets there are no jobs. But we must decide the types of jobs we wish to develop and sustain, and the social and economic values that will support our overall competitiveness.
>
> Each of our competitors has different labour policies, just as they have different resources and different strengths within their workforces. When we compare ourselves to other nations, we must be cautious not to compare ourselves with only one element of each society. Canada, like every country, faces an integrated set of possibilities: a low wage economy comes with low domestic consumption; high levels of education increase the ability to compete in areas of high technology; an innovative and flexible workforce can adapt quickly to new competitive situations.

> Our choices, taken together, determine our ability to compete. A country cannot simply adopt one aspect of another nation's strategy without recognizing the impact that this will have on other domestic policies. We may be tempted, for example, to modify our labour laws and other aspects of our social policy to attract investment. Where laws can be improved within Canada's overall labour and social context, such ideas should be adopted. But we must be cautious of an unthinking downward spiral, where we strip our laws of their balance and protection in the name of economic flexibility, without regard to the social consequences. To make these choices sensibly, we must be conscious of the way our system of labour relations actually works and we must be confident that, despite occasional conflict, it will help to keep Canadian labour productive and competitive. [25] [Emphasis added]

In undertaking a review of labour laws, we must be mindful of these dual considerations of reducing the inequality of prosperity, and maintaining broader social values. To sacrifice either risks unpalatable social impacts.

One can look to the disputes around the world, that have at their heart the inequitable participation in economic activity, or disputes domestically, such as in the "Occupy" movement's appearance in Canadian cities, and conclude that Professor Lynk was correct, perhaps even prescient, when he concluded:

> …much of the unnecessary grief suffered during the past century in Canada and around the world has come from forgetting about the consequences of unchecked inequality. Any political community that suffers from overt imbalances among the different stratums of society is diminishing its democratic character, dampening its social capabilities and stifling its economic potential.
>
> The important contribution of post-war Canadian labour law has been to assist in advancing the growing egalitarian character of our country while fulfilling our commitment to promoting social rights. This was most clearly visible in the years between 1945 and the mid-1980's. As labour laws do their job, the distribution of income, wealth and social opportunities becomes more equitable, and our society becomes more cohesive. Allow labour laws to fall into disrepair, or actively deconstruct them, and the virtuous circles that promotes egalitarianism becomes smaller, our economic life becomes more disfigured, and our sense of mutual reinforcement wanes.
>
> Ivan Rand was alert to all this. In his 1946 Windsor arbitration award, he wrote:
>
> > The power of organized labour, the necessary co-partner of capital, must be available to redress the balance of what is called

[25] A. Sims, R. Blouin, P. Knopf *Seeking a Balance ,Canada Labour Code Part 1 Review* (1995) at 28-29

> social justice: the just protection of all interests in an activity which the social order approves and encourages.[26]

Income and wealth inequities contribute to social ills that society seeks to avoid. Consequently, the inequality of prosperity is to be avoided. A strong factor in widening those gaps is the lack of bargaining power that leads to workers' to achieve economic gains. Union strength supports fairness through collective bargaining as it creates pressures that assist both represented and unrepresented workers to move toward a narrowing of the gap in the distribution of income, and thereby, accumulated wealth. Dismantling legislative protections for workers reduces the bargaining power of those workers which in turn moves an economy toward a more inequitable distribution of economic prosperity. This increases the number of people who can participate in an economy at nothing more than a subsistence level.

As true today as they were at the time of his writing, the words of Mr. Justice Rand still resonate:

> …The distribution of the total available goods and services has become an issue that goes to the roots of democratic society; it is not an economic issue only; it involves social and political factors of the highest importance…
>
> Underlying that issue in the private sector of our economy, and accepted by the majority, are certain assumptions; the validity of private property; the acceptance of large scale private management and enterprise with regulation where the public interest is substantially concerned; that employees have a right to strike; that the right is socially desirable; that 'free collective bargaining' is the most acceptable mode of reaching terms and conditions of employment; that leadership of the character of statesmanship in both groups, capital and labour, is the necessity of the hour; that respect for law and the maintenance of order are conditions of democratic survival.[27]

CUPE believes that government can, and should, play a role in assisting parties to adapt to change and to resolve their differences through mediation and facilitation. The economic future of the province is enhanced by the ability of labour and enterprise to work together to ensure that workers can maintain and enhance their standards of living, and that all sizes of business can maintain and enhance their competitive position. Professor Lynk and others provide a blueprint for doing so: strong labour laws that encourage the vigor of collective bargaining. An investment by government in a more balanced

[26] *University of New Brunswick Law Journal*, Volume 58 2008 p. 14 at 40
[27] The Honorable Mr. Justice I.C. Rand, CC. *Report of the Royal Commission Inquiry into Labour Disputes,* August 1968 (Ontario)

relationship will pay dividends not only for labour and enterprise but for all of the citizens of Saskatchewan. In this way the government will also be demonstrating its sense of responsibility for protecting the public interest.

Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*...all of these values are complemented and, indeed, promoted, by the protection of collective bargaining in s.2(d) of the *Charter*...the right to bargain collectively with an employer enhances the human dignity, liberty, and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work...[28]

[28] *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para. 81-82

Purpose of Work

> Every employee needs a sense of worth beyond the receiving of a paycheque.[29]
>
> Dickson, C. J. recognized that an employee's sense of dignity and self worth is connected to his or her work.[30]

In considering any possible changes to the suite of labour legislation, it is important to be mindful of the purpose of work in people's lives. While the most obvious purpose of work is to ensure a capacity to maintain the needs of one's self and one's family, the reverse is also true. It is important that work not imperil one's ability to maintain one's self and one's family. In addition, the exercise of statutory rights should not put a person in such peril. The potential for economic, emotional, as well as physical injury should be avoided. The community must remain mindful of these reciprocal needs.

Another important purpose served by work in the modern era is that of self-actualization. It permits us to develop a sense of self-worth and value by giving us an opportunity to contribute not only to those we love, but also to the broader community and those whom our labour serves. Our occupation is an element of our construction of who we are. As such, our labour laws must also recognize an element of self-determination as a positive social construct. Labour regulation that intrudes upon our ability to be present for our families, or which is injurious to a worker's physical integrity, or sense of value and dignity, should be avoided.

In 1992, the BC Sub-Committee of Special Advisors commented:

> The focus of the enlightened workplace today is on the employee. The organization of work and management practices must allow employees to realize their own potential and contribute in a way that maximizes job satisfaction. Unionization is consistent with that goal and indeed can provide employees with the collective will to bring about meaningful workplace participation. That is not to say that the current approach to collective bargaining has, in all cases, produced the type of relationship required for the future. Our point is that union representation can provide employees with a vehicle to achieve a relationship in the workplace that is conducive to the individual interests of the employees

[29] G. W. Adams *Negotiation: Why do We Do It Like We Do?* Kingston: Industrial Relations Centre, Queen's University (1992) p2.
[30] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) at p. 36 para 72

> and the interests of the employer as well as the interests of the public at large.[31]

Mr. Justice Ball considered this point in his recent Queen's Bench judgments in the constitutional challenge:

> The majority in *BC Health Services* extensively reviewed the history of collective bargaining in Canada (at paras. 40-68) and Canada's international law obligations (paras 69-79), before turning to the values that underlie the *Charter.* They agreed (at para 82) with Dickson C. J.'s observations that the right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them some control over a major aspect of their lives, namely their work. Then they stated:
>
> > 86. We conclude that the protection of collective bargaining under s.2(d) of the *Charter* is consistent with and supportive of the values underlying the *Charter* as a whole. Recognizing that workers have the right to bargaining collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter.[32]

In crafting legislation regulating labour relations and work generally, we must be mindful to preserve these values that are so integral to our society - they are the bedrock upon which our constitution is founded.

[31] J. Baigent, V. Ready, T. Roper *A Report to the Honourable Moe Sihota Minisiter of Labour: Recommendations for Labour Law Reform* (1992)
[32] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) p. 18, para. 78

The Intent of the Review

"The reading of history proves that freedom always dies when criticism ends"[33]

The construction of the questions posed in this subject heading presumes that consolidation is a purpose worthy of pursuit without inviting any discussion of whether that is so. Before discussing which statutes to consolidate, it is useful to discuss whether there is a worthwhile purpose to be served by any level of consolidation.

That purpose should be measured by its usefulness to statutory users. The covering letter by which the paper was distributed states the government's goals to "modernize" and "simplify" legislation. It conveys the belief that one step towards achieving those goals is to "restructure" the legislation so that it is easier to use and understand.

The only example of consolidated legislation to which the paper can point is in the federal jurisdiction. With respect to its drafters, that has not made that legislation simpler or more comprehensible. Rather, that Code is divided into discrete parts which each cover a subject topic (i.e., one part on traditional unionized labour issues, another on labour standards issues, and so on). Each part is used as if it were an independent statute, without connection to the others, so much so that when there was a federal review published in 2006, it considered only Part III on Federal Labour Standards, and no other part of the Code.[34] An earlier review in 1995 considered only Part I of the Code.[35] Consolidation has not enhanced its accessibility to the reader, other than that the reader needs to take only one book off of the shelf.

More important than where the statutory provisions are to be found, is whether the text of the provisions achieve the goal of protecting worker rights. Consolidation does not achieve that purpose in any greater way than independent statutes do.

Consequently, CUPE does not see any advantage to be gained by consolidation and does not support it as an independent purpose to a review process.

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[33] Hon. J. Diefenbaker, *"The Role of the Opposition in Parliament",* Address to the Empire Club of Canada, Toronto, October, 27, 1949

[34] H. Arthurs, *Fairness At Work: Federal Labour Standards for the 21st Century* (2006) for Human Resources and Skills Development Canada

[35] A. Sims *Seeking a Balance* (1995)

Consolidation Restricts Debate in Legislature

CUPE does, however, see a detriment to consolidation. Just as CUPE believes the current process makes insufficient provision for broad-based community input, CUPE foresees a consolidated statute having insufficient provision for legislative debate.

In the opening letter of the paper, the Minister identifies the principal goals of the review as being to "modernize and simplify legislation". The Minister suggests "restructuring and organizing the legislation" as one of the primary methods to achieve this goal. The paper also states the Government is considering consolidation of 15 of the 17 Acts referenced in the paper.

It is CUPE's view that consolidation fails to meaningfully or procedurally resolve the problem identified by the government. Consolidation, more commonly referred to as an omnibus bill, is an increasingly troubling trend that appears to limit substantial review of legislation.

The Federal Conservative Government's 425 page omnibus budget bill, Bill C-38, consolidated amendments or impacts to approximately 69 Acts. With 753 clauses, the omnibus budget bill went further than the purported purpose of implementing the Federal Government's budget introduced in Parliament. It is more accurate to describe it as a consolidated legislative agenda that effectively restricts substantive debate in the House of Commons on controversial changes to Canadian laws.

What is worrying to observers of democracy is that the application of parliamentary rules to omnibus bills allows governments to minimize scrutiny of their proposed legislation by playing out the time clock. Modernity or promises of simplification become the least apt descriptors for consolidated legislation.

Ordinarily, each bill proposing to amend a specific Act would receive its own allotment of time for debate. Consolidation uses parliamentary rules and procedures regarding time allocation for debate of bills. By packaging bills together, they are introduced to Parliament or the provincial Legislative Assembly as one bill.

The rules of parliament grant debate time per bill regardless of how big or small it is.

Westminster democracy is upheld using traditions, Standing Rules, and Speaker's rulings acting as precedent. *The Rules and Procedures of the Legislative Assembly of Saskatchewan, December 2011,* under rule 33(1) and 35(a) respectively show that a consolidated, omnibus labour bill would receive 20 hours of debate in the Legislature, which may also include the time the bill is scrutinized by a Standing Committee upon first or second reading.

By virtue of consolidation, any amendments to each and every one of the 17 Acts directly or indirectly referenced in the paper would receive a total of 20 hours of debate instead of the possible 340 hours of debate the rules would permit if each bill were presented separately. Thus, the opportunity is lost for a very focused consideration of each statute's special area of concern.

Further still, the introduction of an omnibus bill in the fall session of the Legislative Assembly would give the bill "specified" status by virtue of the timing of the introduction in the legislative calendar as indicated by Rule 33(1). This "specified" status means the government is almost guaranteed passage of the bill before Completion Day at the end of the legislative session. It is important to note that the specified status means the bill is required to be called for vote and passed at the committee level to aid its expeditious passage at third reading in the House (Legislative chamber) even if the committee does not have quorum.[36]

After the sensation of the omnibus budget bill federally and the public outcry about it, CUPE observes that citizens expect more detailed and fulsome debate.

[36] The Legislative Assembly of Saskatchewan (2011, December). *Rules and Procedures of the Legislative Assembly of Saskatchewan.*

Which Acts should be consolidated?

CUPE says that no Acts should be consolidated.

Are there Acts that are not currently the responsibility of the Minister of Labour Relations and Workplace Safety that should be included in a consolidated Act?

CUPE says no Acts should be consolidated.

Are there Acts that should not be included in a consolidated Act? What do you see as the benefits or risks of consolidating Acts?

CUPE says no Acts should be consolidated.

Human Rights

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

> …to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…
>
> …to promote social progress and better standards of life in larger freedom.[37]

While the government paper does not raise or reference *The Human Rights Code* (HRC), it would be remiss not to take this opportunity to raise our concerns about the 2011 amendments to the HRC. The HRC has two very important components – a catalogue of personal freedoms recognized by the province, and a codification of prohibitions against discriminatory practices in a variety of settings. The HRC describes its purpose:

> 3 The objects of this Act are:
>
> a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
>
> b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.[38]

Thus the rights stated in the HRC are not gifts given to citizens from the state by operation of statute. The statute is merely a recognition of rights so fundamental to the human condition they are described as "inalienable", that cannot be transferred to another as they are so intrinsically a part of ourselves. It is the practice of those rights by ones self, and the recognition of those rights in others that give us the dignity of which Section 3 speaks. Those rights are so fundamental that human rights legislation is held to be quasi-constitutional. That character makes it the paramount legislation in the province and the yardstick by which all other statutes are measured. They should be interpreted in a manner which is consistent with the HRC.

These rights have long been considered in this light, as described by the Woods Task Force:

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[37] *Charter of the United Nations and Statute of the International Court of Justice*, San Francisco, 1945
[38] *Saskatchewan The Human Rights Code*, ss. 1979, c S-24.1 s. 3

> 27. In brief, fundamental human rights today embrace as ideals the political rights of freedom of speech, religion, association and assembly; the egalitarian right of freedom from discrimination on the basis of race, national origin, colour, religion and sex; the economic right to a decent standard of life; and, for Canada at least, the linguistic right to the use of the mother tongues of French and English.
>
> 28. These rights are supported by the rule of law in a democratic society. The rule of law itself constitutes a fundamental human right: to security of life, liberty and property, security of the person and personality, and the assurance of procedural fairness – due process of law – in the determination of rights and obligations. Section 2 of the *Canadian Bill of Rights* articulates many of these procedural safeguards to the administration of justice according to law.[39]

Given that elevated role among the collection of provincial statues, it is disturbing that its own enforcement mechanism is so eroded by the elimination of the Human Rights Tribunal (HRT) as to make its protections illusory. The public values the protection of human rights as having a significance that transcends the individual claim. It is this jurisprudence that communicates the trends of public policy that readers can extrapolate into other contexts. The absence of tribunal jurisprudence deprives the larger community as well as the litigants of the guidance jurisprudence is designed to provide.

A statute of this stature should have an enforcement mechanism that is accessible to citizens – that is, easy to access, affordable and expeditious in its response. While the courts, to which some few complaints will now be at liberty to proceed will certainly give a fulsome meaning to the HRC's provisions, we respectfully observe that the advent of administrative tribunals was to give to the masses ready and affordable access to justice at the hands of those with specialized expertise. Courts are expensive venues for most human rights litigants – the immigrant seamstress in the sweatshop, the young waitress harassed by a customer, the single parent denied an apartment, the aboriginal applicant denied a job. These are not the litigants who can afford the cost and complexity of court litigation

[39] H.D. Woods, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations,* December 1968, p. 12

While unionized workers often have the choice to move their human rights claims into their collective agreement arbitration process, that option is not available to unrepresented workers.

Further, in this area of the law, more than any other, not only must justice be done, it must be seen to be done. Having all judgments made by a single individual does not have the appearance of justice – it has the appearance of tyranny.

If confidence in human rights enforcement erodes, those who would exploit others will become embolded. If the measure of a society's character is how it protects the disadvantaged, we should adequately resource the mechanisms that do so.

Consequently, CUPE vigorously urges the government to restore the Human Rights Tribunal and the qualified expertise of a full and functional staff at the Commission.

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent". No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.[40]

[40] H. Arthurs *Fairness at Work: Federal Labour Standards for the 21st Century* Commission on the Review of Federal Labour Standards, (2006) at 47

Employment Standards

"Caring, Dignity and Respect for All"
(Saskatchewan Labour, posted in Regina Labour Standards Office)

> In any society there prevail values fundamental to it and to the goals it pursues. These values are often enshrined in the concept of fundamental human rights, or "natural rights". Relating mainly to freedom of the person, property rights, and freedom of thought and political action, they compose the liberal democratic traditions of western society designed to enhance the free development of the human personality. The concept of natural rights implies that they exist in the natural order of social intercourse, for man to perceive as he will or as they are revealed to him.

The provisions of *The Labour Standards Act* (LSA) are a statutory minimum. While most collective agreements at unionized workplaces exceed these minimum standards, in some instances a collective agreement is silent, relying upon the provisions of the LSA to apply on a particular issue. The LSA has far less significance to unionized workplaces than it does to non-union workplaces where the provisions of the LSA are the primary vehicle for worker protection. Relatively few non-union workers can achieve a personal contract of employment. When they do, it is a costly venture to commence court proceedings to enforce its terms. The LSA and its enforcement framework are a cost-efficient means for unrepresented workers to enforce at least these minimum standards.

It is therefore important that the LSA apply universally to non-unionized workers unless there are very compelling reasons for an exception. CUPE says that there is an absence of a compelling modern rationale for most of the exclusions from the provisions of the LSA, created in the LSA itself or in the Regulations.

The multiple purposes served by labour standards laws were described by the Woods Task Force:

> 114. Labour standards have been designed for a number of purposes and have performed with varying degrees of effectiveness. They range from general minimum wage programs to special protective measures aimed at hazardous employment practices in particular occupations. We limit our attention for the most part to wage and hour standards,

since these are the areas where such programs are most prone to impinge on the results of collective bargaining, a subject to which we return in Part Four.

115. Wage and hour standards are usually designed to serve one or more of three basic purposes. First, they may be designed as part of an anti-poverty program to ensure workers a minimum standard of living without being exploited by having to work unduly long hours. This was probably the main purpose of most early wages and hours legislation. This purpose was later combined with that of eliminating "unfair" competition if only to garner employer support for the legislation. Lately a new and more sophisticated purpose has been added. The pressure of higher standards can be used to improve productivity and the rate of growth by forcing marginal employers to use their labour forces more efficiently or go out of business. In the latter event, the result could be unemployment in the absence of complementary fiscal, monetary and manpower programs to facilitate the movement of displaced labour into other more productive undertakings.[41]

Does the existing employment standards legislation adequately meet its intended purpose?

CUPE says the myriad of exclusions and exceptions create unsupportable holes in the workers protection safety net.

Should all provisions governing employment standards be contained in the same statute?

CUPE says that no Acts should be consolidated.

[41] H.D. Woods, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations*, December 1968, p. 35, para. 114-115

Scope of The Labour Standards Act

Application of the LSA

Labour standards legislation is intended to protect the interests of as large a group of workers as possible and for that purpose it is interpreted in a "broad and generous manner". [42] CUPE observes that the multitudes of exceptions to the LSA's protections, in whole or in part, created by the Regulations is at odds with that purpose. CUPE says that the provisions of the LSA should apply to all workers unless there are very compelling reasons otherwise. And in considering the list of exceptions created by the Regulations, CUPE observes that there are no such reasons for most of those exceptions.

The following chart represents the exceptions to labour standards created by the combination of the Act and the Regulations.

CUPE says that the majority of the exceptions from protection are historical anachronisms that are no longer supportable on principle. All Saskatchewan residents are worthy of baseline protections provided by statutory regimes. They are entitled to work that is safe in terms of the hours it demands of them. They are entitled to pay that reflects the value of the work they perform. They are entitled to payment for that work with a regularity that enables them to maintain their family. They are entitled to time away from that work that permits them to be active participants in the lives of their family, and to recuperate sufficiently from work to be able to fully engage when next called upon to work.

The consideration of "unique" business elements should not leave any sector woefully unprotected or without sufficient negotiating strength to advocate for themselves, either directly with their employer or through an adequate dispute resolution mechanism. Thus, if a sector is inappropriate for inclusion in the LSA, or some part of it, as currently constructed, it should be protected elsewhere in the suite of statutes. Exceptions from the LSA, as noted in the spreadsheet on page 44 or some part of it, should not leave any worker without recourse in the event that the value of their labour is disrespected or abused. Nor should the number of exceptions leave the safety blanket more like a sieve. That is unfortunately the character of the current LSA and its Regulations, particularly those relating to scope and hours of work/overtime pay**.**

[42] *Re Rizzo and Rizzo Shoes Ltd.,* [1998] 1 SCR 27 at para. 36 and 40.

Exclusion Type of Worker	Whole Act	OT Rate & Calculations /Hours of Work S.6	Annual Holidays S.30	Public Holidays S.39	Rest Period S.13	Freedom From Mandatory OT S.12	Weekly Days Off S.13.2	Minimum Wage S.15	Notice of Discharge S.43	Payment When Discharged S.44
Manager	Act S.4(2)									
Farming, ranching market garden	Act S.4(3)									
Teachers		Act S.4(4)	Act s.4(4)	Act s.4(4)						
Family Business	Reg. S.3(2)(a)									
Sitters	Reg. S.3(2)(b)									
Commercial Fishers or Trappers	Reg. S.3(3) *except payment proceedures for enforcement									
Firemen Under Platoon Act		Reg. S. 4(1)								
Some City Newspaper Employees: Editorial Writers, Reporters, Advertising Salesperson		Reg. S. 5(1)								
Commercial Hog Operation Employees		Reg. S. 5.1(1) *biweekly 80hr average		Reg. S. 20.1 alternate dates		Reg. S. 5.1(1)				
Oil Truck Drivers		Reg. S. 6(1) (unequal averaging imposed)								
Professionals in training (intern etc)		Reg. S. 7(2)(a)				Reg. S. 7(2) (a)				
Municipal Road Construction or Maintenance Equipment Repair		Reg. S.7(2)(b)				Reg. S.7(2)(b)				
Traveling Salespeople Paid by Commission		Reg. S.7(2)(c)				Reg. S.7(2)(c)				
Logging Camp Cooks & Watchmen		Reg. S.7(2)(e)				Reg. S.7(2)(e)				
Non-Livein Care Providers		Reg. S.7(2)(f)				Reg. S.7(2)(f)			Reg. S.21.1	Reg. S.21.1
Outfitters		Reg. S.7(2)(g)				Reg. S.7(2)(g)				
Mineral Exploration North of 62		Reg. S.7(2)(h)				Reg. S.7(2)(h)				
Vehicle Salesmen		Reg. S.7(3)								
Residential Service Facility Workers		Reg. S. 8(2)					Reg. S. 8(2)	Reg. S. 8(3)		
Retail Sales Employees					Reg. S. 11(3)					
Fire Suspension Employees					Reg. S. 11(2)					
Livein Care Providers					Reg. S. 11(1) 2 days at a time mutually acceptable			Reg. S.13(2) limited to first 8hrs of day & employer may deduct room & board Reg. 14		
Livein Domestic Workers					Reg. S. 11(1) 2 days at a time mutually acceptable					
Construction Worker				Reg. 18(1) alternate calculation & employer option to pay at Dec. 31						
Well Digging Rigs				Reg. S.19 alternate calculation						

Domestic Workers

Domestic workers are often undervalued and invisible. Most commonly they live in their employer's home. They are vulnerable to the will of their employer because to lose their employment means to also lose their residence, leaving them with nowhere to go. The International Labour Organization (ILO) has adopted a Convention on the working conditions of domestic workers on June 1, 2011. Its provisions include:

> Article 10
>
> 1. Each member shall take measures towards ensuring equal treatment between domestic workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements taking into account the special characteristics of domestic work.
>
> Article 11
>
> 1. Each member shall take measures to ensure that domestic workers enjoy minimum wage coverage where such coverage exists, and that remuneration is established without discrimination based on sex.

In Saskatchewan, the operation of the Regulations pursuant to the LSA exclude domestic/care giving workers from the provision from Part II of the Act, dealing with minimum wage. Instead, the Regulations provide that live-in domestics or care givers are entitled to the minimum wage for the first 8 hours of the work day. These workers are not exempted from the hours of work and overtime provisions. There should not be any interplay between reduced minimum wage and the overtime provisions that leave domestic workers subject to any application of the LSA that could be less than what is provided to most workers. Any necessary change should be made so as to ensure compliance with this international standard.

All workers should have their work protected by these minimum standards, if not in the LSA, then in an industry specific statute that has been the result of an industry specific consultation that includes unrepresented workers in that industry.

Managers

One of the groups of employees excluded from the protection of the LSA are those who perform services that are entirely of a managerial character.[43]

Legislative provisions must be crafted mindful of the exclusion of managers here and in the *TUA*. One purpose of worker protection laws is to protect from abuse those who do not have sufficient bargaining power to protect their own interests. While it can be suggested that a manager can sufficiently represent their own interests, in practice that is less often so. Front-line managers often do not have so rare a skill set that they cannot be replaced. Lower level management skills can be transitioned from one business sector to another. That ease of substitution does not give them the bargaining power contemplated in the arguments for their exclusion from protection of either of these pieces of legislation. Managers who are potentially going to be excluded from protections and benefits under the LSA to have protection of their individual rights, should not also be deprived of their rights to collective bargaining if the exclusion provision of managers were to be maintained or broadened under the TUA. We will return to this issue in the discussion of the TUA.

Alternate Work Arrangements

The paper implies from its questions that the LSA does not apply to individuals who work at home. While there are some exceptions created for domestic workers whose work is in the home of another, for individuals performing work for an employer (other than themselves) but whose location from which they perform those tasks is their own home, the LSA does indeed currently apply. [44]

"Self-employed" Misnomer

In regard to the final question, CUPE notes that the question is framed in a way that ignores the purpose of the LSA. With exceptions, the Act is to apply to "every employee employed in the Province of Saskatchewan and to the employer of every such employee". An employee is a person laboring in a context where the control/decisions about how that labour is performed are made by others. It is to protect that employee from abuses by those decision makers that laws regulating employment are created.

[43] Saskatchewan *The Labour Standards Act* RSS c. L-1 Section 4(2)
[44] Saskatchewan *The Labour Standards Act* RSS 1978 c. L-1 Section 4(1.1)

To pose the question as whether "self-employed independent contractors" should be covered by the Act misapprehends the nature of employment. The relationships of employee and business owners are at opposite ends of a spectrum of relationships that vary with the level of control exerted over the worker by others. An independent contractor is by definition NOT an employee. They are, rather, the person with the control over their own efforts. Thus the reference to "self-employed" in a misnomer. An independent contractor is a business owner whose efforts are for their own direct benefit in their own business. Their lives are controlled by their own decisions, not the decisions of others. Thus, there is no abuse by others from which they need protection. It is, therefore, sensible that they are excluded from the LSA.

Should the Act apply to more or fewer categories of employment or industries? Why or why not?

CUPE says that the LSA should apply in total to all employees, unless they are covered by a statute that is industry specific that provides for other minimum standards. CUPE recognizes that many sectors have unique facets to their enterprise and that it is appropriate to consider the voices of those involved in those sectors as to how the baseline protections should be tailored to that sector. Where that is the case, CUPE encourages a consultation with the stakeholders in those industries.

The Act currently applies to standard employer-employee relationships. As a result, some individuals' work arrangements may not be covered by the Act (i.e. working remotely or being a self-employed independent contractor). Given the changing nature of work relationships, should the Act be changed to cover these new work arrangements?

CUPE says the LSA already applies to variations of the employment relationship and that no revisions are necessary to accomplish that objective. However, the LSA quite properly does not apply to the "self-employed". That is not an employment relationship, given that the employer and the employee are the same person.

Employment Agencies

When discussing the topic of employment agencies, the first image that comes to mind is the economically vulnerable unemployed person desperately searching for work. But there are also other images that are not so readily apparent. Of these, the highly mobile currently employed professional searching for their 'dream' position can hardly be said to be vulnerable or in need of protection. This is contrasted with the immigrant worker who has paid an exorbitant fee to an agency in their country of origin that is many times their annual wage, just to be able to come to Canada to earn a sufficient living to raise the family they have left behind. That latter image has a Canadian counterpart – the employer who has made connections with the *ex juris* agency, located in some other country, and has taken advantage of that economic urgency to find an immigrant worker to whom they can pay substandard wages as compared to any Canadian worker doing that same job. While the fee is not paid in Canada, the benefit of the fee is reaped by a Canadian employer.

The unemployed worker and the immigrant worker are often persons vulnerable to abuse by an agency, whereas the currently employed worker seeking a 'better' job is unlikely to share that vulnerability. Further, that currently employed worker can be paired with that better job as a result of a headhunting firm that is paid directly by prospective employers searching for more skilled employees. Those employers are not vulnerable. CUPE has no objection to the practice of an employer-contracted and employer-paid headhunter who receives no fee directly or indirectly from the employee.

CUPE observes that it is the potential employee that stands to suffer harm from agency abuse, not the government. Thus CUPE is opposed to a system that results in fines paid to the government, without addressing and remediating the financial harm to the payor of the fee – the employee. CUPE says that in addition to fines, employers should be compelled to reimburse the person from whom the fee was received, and in the amount which that person paid. In other words, if fees are charged, there should be no residual gain to the agency that received the fee. A fine to government should be significant enough in a single fine to deter the practice.

Further, CUPE says that to avoid the impoverishment of immigrant workers which occurs as a result of the search by a Canadian employer for workers in other countries, the Canadian employer should be required to reimburse that

employee for any fee that employee paid to an agency in another country that played any role in them obtaining work for that Canadian employer.

A subset of immigrant workers are immigrant domestic workers whose employment is often arranged through employment agencies in Canada or abroad. This attaches their immigration aspirations to their employment opportunities. They are vulnerable to the will of their employer because to lose their employment means to also lose their immigration access. The ILO has adopted a Convention on the working conditions of domestic workers on June 1, 2011. Its provisions include:

> Article 15
>
> 1. To effectively protect domestic workers, including migrant domestic workers, recruited or placed by private employment agencies, against abuse practices, each Member shall:
>
>   a) Determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers, in accordance with national laws, regulations and practice;
>   b) Ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers.
>   c) Adopt all necessary and appropriate measures, within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of domestic workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations that specify the respective obligations of the private employment agency and the household towards the domestic worker and provide for penalties, including prohibition of these private employment agencies that engage in fraudulent practices and abuses.
>   d) Consider, where domestic workers are recruited in one country for work in another, concluding bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment; and
>   e) Take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers.
>
> 2. In giving effect to each of the provisions of this Article, each member shall consult with the most representative organizations of employers and

> workers, and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers.[45]

In Saskatchewan, the general prohibition against fees charged by employment agencies goes a long way to satisfy this international standard. However, CUPE says that immigrant domestic workers and other immigrant workers are both charged fees by agencies in their nation of origin, to the benefit of their Canadian employer. CUPE says that to adopt a system that requires Canadian employers to reimburse immigrant domestic workers the fees they have paid to agencies in their nation of origin as a next step in the development of our domestic law, will serve the dual purpose of protecting domestic workers and advancing our compliance with the spirit of these international standards.

CUPE does draw a distinction between paying fees to obtain employment (which should remain unlawful) and paying reasonably priced fees for training in interview skills, resume preparation and other job search skills training.

Should labour legislation continue to prohibit the charging of a fee for finding employment for an individual? Why or why not?

CUPE says that workers should not pay fees to others for the obtaining of employment at a time when they are economically vulnerable and open to abuse. CUPE does say however that it is legitimate for a prospective employee to pay for education and training in interview skills, resume drafting and other job search techniques and skills that will enhance their opportunities for meaningful employment.

Should there be fines for anyone charging fees to individuals seeking work? Why or why not?

CUPE says that there should be fines in an amount significant enough in a single fine to deter the practice. In addition, an amount should be required to be paid to the employee and in an amount equal to what the employee paid.

[45] International Labour Organization *Convention Concerning Decent Work for Domestic Workers* 100th Session, Geneva June 1, 2011

What would be a reasonable fine?

In 2006, the Commission on Improving Work Opportunities for Saskatchewan Residents recommended more substantial fines for repeat offenders of the LSA.[46] CUPE supports that recommendation as a means of encouraging compliance. To accomplish this objective, fines will have to be significant.

The reasonable fine should be in an amount significant enough in a single fine to deter the practice. In addition, an amount should be required to be paid by the agency to the employee to reimburse the fee paid by the employee. This avoids there being any profit motive for the agency's charging of an illegitimate fee. It avoids the fine being merely a cost of doing business. Where the beneficiary of an *ex juris* fee is a Canadian employer, that employer should pay both the fine and the amount of the fee paid by the immigrant employee in their country of origin, thus reimbursing the employee.

[46] *Final Report and Recommendations of the Commission on Improving Work Opportunities for Saskatchewan Residents*. February 2006 Executive Summary at p. 14.

Hours of Work

"Hours of Work" provisions including breaks from work of all types, are designed to ensure that every worker has time for the other facets of their life: family, health, rest and civic life. This is accepted by other legislative review groups:

> I begin by reiterating the decency principle I proposed in Chapter Three: no one ought to be subject to indignity or unwarranted danger in the workplace, or be required to work so many hours that they are effectively denied a personal or civic life. This principle does not tell us precisely how many working hours a day or week ought to be the norm or the maximum, or at what point extra hours ought to be discouraged by requiring overtime to be paid at premium rates or forbidden altogether. However, it does tell us that there must be boundaries around working time, and that those boundaries should be fairly tightly patrolled. To be denied the right to take a break for lunch or personal needs is to be subjected to indignity; to work so many hours that one's mental and physical faculties are depleted is dangerous; to be routinely prevented by work commitments from sharing domestic responsibilities with one's partner, from attending a meeting at the local school, or from simply relaxing at the end of a hard day's work is a *prima facie* violation of the decency principle. Other principles, other interests, are important too, and occasionally they put small dents in the decency principle; but they never deflate or destroy it.
>
> On the contrary, in an era when the work-life balance is increasingly acknowledged as an issue of economic and social importance, there is every reason to maintain these norms as a benchmark against which variations can be measured. This is not to say that variations are always or usually inappropriate; it is only to say that an onus ought to fall on those who propose them to come forward with adequate justifications for intruding into the non-working lives of workers.[47]

Standard Hours

In 1919 (coming into force in 1921), the ILO adopted the *Hours of Work (Industry) Convention, 1919 (No. 1*).[48] It limited work to 8 hours in a day and 48 hours in a week. It took another some 20 years for the weekly expectation to be reduced to 40 hours in Saskatchewan.

[47] H. Arthurs *Fairness at Work: Federal Labour Standards for the Twenty First Century* 2006 at p. 137-139
[48] International Labour Organization C001-Hours of Work (Industry) Convention, 1919 (No. 1) *Convention Limiting Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week.*

That 8/40 combination was approved in the federal labour standards review commission report.[49] Similarly, this combination was approved in the B.C. employment standards review undertaken by Mark Thompson. [50]

Mandatory Overtime

The LSA provides that despite the standard hours of work, if the employee works in excess of 8 hours in a day or 40 in a week they shall be paid overtime.[51] However, there can be no work required beyond 44 hours.[52] The employee can consent to hours of work beyond 44 in a week at overtime rates.

This recognizes that there is a point in any work day/week at which an employee must be free to decide the priorities in their own life. While for some this may be time with their family, for others it is the economic imperative of a second or third job. It is a reality that many of those workers for whom the LSA is their only protection are working at or marginally above the minimum wage. One minimum wage job is not sufficient income on which to raise a family. The number of workers with multiple jobs, or even households where both parents have multiple jobs, is staggering. For more hours of overtime to be made mandatory, there will be situations where, to work the mandatory overtime from one job, they are absent without leave from the other job, putting them at risk of termination. A refusal of mandatory overtime at the first job puts them in jeopardy of losing that job. Employment standards legislation is intended to preserve human dignity, not to deprive workers of control over their own lives. CUPE opposes any increase to the number of hours of overtime that could be made mandatory.

CUPE says that the availability of an averaging agreement should be abandoned for part-time workers. As those workers will not reach the weekly threshold for overtime, there is no rationale for also depriving them of overtime on a daily basis.

Overtime Rates

Overtime rates of pay are remuneration for the intrusion the employer seeks to effect upon the personal life of their employee. They are also a disincentive to

[49] H. Arthurs *Fairness at Work: Federal Labour Standards for the 21st Century* Commission on the Review of Federal Labour Standards, (2006)
[50] M. Thompson *Rights and Responsibilities In a Changing Workplace: A Review of Employment Standards in British Columbia 1994*
[51] Saskatchewan *The Labour Standards Act* RSS 1978 c. L-1 Section 6
[52] Saskatchewan *The Labour Standards Act* RSS 1978 c. L-1 Section 12

the employer for that intrusion. Further, there is no need to commit that intrusion when the employer has control of the means by which to avoid it – the hiring of additional employees.

Permits

We have above addressed the inequality of power in a non-unionized workplace between the employer and the employee. That inequality can easily be exerted to push employees to choose to agree to amendments to their rights. The permit system adds an oversight that assists in avoiding that misuse of power. Thus permits for averaging of wages, lengthening of workdays while shortening the week, etc. should continue. The granting of permits should include a rigorous investigation and oversight to ensure employees are not being compelled to agree.

Rest Breaks

The purpose of rest breaks, including meal breaks, is to attend to one's bodily needs. These include the need to rest between one work day and another. That need is as great today as it has ever been in the past. Although technological change has reduced the physical demands of many jobs, the reductions in workforce that compel greater periods of heightened attention, and increased demand for focus and productivity, all lead to workplace stress that can be as fatiguing as physical exertion. If there were any change to the rest provisions of the LSA, it should be to increase the frequency and duration of rest, but certainly not to reduce them. A break pattern for consideration might be a break of some type at 2 hour intervals.

CUPE also observes that there is an interplay between human rights issues and rest in some circumstances. Many employees have personal circumstances which may require accommodation by increasing these periods of rest. CUPE says that there should be a statement of recognition of those issues in the LSA as well.

Should employees and employers be able to enter into mutually agreed upon flexible work arrangements without requiring a permit?

CUPE says the permit system should be retained, as an oversight to prevent employer abuse. CUPE suggests that the permit process be augmented to ensure a compelling need is provided to support the specific permit request and to verify employees' agreement to the adjustment.

What limitations should there be on hours of work, if any?

CUPE says the current limitations on daily week and hours of work should be retained.

Are the overtime provisions appropriate, adequate and clearly set out so as to ensure compliance?

CUPE says that, apart from the many unsupportable exceptions from the overtime provisions created by the Regulations, which issue has been addressed above, the overtime provisions are appropriate and should be retained.

Should permits continue to be required in certain circumstances? If yes, please describe the circumstances.

CUPE says the current permit system should be retained.

Are the rest and break provisions appropriate?

CUPE says that the number of exceptions created by the Regulations should be addressed. In addition, the current rest and break provisions would be more appropriate if the scheduling of breaks was regularized.

Should the hours of work provisions under the Fire Departments Platoon Act be amended?

CUPE's says the discussion of this statute should be limited to those parties to whom its provisions apply in a consultation process that is industry/statute specific.

Should these provisions be included in the hours of work provisions for all other workers?

CUPE's position is that the discussion of the appropriateness of the *Fire Departments Platoon Act* (FDPA) to fire departments should be limited to those parties to whom its provisions apply in a consultation process that is industry/statute specific.

If the question is intended to inquire about "consolidation" of the *Fire Department Platoon Act* into a single labour standards statute, CUPE says that the LSA is already a labyrinth of exceptions and that there is no benefit to be gained by consolidating this specific statute into a general one.

However, if by this question it is meant to inquire whether the specific provisions of the Act should be made part of the hours of work provisions that apply to all other workers, CUPE says that they should not.

Leave Provisions

The right to leaves from the daily work schedule demonstrates a recognition that some events are culturally significant enough to justify a shifting of expectations in the 'labour for money' reciprocity. Bereavement and illness have historically been of sufficient significance to shift these expectations. The expansion of the leave provisions to take into account other issues that arise from demographic change are positive. CUPE observes that the attendance for jury duty is a statutory compulsion. We suggest that reference should be made in the LSA to the mandatory granting of leave to comply with that compulsion.

The leaves suggested by the paper which are specifically canvassed in the questions are either single events in a worker's lifetime (citizenship ceremonies), or at least very rarely to be more than single events (live organ donation). It appears these questions are patterned after Manitoba's provisions of leave for organ donation[53] and citizenship ceremonies.[54]

CUPE also embraces an expansion of circumstances entitling workers to leaves of absence from work as our progress toward tolerance and acceptance of differences in a civil society. Citizenship ceremonies as a circumstance entitling a worker to leave is a social recognition of our communities' changing demographics. Organ donation is an extension of our recognition of individual and family health as being important social objectives. In the event of a major family illness that would necessitate an organ transplant, one must consider the possibility that if such a leave were denied, the worker may abandon their job in favor of pursuit of this important family issue. That is not a desirable outcome for either the worker, or the employer that would have to spend time and energy to recruit and re-train in order to replace the efficiency of the worker who was lost.

CUPE would not oppose the addition of either of these events as appropriate circumstances for entitlement to leave of absence from work. CUPE would also not oppose the addition of other circumstances entitling people to leaves as the expansion of our acceptance of shifts in social demographics and a positive move toward tolerance and acceptance in a civil society. CUPE suggests that the leave provisions also take into account the cultural diversity in our communities by contemplating leaves for the religious observances of those

[53] Manitoba *Employment Standards Code,* CCSM C E110 s. 59.6(2) provides for 13 weeks of leave
[54] Manitoba *Employment Standards Code,* CCSM C E110 s. 59.7 provides for leave of up to 4 hours

who are not of the Christian tradition, and for whom many of the current statutory holidays have no personal significance such as Christmas and Good Friday.

Are the existing leave provisions clear and easy to understand? Are the current leave provisions sufficient?

CUPE says that the leave provisions should take into account the cultural diversity in our communities by contemplating leaves for the religious observances of those who are not of the Christian tradition. CUPE also supports the addition of leave for organ donation and citizenship ceremonies. As to clarity of the provisions, the provisions are clear and understandable. If there is any concern about how easily these provisions are understood by workers, the adoption of website or brochure information circulars would be of assistance. Further, given that many low-wage earning workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

Should Saskatchewan consider expanding the number of leave provisions to include: organ donation, citizenship ceremonies; and others?

CUPE supports the addition of organ donation and citizenship ceremonies in the leave provisions. CUPE also advocates adding culturally based leaves to reflect the diversity of our communities.

What would be the impact of changing the leave provisions?

CUPE supports the addition of organ donation and citizenship ceremonies in the leave provisions. CUPE also advocates adding culturally based leaves to reflect the diversity of our communities. CUPE believes that the limited extra cost of these expanses to the leave provisions are outweighed by the benefit of expanded social tolerance.

Annual Holiday Provisions

Annual Holiday (vacation) has several purposes, one of which is a time for workers to recuperate from work. The productivity expected of every worker has increased over time as enterprise pursues the adage of 'doing more with less', or LEAN approaches. That compaction of work makes for work times that push employees harder, in turn creating a continued need for recuperation time.

The insufficiency of minimum wage and the increasing numbers of casual and part-time jobs are developments that make it necessary for many workers to hold multiple jobs in order to adequately support themselves and their families. This holding of multiple low paying jobs increases the total number of working hours for these workers. This is another contributor to the need for vacation. These rest periods are supported by the comments of H. Arthurs in the federal labour standards review discussed above.

Are the existing annual holiday provisions clear and easy to understand? Are the current annual holiday provisions appropriate and adequate?

CUPE says the current provisions are appropriate, adequate, and should be maintained. CUPE also says the provisions are sufficiently clear. However, if there are any concerns about how easily these provisions are understood by workers, the adoption of website or brochure information circulars would be of assistance. Further, given that many low wage earning workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is their second language.

Public Holiday Provisions

Commonly referred to as statutory holidays, these are dates of particular social importance to warrant observance by freedom from labour. This permits us to participate with our families in community events: Canada Day celebrations, Remembrance Day ceremonies, Labour Day events, religious occasions and so on. These holidays permit workers to have a civic life on significant civic, ceremonial and religious occasions. It is these types of occasions which contribute to our sense of social identity and cohesion.

It is also a reality that most families have both parents working. And a reality that for those workers who are reliant upon the LSA as their only protection, they have families in which parents often have multiple jobs. This necessitates shift work. Public holidays on fixed dates are often among the few days these families have time together as a family. To give employers the opportunity to move the observance of the public holiday to other dates, deprives these families of these few occasions for family life. Even if movement of a statutory holiday was only permitted with the consent of workers, vulnerable employees are hardly in the position to disagree.

These public holidays serve a secondary purpose of providing an intermittent rest period from work. While this secondary purpose could be accomplished on any day of the calendar, the primary purpose of civic and family life cannot.

Are the existing public holiday provisions clear and easy to understand?

There is some confusion regarding the observance/scheduling of Canada Day, particularly if July 1 falls on a Sunday. CUPE suggests that the public holiday provision be amended to harmonize with regard to Canada Day. CUPE proposes that the LSA provide that in Saskatchewan the scheduling and observance of Canada Day be in accordance with the federal legislation that created it.

The existing public holiday provisions are otherwise clear and understandable. However, if there is any concern about how easily these provisions are understood by workers, the adoption of website information circulars or print brochures would be of assistance. Further, given that many low wage earner workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

Is the current number of public holidays appropriate?

CUPE says the current number of public holidays is appropriate.

What would be the impact of changing the number of public holidays?

CUPE does not support changing the number of public holidays.

Should employers and employees be able to observe a public holiday on a different day without requirement a permit?

Given the influence employers can have upon economically-dependent or otherwise vulnerable workers, CUPE says that the current permit/order system for altering the observance of statutory holidays should be maintained. As with the hours of work discussion, we reiterate the point that these workers often do not have the financial stability risk resisting an employer request/demand to reschedule the stat. CUPE says that public holidays should always be observed on their calendar date so that a worker can share those days of rest or occasional observance with their families, unless there is a very compelling reason and the employee consents. To permit movement of dates makes unrepresented workers vulnerable to employer abuse. CUPE says that the permit/order system should be fortified to use offices to investigate employee wishes before the granting of any permit/order.

Notice Provisions

Decisions to dismiss or lay off employees are decisions into which the employee has no input. By contrast they are events which employers generally plan significantly in advance. Notice to employees of dismissal and lay-off gives them an opportunity to respond to these unilateral decisions by providing them an opportunity to seek alternate employment. In this way they can minimize the economic upheaval to their family. Without that opportunity, they may be forced onto unemployment insurance or welfare. The public purse should not be responsible for the fallout from an employer's decision. It is sensible, therefore, that the employer making the decision should provide employees with a reasonable opportunity to recover from the impact of those decisions.

Further, it is sensible when larger groups of employees are leaving employment at the same time, that they receive longer periods of notice, as they will be competing with each other for available work opportunities. Indeed, consideration should be given to tiered notice requirements as the size of the terminated group increases such as is done in B.C.[55] or Manitoba[56].

Waiver of such notice periods should only be available where the employee advises that they have obtained alternate employment. Thus, waiver of the notice period should be entirely at the employee's initiative.

As to the issue of notice by employees who intend to leave their employment, CUPE observes that such notice is commonly given. However, it may be that some employees are deterred from giving notice by accounts of situations when employee notice is met with retaliatory immediate termination, thus depriving employees of the opportunity to work out the notice they have given. It may be that more employees would give notice if there was no risk of this occurring. CUPE, therefore, suggests that when employees give notice, the employer must permit the employee to work out that notice period.

Public policy does not countenance people being compelled in this way. Additionally, CUPE observes that there really is no way to force people to work productively during such a mandatory period of compulsion to work.

[55] British Columbia *Employment Standards Act*, RSBC 1996, C113 s.64 provides 8 week's notice for a group of 50 to 100, 12 week's notice for a group of 101 to 300 and 16 week's notice for any group 301 or over.
[56] Manitoba *Employment Standards Code*, CCSM CE110 s. 67(1) provides 10 week's notice for groups up to 100, 14 week's notice for groups from 101 to 299, and 18 week's notice for groups of 300 or more.

CUPE also says that policy should favor employee mobility as part of the Charter protection under Section 7 which provides for the right to life, liberty, and security of the person.

Further, the public treasury benefits from employee mobility. Employees most commonly leave a job in favor of a job with better pay. That better-paying job will result in increased taxation on their earnings. Given that most marginal earners spend nearly all of their income on the cost of living, there will also be greater sales and other tax revenue as their increased income moves through the economy.

An additional reason many employees change their employment is in pursuit of the opportunity to make greater use of their skills, education and experience. Policy should favor having workers make greater contributions to productivity in this way. Thus CUPE opposes hindering employee mobility by making any employee notice period mandatory.

Are the current notice provisions appropriate and adequate? Why or why not?

The current provisions requiring employers to provide notice to employees are appropriate.

Should employees be required to provide written notice when terminating their employments? If yes, what would be a reasonable notice period?

Employees should not be required to give notice when terminating their employment. However, preventing employer retribution could encourage them to do so.

What circumstances would warrant the waiving of the notice period?

Waiver of a notice period should be at the employee's option and initiative only.

Minimum Wage

In August 2005, in association with the Commission on Improving Work Opportunities for Saskatchewan Residents, the Canadian Policy Research Networks Inc., was engaged to report on low paid workers.[57] As the parameter for defining low paid workers, that study used any person earning less than $10 per hour in 2000 or 2001 dollars. They found:

> "In Saskatchewan, 21.4 percent of full-time workers, or 59,000 people earned less than $10/hour in 2000…About 28 percent of women full-time workers in Saskatchewan were low paid in 2000 compared to only 16 percent of men."[58]

Other findings from the 2000 Statistics Canada data included:

- Over 1/3 of the low paid full time workers in Saskatchewan have a post-secondary certificate or university.[59]
- Over 1/3 are recent immigrants (in Canada less than five years).[60]
- Average employment income for Aboriginal persons working full-year full-time was 16% lower than for non-Aboriginal persons.[61]
- For part year or part-time work that gap widened to 24%.[62]
- Incidence of low pay is relatively high for lone mothers (though not lone fathers) and for those with a disability.[63]
- When 2000 data was compared to 1980 data, the share of low pay among full-time workers increased over that 20 year period.[64]

The study also compared data over time to determine whether low pay earners move into better paying jobs within 5 years. That analysis found:

- Men had a 73% chance of earning more while only 28% of women did.
- Unionized workers had a 68% chance of earning more while only 46% of non-unionized workers did.
- Wage improvements were not persistent – 25% of workers whose wages improved then fell back into low earnings in the next 4 years.

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[57] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005

[58] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005, p. 5

[59] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005, p. 7

[60] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005, p. 7

[61] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005, p. 9

[62] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005, p. 9

[63] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005, p. 9

[64] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., August 2005, p. 13

The study recommends an increase in minimum wage as a means to combat the impact of those trends.[65] Although, in 2005 they found a target of $8/hour was appropriate, that minimum wage rate was not achieved until some years later. The study recommended periodic increase "at least to keep up with increases in the cost of living.[66] The study also recommends increased education.

The percentage of full-time employees (not including students) earning $10 an hour or less was 21.4% in Saskatchewan as compared to the national average of 16.3%. These numbers do not include Aboriginal persons living on reserve. Of those low paid workers, 27.8% were women. Of those low paid workers, 34.6% were recent immigrants, as compared to a national average of 27.4%. While those numbers and percentages will have changed, they do reveal two important trends in low paid worker demographics: many are women and many are recent immigrants.

The Legislative Directives include Directive #21: Annual Indemnity and Allowance, which sets out the base "annual indemnity" for each MLA of $91,800. In addition to this indemnity, those MLAs with specific functions are also paid "annual allowances" for those extra duties. It is to both of these amounts that the cost of living increases are applied. While Member of the Legislative Assembly (MLA) salaries are indexed to the cost of living the application of a percentage to a higher salary produces a greater wage raise than when that percentage is applied to a lower salary. This broadens the wage gap rather than remediating it.

April 1, 2012	2.8%
April 1, 2011	1.4%
April 1, 2010	1.0%
April 1, 2009	3.3%
April 1, 2008	2.8%
April 1, 2007	2.0%

Totals 13.3% (with the effect of compounding 14.04%)

[65] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., p, 17; August 2005
[66] *Low Paid Workers in Saskatchewan: A Report to the Commission on Improving Work Opportunities for Saskatchewan Residents.* Canadian Policy Research Networks Inc., p, 18; August 2005

This demonstrates the need for establishing a living wage as a minimum wage baseline before commencing an indexing of the minimum wage to the cost of living/living wage combination.

CUPE says that some form of indexing alone does not adequately address the issue of determining the minimum wage. We must examine the purpose for which we set a minimum wage. It ought not to be an exercise in determining an arbitrary number that some people think is good for their interests. It should be about ensuring that any person working a full-time job of any sort should be able to support themselves. To do that there needs to first be a consideration of the amount of earnings it takes to accomplish that goal in any given jurisdiction. In other words, there should be a consideration of what the public commonly refers to as the poverty line. There ought to be no person working full-time in any job who is responsible solely for themselves to be living below the poverty line.

CUPE observes that the poverty line is more accurately expressed as the low income cutoff (LICO) set by Statistics Canada.

> This is calculated on the after-tax income level where a family is spending 20% more than the average on food, clothing and shelter. If the average family spends 43 % of its income on these necessities, a family spending more than 63% of its after-tax income is considered poor.

The less a worker earns, the greater a percentage of their total earnings will be consumed by these necessities. CUPE says that the LICO is the minimum step toward a minimum wage that approximates a living wage. CUPE says that the current minimum wage should be raised to bring an individual earning that wage in a full-time job above the LICO for Saskatchewan.

CUPE says that the minimum wage should be increased immediately to $10 per hour. Then the Minimum Wage Board should conduct an investigation into the LICO for Saskatchewan and a living wage for Saskatchewan with the intention to implement an increase to the higher of those two amounts before the end of 2012. Only after the minimum wage is raised to that number is it appropriate to begin a consideration of a formula for indexing the minimum wage in the future.

As to an indexing system, CUPE says that at a minimum it should be indexed to increases (not decreases) in the Cost of Living calculation that is used under the Legislative Directive for MLAs and applied annually on the same April 1st,

implementation date. Further, CUPE says that the minimum wage must also annually be compared to the LICO and living wage values for that year, such that if the application of the new cost of living percentage is insufficient to meet the higher of those two figures, the minimum wage should be increased to meet that figure. This combination of LICO/living wage and some indexing formula is similar to the recommendations of the 2006 commission studying this issue. The commission recommended that the minimum wage be raised to the then current LICO and thereafter adjusted annually based on the consumer price index.[67]

For those workers with disabilities, it is as socially unpalatable for disabled workers to earn a discounted minimum wage as it is to utilize other exploitative work practices such as child labour. CUPE emphatically says that the discounted minimum wage for disabled workers should be removed from the statute/regulations. CUPE does draw a distinction between employment and therapeutic work skills training programs which are a form of education, rather than a form of employment.
We have had the benefit of reviewing the submission of CEP and adopt their description of the international standards respecting disabled workers.[68]

Should the minimum wage be indexed? If so, how should the minimum wage be indexed?

CUPE says that the minimum wage should be immediately raised to $10. The Minimum Wage Board should be immediately tasked with investigating the LICO and living wage for Saskatchewan with a view to implementing a further increase in the minimum wage to allow a full-time worker responsible for themselves alone to exceed the higher of the LICO or the living wage. From that time forward, the minimum wage should, at a minimum, be indexed to the cost of living annually. CUPE however say the more responsible approach would be to further increase the minimum wage by whatever amount is necessary to continue to meet the higher of the LICO or living wage.

[67] *Final Report and Recommendations of the Commission on Improving Work Opportunities for Saskatchewan Residents,* Executive Summary, February 2006 at p. 12
[68] Communications, Energy and Paperworkers Union of Canada, *Submission to Saskatchewan's Labour "Consultation": International standards and the bid to turn to the clock back on worker's rights.* July 24, 2012, p. 19

If the answer to the previous question is yes, is there a need to continue the Minimum Wage Board?

CUPE says that there continues to be important work to be done by the Minimum Wage Board and it should be continued.

Is the list of matters the Minimum Wage Board can review and made recommendations on appropriate and adequate?

CUPE says that in addition to its current responsibilities, it should also be tasked to study annually whether a cost of living increase in the minimum wage is sufficient to continue to meet the higher of the LICO or the living wage.

Should the list be altered? If so, how?

CUPE says that in addition to its current responsibilities, it should also be tasked to study annually whether a cost of living increase in the minimum wage is sufficient to continue to meet the higher of the LICO or the living wage.

Should employers be able to pay disabled workers wages lower than the minimum wage? If so, under what circumstances?

CUPE emphatically says that the discounted minimum wage for disabled workers should be removed from the statute/regulations. CUPE does draw a distinction between employment and therapeutic work skills training programs which are a form of education, rather than a form of employment.

Payment of Wages

The existing provisions for the payment of wages contemplate a paper record of earnings to be provided to an employee regardless of the method of payment (cheque, direct deposit) in that Section 48(2) provides that where holiday pay is included in with regular wage payments, the employer shall provide a "written statement" that identifies what portion of the payment is regular wages, annual holiday pay and public holiday pay. The Regulations s. 28 provide that this written statement must be "readily detachable from or separate from" the pay cheque. Employers put themselves in peril if they do not provide such a written record.

While *The Electronic Information and Documents Act, 2000* clarifies that "in writing" and similar phrases in other statutes does not prohibit the use of electronic formats,[69] the Act also provides:

> Retaining documents
>
> 12 A requirement pursuant to any law to retain any information or document is satisfied by the retention of the information or document in an electronic form if:
>
> a) The information or document is retained in the format in which it was created, provided or received, or in a format that does not materially change the information or document;
> b) The information or document will be accessible so as to be usable for subsequent reference by any person who is entitled to have access to the information or document or who is authorized to require its production; and
> c) Where the information or document was provided or received, information, if any, that identifies the origin and destination of the information or document and the date and time when it was sent or received is also retained.
>
> Whether document is capable of being retained
>
> 13(1) Information or a document in an electronic form is deemed not to be capable of being retained if the person providing the information or document inhibits the printing or storage of the information or document by the recipient.

[69] Saskatchewan *The Electronic Information and Documents Act, 2000*, s.s.c. E-7.22 s12,13

(2) For the purposes of sections 8, 9 and 10:

(a) Electronic information and electronic documents are not to be considered as being provided to a person solely by means of making that information or those documents available for access by that person through any means including the Internet; and
(b) In order to satisfy the requirement to provide any information or document to a person, the person must consent to accept the information or document in an electronic form in satisfaction of the requirement.[70] [Emphasis Added]

Thus the "portal" without printing capabilities is insufficient to meet the statutory requirements. Further, the employer must obtain consent. They cannot presume consent so as to require the employee to actively object.

CUPE says that the obligation to provide a written statement is appropriate and should continue. There continue to be many households which do not have a computer. Nor does the ownership of household computers necessarily mean that the adult workers in the household have sufficient computer skills to access payroll information. Even workplace portals at which an employee can "view" their payroll information are not sufficient. Such an alternative does not satisfy this requirement if the employee is not at liberty to print a written copy of that statement from the portal station. It also does not take into account the limited time available to view those records if the employer insists that this occur during non-working time. This is particularly of concern at large employers where many employees will be trying to access the computer/portal/online record at the same time. Every pay period the employee should continue to receive a paper copy of a statement of their wages from all sources, printed at the employer's expense.

The Act in s. 48 (1.2) provides that if wages and other amounts are not included in a written statement, they are deemed not to be paid unless the employer can establish that the employee was regularly informed of these separate amounts. In CUPE's view, a website or online portal by which the employee can inform themselves of these amounts does not satisfy the employer's onus to "establish" that they informed the employee.

The use of direct deposit as a payment method (separate and apart from the issue of producing a record of the calculation of that pay amount) is currently

[70] Saskatchewan *The Electronic Information and Documents Act, 2000*, s.s.c. E-7.22 s12,13

by agreement. This option means that no employee is forced to hold a bank account if they choose not to. Access to direct deposit should continue to be made the subject of agreement.

Are the requirements for payment of wages understandable? Why or why not?

CUPE says that any doubt about the employer requirement to provide a written pay statement regardless of payment method should be clarified. The current provisions are otherwise clear and understandable. However, if there is any concern about how easily these provisions are understood by workers, the adoption of website information circulars and print brochures would be of assistance. Further, given that many low wage earner workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

Are the time frames for payment of wages appropriate or adequate? Why or why not?

CUPE says that the time frames for the payment of wages are appropriate.

Collection of wages

The collection of arrears in wages is dealt with under a combination of the LSA and *The Wages Recovery Act* (WRA). While these two statutes provide for a detailed mechanism for collection, we observe that the language of the WRA is not contemporary. For example, it refers to the resident of a home as being an "inmate". The language may be difficult for unrepresented workers to understand. This will be particularly so for workers who have literacy challenges or for whom English is a second language. CUPE says that it will serve the interests of access to justice to update the language of the WRA, without altering its effect, to make sure it is more easily understood.

Are the current provisions adequate and appropriate to address the need to ensure the payment of wages to employees and former employees?

While the effect of the current provisions is adequate, the language of the WRA should be revised to use more contemporary words in order for it to be more easily understood. Further any concerns about how easily these provisions are understood by workers can be addressed by the adoption of website circulars and print brochures that would be of assistance. Further, given that many low wage earner workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

Equal Pay

LSA's current provisions on equal pay fall far short of what is necessary to remediate inequalities of gender. It is widely recognized that women earn on average less than men. This difference in their pay is commonly called the wage gap. In Saskatchewan, the wage gap exists for many reasons: women require leave from work for family responsibilities; there are fewer opportunities for women to access education and training; other supports are not accessible or affordable such as child care and elder care; and more women are not unionized.

However, a significant part of the gap exists simply because it is women doing the work. Women working in clerical, sales, service areas make considerably less than people in male-dominated jobs of comparable value. Pay equity exists when work of equal value receives equal pay.

LSA prohibits an employer from paying differently based upon gender to employees:

- In the same establishment
- That is similar work
- Under similar working conditions
- Requiring similar skill, effort and responsibility
- Except where the differential is based upon a seniority or merit system.[71]

This offers really no more protection than a bare compliance with human rights requirements. It does not address the larger public policy issue. It does not address the clustering of a single gender into jobs – that there are jobs that are stereotypically populated by one gender or the other. Within those jobs it would be an obvious affront to pay genders differently. However, between jobs that are disproportionately populated by the different genders which may require different skills but which have similar values to the enterprise, the current provisions do not provide any means to rationalize the differential in pay.

The international standard for remediating this aspect of gender inequality is set out in an ILO Convention which provides:

[71] Saskatchewan *The Labour Standards Act*, RSS 1978 c. L-1-S. 17(1)

Article 2

1. Each Member shall, by means of appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.[72]

In keeping with this ILO Convention, which Canada has ratified, CUPE promotes equal pay for work of equal value for all Saskatchewan women. We believe that this goal will be reached most effectively and quickly through the passage of specific pay equity legislation.

Saskatchewan's short-lived previous measures for pay equity in the public sector were an important first step that needs to be restored and expanded. CUPE believes the government should enact comprehensive legislation that will cover all workers in Saskatchewan, unionized and non-unionized, in the public and the private sectors. The express purpose of such legislation would be to ensure women's economic equality.

For legislation to effectively identify and correct wage differences based on gender, it must be proactive, mandatory, monitored, enforced, unlimited as to sector, communicated and allow for class action and individual complaints, without delays.

Are the current provisions adequate and appropriate?

CUPE says the current pay provisions fall short of equal pay for work of equal value, and thus are insufficient to meet Canada's international obligation or Saskatchewan's public policy needs.

[72] International Labour Organization, *Equal Remuneration Convention,* 1951 (No. 100)

Discriminatory Actions

The LSA has provisions that protect employees from certain kinds of employer misconduct. They provide protections from retaliation for those, commonly referred to as whistleblowers, who disclose statutory breaches. In respect of whistleblower protections CUPE urges separate consultation that includes the Privacy Commissioner. The provisions include protection against discharge on the basis of pregnancy or maternity leave. They provide some limited protection for employees who are ill or injured from termination of employment, or other adverse employment consequences.

One aspect of these protections which CUPE particularly wishes to raise is the limited protection against those consequences in the circumstance of workplace injury. All workplace injuries are preventable with enough attention. To limit the protection of an employee from termination of employment or other adverse consequences for a period limited to 26 weeks is insufficient. It is the employer that has control over the safety of the workplace, the insufficiency of which leads to employee injuries. Consequently, CUPE says that in this circumstance the protection should be for an unlimited period.

We also note some overlap with the protections of the HRC. Human rights legislation is foundational to any jurisdiction. It is reflective not of a statutory gift, but of rights so fundamental that they are integral to each person. The legislation does not create those rights, but rather it is the statutory confirmation of them. With that significance, they should be protected with a more robust enforcement system than the Commissioner alone. In the absence of the HRT, the enforcement of these rights is limited to those who can afford the cost of a court action, assuming their claim ever gets through the Commissioner stage. An unenforceable right really is no right. Access to justice should be real, not illusory. CUPE strongly urges the restoration of the Human Rights Tribunal and an effective, cost-accessible enforcement mechanism for the enforcement of such rights.

Are the discriminatory action provisions understandable? Why or why not?

CUPE says that the current provisions are understandable. However, if there are any concerns about how easily these provisions are understood by workers, the adoption of a website or brochure information circulars would be of assistance. Further, given that many low wage earning workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is their second language.

Are the discriminatory action provisions appropriate and adequate? Why or why not?

The protections of these provisions should be modified so that the protection against termination or other adverse employment consequences for an injured worker receiving Workers' Compensation Benefits does not have a time restriction. CUPE also says that the prevention of discrimination of all kinds would be better protected by the restoration of the Human Rights Tribunal.

Labour Relations

The paper has several observable themes:

- issues that would shift the emphasis of the TUA away from collective bargaining as a mechanism for leveling the imbalance of power between enterprise and labour, so as to promote employer interests alone (profits, gains, flexibility at the expense of workers' stability of income);
- issues that would make it more difficult for union members to maintain their representation in various circumstances, as a means to defeat bargaining and bargained rights (given that the previous changes have already made if more difficult for non-union workers to achieve union representation at the outset);
- issues that compromise a union's ability to address the full range of the socio-economic issues that impact what can be achieved in collective bargaining;
- issues that would allow greatly increased state intervention in free collective bargaining and the internal relationship between union and member, without reciprocal interference in the internal affairs of employers; and
- issues that artificially restrict strike action so as to erode its use as a method to motivate compromise in free and fair collective bargaining.

Does the existing labour relations legislation adequately meet its intended purpose?

In keeping with the discussion of labour relations at the commencement of our response, CUPE says that the existing labour legislation does not adequately meet its intended purpose.

Should all provisions governing the conduct of labour relations be contained in the same statute?

CUPE says that no statutes should be consolidated.

Structure, Resourcing and Procedures of the Labour Relations Board

CUPE is committed to labour relations that are based on mutual respect, creative problem-solving and lasting solutions that have been crafted by the parties themselves. CUPE believes that the interests of its members can be, and are served best when those features are present. To that end, CUPE believes that the Labour Relations Board has a role to play in facilitating those kinds of relationships.

Throughout this response, we make reference to changes in the Labour Relations Board (LRB) structure that CUPE believes are necessary for it to perform the demands of its current statutory jurisdiction. Needless to say, if the LRB were to be given broader statutory authority it would need to be resourced to an even greater extent than what CUPE currently proposes. Given that CUPE does not favour consolidation of statutes and opposes having all of the statutory functions in the labour relations field being amalgamated into a single tribunal, we have not addressed the level of resources that would be necessary to service that greater level of demand. What CUPE addresses is the level of resourcing necessary to best carry out its current jurisdiction.

The LRB is currently comprised of a Chair and a single Vice-Chair, augmented by wingers appointed from each of labour and management. The TUA identifies very few matters upon which a Chair or Vice-Chair can sit alone. Many of the wingers have very busy practices as nominees in other kinds of adjudication, in addition to the work they perform for the LRB. Those three facts contribute to significant delays in matters being scheduled for hearing or concluding once commenced.

In addition, the third party processes - such as conciliation, conciliation boards and special mediators - involve reporting to the Minister and are cumbersome to compose, since this is done by the Minister.

In light of those observations, CUPE makes the following submissions for the resourcing of the LRB in order to carry out its current statutory mandate in a way that makes the TUA's provisions effective.

Mediators Attached Exclusively to the LRB

CUPE believes that mediation should be a focus of the TUA and of the functioning of the LRB. CUPE suggests that a cohort of mediators should be permanently attached to the LRB and tasked only with matters arising under the TUA. CUPE also suggests that the conciliators, conciliation board and special mediator functions, including the references to reporting to the Minister, should be removed from the TUA and replaced with mediators. CUPE envisions that mediators will assist the parties in navigating their way to their own resolutions to matters as much as possible, in the belief that the resolutions that are mutual are the most lasting, and that the process by which those agreements are made are experiences that contribute to a healthy and respectful relationship in the long term. CUPE see mediators as facilitators in a way that could ultimately reduce the demand upon the adjudicative functions of the Board.

CUPE sees mediators having a role in a multitude of functions:

- Mediating collective bargaining. CUPE would hope that with mediators attached to the Board, parties would become familiar with those mediators and develop relationships of trust with them, such that they would be willing to have greater access to them earlier in bargaining;

- Mediating essential service plan agreement negotiations;

- Mediating adjustment plans in response to technological changes'

- Mediating challenges arising from certification and decertification matters such as the constituency of the voters' list, appropriateness of the bargaining unit issues, etc;

- Mediating grievances under Section 26.3(4) (expedited arbitration);

- Grievance mediation under Section 26.4;

- Mediate (in substitution for conciliation) under Section 26.5(6) in first collective agreement situations;

- Mediating settlement conferences: CUPE envisions a proactive approach to resolutions generally, that would see a move toward settlement

conferences, upon the LRB's initiative. CUPE also sees a role for mediators in facilitating those case settlement conferences in matters of any kind where the parties would find them useful. CUPE draws a distinction between settlement conferences for the purposes of settlement and resolution, and the case management functions of the LRB which are aimed at making efficient use of hearing time;

- Mediating settlements of duty of fair representation complaints;

- CUPE sees mediators having a potentially significant role in providing assistance in relationship building.

Composition of the LRB

Section 4 of the TUA provides for the Board to be composed of members equally representing labour and management, a Chair and not more than two Vice-Chairs. CUPE advocates that as a minimum the second Vice-Chair contemplated by the TUA be appointed, such that the equal representation of labour and management also be present in the appointments of the Vice-Chairs. Further, CUPE advocates for a change in Section 4(1) to provide for 4 Vice-Chairs.

CUPE notes Section 4(2) which provides that the Board cannot proceed in the absence of quorum. In Section 4(2.1) quorum is described as three members, at least one of which must be Chair or Vice-Chair. By increasing the number of Vice-Chairs as proposed, CUPE observes it would more than double the number of panels that can be convened at one time.

CUPE has experienced delays in matters being scheduled at the outset, and further delays in scheduling continuations of matters, as the panel members are so fully committed that their calendars are settled many months in advance. This leaves little opportunity to respond to time-sensitive applications. Having a larger cohort of Vice-Chairs among whom to schedule hearings will permit appropriate amounts of time to be devoted to writing decisions in hearings that have already concluded, and permit the timely commencement of hearings in time-sensitive matters.

Use of Adjudication Resources

CUPE advocates for a greater range of matters upon which a Vice-Chair can sit alone. CUPE advocates for an eventual transition to a primarily single Vice-Chair model for adjudication. Other jurisdictions have made that transition as a means of extending the Board's resources to be the most cost-efficient. For example, in British Columbia, the majority of matters are determined by a Vice-Chair sitting alone, with the Vice-Chairs being appointed with an equal number from labour and management.

In the meantime CUPE advocates that single Vice-Chairs be permitted to hear a broader range of applications. Currently, Section 4(2.2) permits the Chair to designate themselves or a Vice-Chair to sit alone on only two types of matters: those under Section 25.1 (Duty of Fair Representation) and Section 36.1 (employee/union disputes which require the application of the principles of natural justice, inadequate notice of union meetings, or denial of membership). CUPE says that there are other matters that could also reasonably be assigned to a Vice-Chair sitting alone during the transition period. CUPE envisions these including:

- determining disputes about voting constituency in certification, decertification or raid applications as well as whether the applicant has sufficient threshold support for the conduct of a vote and whether there is a collective agreement in force that would affect the application;
- determining the scope review issues of inclusion/exclusions from an already described bargaining unit;
- determining the parameters of an appropriate bargaining unit in new certifications;
- determining unfair labour practices that involve the discharge, discipline, layoff or suspension of an individual(s);
- determining whether a labour organization is a company dominated organization;
- determining applications for exclusion from membership based upon the religious training or belief;
- determining the fixing of expiry dates pursuant to Section 35.

Timing Procedures for Making Current Provisions Effective

The right to obtain certification without interference with employee wishes is a foundational right under the TUA. However, delays in conducting votes or having complaints heard extend the time in which unfair labour practices can be committed and during which their impact is not remediable. For those reasons, CUPE suggests the introduction of procedural requirements that will make those remedies effective.

CUPE advocates for the adoption of time limits for the conduct of certification, decertification and raid votes. CUPE suggests a timeframe of 10 days from the date of application.

CUPE further advocates for the scheduling of hearings in unfair labour practice complaints involving termination, discipline, layoff or suspension within 3 days of the filing of the application. CUPE believes that such a timeline is necessary to correct the chilling effect that these types of unfair practices generate. CUPE also believes that such a timeline is achievable with the additional resourcing of the Board suggested above.

Expedited Arbitration

The parties to a collective agreement are at all times free to adjust the terms of their agreement on a permanent or a one-time basis. This includes the freedom to adjust grievance and arbitration procedures to accommodate a particular matter that should be heard in an expedited manner. Thus for the purpose only of achieving the availability of expedited procedures, Section 26.3 is not as innovative as it may have first appeared.

The true dilemma that a statutory provision should address is where there is deliberate delay by one party in a matter that could or should be dealt with on an expedited basis, AND that party will not agree to expedited arbitration either under the Section or as an amendment to the operation of their collective agreement. For this reason, CUPE advocates that Section 26.3 be amended to permit an application by one party alone, rather than a requirement that there be mutual agreement to its use. CUPE further advocates that a list be maintained of arbitrators who are willing to hear matters on an expedited basis, and that applications under Section 26.3 be allocated to arbitrators on that list in a rotation by the Registrar of the LRB. This would avoid the need

for the participation of the Minister in the functioning of this Section. As not all arbitrators may be willing to commit themselves to arbitrations conducted on an expedited basis, this should be a list that is separate and apart from the list that is currently maintained pursuant to Section 26.6.

Officers

One of the issues of concern to CUPE is the frequency of mail ballots. The holding of a poll at a workplace provides a more vigorous ballot because of its convenience. When votes are held they should be conducted using procedures that encourage a large return, regardless of the outcome.

CUPE advocates for more officers, so that more workplace votes can be conducted in preference to mail-in ballots.

Scope Under the Trade Union Act

Cover all Workers Unless There is a Very Compelling Reason Not To Do So

Definitions of "Manager" or "Confidential Capacity":

Legislative provisions must be crafted mindful of the definition of "manager" in both the LSA and in the TUA. One purpose of worker protection laws is to protect from abuse those who do not have sufficient bargaining power to protect their own interests. While it can be suggested that a manager can sufficiently represent their own interests, in practice that is less often so. Front- line personnel often do not have so rare a skill set that they cannot be replaced. Lower level management skills can be transitioned from one business sector to another. That ease of substitution does not give them the bargaining power contemplated in the arguments for their exclusion from protection of either of these pieces of legislation. Managers who are potentially going to be excluded from protections and benefits under the LSA to have protection of their individual rights, should not also be deprived of their rights to collective bargaining if the exclusion provision of managers were to be continued or broadened under the TUA.

By statutory definition, a manager is not an employee. Only employees as defined by the TUA are given access to collective bargaining. This division of access is premised upon the notion that employers should be entitled to the undivided loyalty of their managers. The assumption is that loyalty would be compromised by union membership when the manager would also serve a second set of interests that were in opposition to those of the employer. This is often described as a conflict of interest. On this logic, managers are deprived of the right to collective bargaining that is available to others.

The broadening of the scope of what constitutes a manager has the effect of depriving a larger group of people from access to what the SCC says is a part of the fundamental freedom of association under the *Charter of Rights and Freedoms*. A broadening of the exclusion of some further workers from collective bargaining would surely attract a challenge to its constitutional validity, leaving labour relations in even greater uncertainly.

The altering of management structures poses a "chicken or egg" type of question – does the exclusion respond to real transitions in accepted management structures or was the morphing of management structure undertaken to achieve the exclusion from access to collective bargaining? The minimal impairment test under Section 1 of the *Charter* would require a consideration of whatever alternative management structures are available to the employer that do not infringe upon the freedom. CUPE says employer preference for a diffuse management structure is not a sufficient reason to meet the minimal impairment test. Thus a broadening of exclusions beyond those who must have labour relations input, authority over discipline and discharge, hiring and promotion, should not be undertaken.

The exclusion of managers should continue to take into account not titles, but actual work duties. It should also take into account the ability of the enterprise to organize its operations so as to limit the number of persons precluded from exercising collective rights. It should organize its operation so as to minimally impair the exercise of the freedom of association by those who could only peripherally be called managers. To expand the definition of manager interferes unnecessarily with the freedom of association of larger numbers of workers.

Another consideration is the impact upon the use of strikes and lockouts as means of settling bargaining disputes. In the short term, it is commonly seen as being in the public interest for strikes to be short as possible. For that to be the case, the leverage in the economic weapon must be such that both the initiator and the responder incur some pressure that moderates the parties' bargaining positions and brings them to a compromise. To expand the definition of manager, thus drawing more individuals out of the bargaining unit, increases the number of persons with whom the employer can seek to conduct 'business as usual' in resistance of the strike. Government should not set its thumb heavily on one side of the scales to so alter the playing field, giving such an advantage to one side of the bargain.

In addition, the inclusion in the bargaining unit of those who are managers and may either possess different skill sets and education, or have years of long experience in the day to day work, gives them a role in crafting bargaining responses that may be more nuanced. This may ease the road to consensus in the bargaining. Taking those individuals out of a bargaining unit could well have the effect of prolonging bargaining and/or strikes, by removing some of the potential authors of compromise positions.

Where people are truly and unavoidably managers, in a conflict of interest with the primary bargaining unit, they should at least be entitled to representation in a separate bargaining unit.

In 2003 the B.C. pro-enterprise government undertook the fourth major review of B.C.'s unionized labour legislation. One of the issues under consideration was the expansion of the definition of "manager" to include the concept of the "management team". A committee of advisors was appointed pursuant to a Labour Code provision that contemplated periodic review of the Code. After receiving submissions and conducting research into the issue, the panel concluded:

> We do not have confidence that an alteration to the definition of employee to specifically include the management team concept would necessarily improve the process of labour relations. [73]

CUPE says, similarly, that the definition of "manager' should not be altered. The LRB is given the authority to determine bargaining units. That determination is most frequently a factual one. The LRB's jurisdiction to respond to the unique facts they hear in a proceeding to determine the configuration of a bargaining unit in terms of the "manager" issue ought not to be interfered with.

The exclusion of managers should continue to take into account not titles, but actual work duties, and it should take into account the ability of the enterprise to organize its operations so as to limit the number of persons precluded from exercising collective rights. An employer should organize its operation so as to minimally impair the exercise of the freedom of association by those who could only peripherally be called managers. To expand the definition of manager to include supervisors interferes unnecessarily with the freedom of association of larger numbers of workers.

We have had the benefit of reviewing the submission of NUPGE and adopt their review of the international standards relating to the representation of managers.[74]

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[73] D. Johnson, J. Bowman, E. Harris, B Laughton and M. Smith *Report of the B. C. Labour Relations Code Review* Committee to the Minister of Skills Development and Labour, (2003)

[74] N.U.P.G.E., - *Saskatchewan's Labour Law Review in Relation to its Compatibility with ILO Freedom of Association Principles and Jurisprudence.* p. 6-7

Confidential capacity

Many of the concerns expressed in regard to managers are in common with the issue of those employed in a "confidential capacity". There should not be a broadening of the definition of "confidential capacity" as to do so unnecessarily deprives those individuals of their *Charter* rights of freedom of association.

Supervisors

As mere supervision does not have those features described above, CUPE also opposes depriving supervisors of access to collective bargaining either wholly or as part of a larger bargaining unit. "In-unit" supervisors also provide strength to the bargaining unit as a whole with their additional working experience. Their removal diminishes the bargaining power of the unit from which they would be removed. Commonly supervisors achieve those positions after many years of work in multiple capacities in the employer's enterprise. This knowledge and understanding of how tasks are inter-related can make these supervisors valuable contributors in the search for compromise in bargaining. The withdrawal of their labour during a strike is an element of the effectiveness of the strike. Most importantly, as mere supervisors either do not have, or do not truly need to have, the features of a manager, there is no constitutionally acceptable reason to deprive them of representation in the union of their choice and within a larger bargaining unit.

Should the TUA be amended to clarify what is meant by "managerial character" and "confidential capacity with respect to the industrial relations"?

The TUA provisions and the jurisprudence developed under them are sufficient if one added two clarifications: that the employer should be required to organize its affairs to minimize the number of people excluded from collective bargaining so as to minimally impair the freedom of association; and that those "managers" in title and in duties, should be able to access union representation in a bargaining unit separate from those they manage.

Should employees with supervisory responsibilities be in the same union as the employees they supervise? Why or why not?

Front-line supervisors should be represented in the same unit by the same union as the employees that they supervise. In rare and extraordinary circumstances, it may be appropriate to have supervisors represented in a separate bargaining unit. Given that the LRB is given the authority to determine bargaining units, CUPE says that no alteration should be made to definitions that would interfere with the LRB's ability to be responsive to the unique features of some workplaces.

The power of organized labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice: the just protection of all interests in an activity which the social order approves and encourages.[75]

[75] Ford Motor Co. v. U.A.W.-C,I,O. (1944-48), 18, 001 Canadian Wartime Labour Relations Board Decisions 159 at 160. (Rand) [Ford Motor]

Accountability

Organizations are accountable to their membership, not to the world.

The government's paper cites the August 2011 Labour Watch-Nanos Reid poll as support for its inclusion of "accountability" in its legislative review. The paper omits that the responses in the poll that the government selected for reference were primed in the poll by suggestive statements that contained misinformation. Nor does the government disclose, as indeed Nanos initially also did not disclose, the responses to other questions that would demonstrate that opinion is much more divided, favoring disclosure to union members and unionized employees over disclosure to any broader audience. Priming responses and suppressing of balancing information make the use of the poll an inappropriate foundation for triggering a review on this point.[76]

The government also refers to the federal Bill C-377 as a reference point. CUPE says that Bill is a seriously flawed policy and should not be adopted in Saskatchewan.

Citizens in a democratic country understand the importance of democracy as a fundamental underpinning of their country's success. So it is in Canada. We are a country citizenship of which is coveted around the world. Democracy is founded upon majoritarian principles that limit the exercise of individual autonomy. Within an organization, one may pursue one's own desires within the limits that have been adopted as the consensus of the majority. It is how we elect governments, pass laws, demonstrate limits on fundamental freedoms under the *Charter of Rights and Freedoms*. It is how we govern entities from business corporations to community based charitable societies to the local service groups.

Unions are also democratic institutions. When a person joins a union, they join an organization with a constitution and/or bylaws that govern the relationship between that member and the union. Matters of internal policy are voted upon by the membership. They are not the subject of decision making by persons outside of the membership. It is to that membership and that membership alone that the organization is accountable for its decision-making and its lawful spending in accordance with that decision-making.

[76] S. Tucker, *"Union Accountability and the Law: Recasting the Current Debate",* May 23, 2012

Decision-making is a democratic process. CUPE's structure is an instructive example. A National convention is held bi-annually. Provincial conventions are held annually. Local unions have meetings regularly and participate in the affairs of the larger organization through participation at these conventions. At all of these levels members have voting status to determine the activities of the union. This can be approved activity by activity, or may be approved by adopting a set of strategic directions with discretion for the executive on how to implement those directions on a daily basis. Either style is adopted by majority vote. Many of the resolutions passed may, to an outsider, appear to be "political'. However, those active in unions have developed a broader understanding of labour relations: the understanding that collective bargaining is not an isolated activity that happens only within meetings attended by limited individuals. They understand that collective bargaining has many influences, both economic and political. They understand that to truly perform the duty of fair representation with which they are charged by statute, they have to be active in all aspects that influence that collective bargaining. Every action done every day by every union executive, activist and member ultimately influences collective bargaining.

The disclosure of a union's financial dealings is already available to the union's membership. Those members are entitled to access the audited financial information of their union. Most often this is done at a union's convention or similar event. Such records are generally required to be audited on a regular basis. Union members have access to their union's financial information if they wish to see it, and it is they that collectively make the spending decisions.

But it is under the guise of 'accountability" to the public that government seeks to go beyond unions being accountable to their members. At the outset that is a faulty premise as there is no relationship between unions and the public that would justify any level of disclosure to the public.

While some misinformed persons assert that unions get tax benefits or subsidies, that is simply not so. Professional bodies advance the interests of their membership in professional and often bargaining matters. Those bodies charge their members such as doctors, lawyers, nurses, physiotherapists, etc. membership fees in return for those services. A visible parallel the public is familiar with is how medical associations negotiate with government for the payment rates to doctors. Those bodies are accountable to their members for those funds, not to the public. Those bodies do not make public disclosure of

all of their expenses, including those that are political in nature made in pursuit of professional and bargaining issues.

Further, those fees are deductible in the hands of the person who paid them – the individual nurse, for example. They are not a tax deduction for the professional body that receives them. The same is the case with union membership fees. They are deductible to the person who pays them, the individual union member: the plumber, the teacher, the street cleaner, the grocery clerk. Those fees are paid in return for the services performed for them by their union in the same way as other work related bodies. They are not a tax deduction in the hands of the union.

This is in contrast to business entities. They pay membership fees to professional and business organizations such as Chamber of Commerce, Canadian Council of CEO's, bodies of Human Resource specialists, Merit Contractors. Those fees ARE deductible in the hands of the business entity, a "subsidy" if you will. Bill C-377 does not require those businesses to make these disclosures. The impact of the proposed federal scheme is discriminatory and we should not adopt it provincially.

If the statements about "accountability" were truly for that purpose, one would expect to see these issues raised in a universal way. Yet they are aimed only at unions. One can only conclude that these statements actually have nothing to do with making unions accountable to their members. Rather the push is to make unions expose the spending decisions of their membership to the scrutiny of governments and employers, and to force spending on a needless disclosure processes that will diminish the resources of unions with which to serve their membership in accordance with their unique statutory duty of fair representation.

For this level of accountability to be necessary first one must try to persuade the public that unions using dues to pursue the broader issues that influence collective bargaining is somehow illegitimate. However, the Supreme Court of Canada has already ruled more than a decade ago that it is legitimate.

> Unions' decisions to involve themselves in politics by supporting particular causes, candidates or parties, stem from a recognition of the expansive character of the interests of labour and a perception of collective bargaining as a process which is meant to foster more than mere economic gain for workers. From involvement in union locals

> through to participation in the larger activities of the union movement, the current collective bargaining regime enhances not only the economic interests of labour, but also the interest of working people in preserving some dignity in their working lives…Whether collective bargaining is understood as primarily an economic endeavour or as some more expansive enterprise, it is my opinion that union participation in activities and causes beyond the particular workplace does foster collective bargaining. Through such participation, unions are able to demonstrate to their constituencies that their mandate is to earnestly and sincerely advance the interests of working people, to thereby gain worker support, and to thus enable themselves to bargain on a more equal footing with employers. To my mind, the decision to allow unions to build and develop support is absolutely vital to a successful collective bargaining system.[77]

If political activism on issues that affect a union's members is a legitimate use of union funds, then there is no legitimate reason for government to insert itself into the relationship between a union and its members in this way. Government's only purpose can be to try to prevent opposition or open public debate. That is a far cry from the democratic purpose for which governments are elected.

The insistence on "accountability" on the part of those likely to be their political opponents is in stark contrast to the government's own level of accountability at the many levels of its own operation. For example, a citizen can seek disclosure of some government dealings by way of "freedom of information" requests. That does not get one as far as one might expect. The government shields many of its operations from such disclosure by putting disclosure-immune bodies in between itself and other entities that are subject to disclosure. A recent example is the pervasive advertising campaign in the last set of health care sector collective bargaining. The Government is subject to disclosure by way of freedom of information requests. Health regions are subject to disclosure by way of freedom of information requests. However, health regions use Saskatchewan Association of Health Organizations ("SAHO") to do the collective bargaining on behalf of all of the health regions. SAHO is funded by government. SAHO engaged in a very pervasive advertising campaign, but SAHO is immune from freedom of information requests for disclosure. So much for the government's accountability <u>to its constituency</u> (all of us) for how those advertising monies were spent.

[77] *Lavigne v. OPSEU*, [1991] SGJ w.S.C.R. 211

Privacy interests are lately gaining increasing visibility and are being subjected to increasing vigilance. We should not adopt any union financial disclosure requirements that require disclosure of what is, by definition, personal information. For example, the federal Bill C-3777 includes "labour trusts" in the disclosure requirements. That means that pension plans, health benefit trusts, long term disability and life insurance carriers will also be spending unnecessary money on disclosure obligations. This erodes the resources these trusts have with which to provide benefits. It will predictably have a negative impact elsewhere in the system as pressure mounts in bargaining and against governments to replace those losses with increased premium contributions or increased government benefits.

Disclosure may also adversely impact upon union's rights to their solicitor-client privilege. When unions are the clients, they have the same benefit of solicitor-client privilege as any other client. That privilege covers not only the advice received, but also the creation of the solicitor-client relationship itself. The requirement to disclose any legal fees paid, to which lawyers and pertaining to which files, is a waiver of that solicitor-client privilege, which has serious consequences for both the union and the individual members whose affairs have generated that solicitor-client relationship. This infringement upon solicitor-client privileges has a more systemic impact. Solicitor-client privilege is one of the cornerstones of our entire legal system. It should not be eroded in any context.

Just as disclosure requirement in federal Bill C-377 would erode unions' resources to serve their constituencies, so too would such requirements impair the government's resources to serve it constituency – the public. The creation of mechanisms to implement reporting requirements such as those contained in Bill C-377 would be significant – in staffing to develop regulations, forms, training, information manuals and database creation in addition to monitoring, auditing and enforcement. That is money better spent on providing services to the vulnerable and disadvantaged.

Accountability is another issue on which there are longstanding perspectives. The Woods Task Force commented:

> 507. The legal personality of unions is a subject on which feelings tend to run high. Those who must deal with unions want to be able to hold them accountable within the scheme of collective bargaining; unions are apprehensive of accountability under the law lest such liability be used to

impair their role or effectiveness in collective bargaining and in other activities vital to their interests.

508. At present there is wide variation in the legal status of unions across Canada. In some jurisdictions they are legal personalities for limited purposes; in other jurisdictions they are legal personalities for all purposes; and their status under the federal statute is unsatisfactory inasmuch as they are declared accountable for certain purposes and it is left to inference as to whether they are accountable otherwise.

509. In our view unions should have a legal status that is commensurate with their status in collective bargaining. It should be made clear what it is that unions should be accountable for, to whom they should be accountable, and by what procedures they should be accountable.

510. We recommend that unions should be accountable

(1) to union members before a Public Review Board or the Canada Labour Relations Board generally in respect of internal affairs of unions and their duty of fair representation;

(2) to employers before the Canada Labour Relations Board for illegal work stoppages, provided that liability be limited to cases in which local and higher level union officers fail to demonstrate that did all they reasonably could to prevent the work stoppage or to persuade the defaulting employees to return to work;

(3) to employers and employees before the Canada Labour Relations Board for matters declared to be union unfair labour practices;

(4) to persons injured by violation of the picketing and boycotting code before the Canda Labour Relations Board or for violation of the general law respecting the form of picketing in courts of law;

(5) to employers in grievance disputes processed to arbitration during the term of a collective agreement or during the period in which grievance procedures are operative;

(6) generally for the conduct of union officers before the Canada Labour Relations Board in matters assigned to the jurisdiction of the Board and in courts of law under the general law of responsibility for agents and employees;

(7) to union members in courts of law for accountability for funds;

(8) to union members for the vesting and funding of union-administered pension plans to the same extent as is required of employer-administered plans under the law; and

(9) generally for the conduct of union members in courts of law under the general law of vicarious responsibility.[78]

All of those measures of accountability that the task force advocated exist in Saskatchewan today. Never has there been an expectation that a union is accountable to the public at large for the expenditures they make at the behest of their membership.

We have had the benefit of reviewing the submission of NUPGE and adopt their description of the international standard applicable to union accountability.[79]

Are trade unions sufficiently accountable? For example, do you believe that unions should be required to provide annual audited financial statements to its members, the government and the public?

CUPE says unions are already fully accountable to their memberships. CUPE members have the opportunity to request financial statements audited in accordance with generally accepted accounting principles, whenever the membership agrees with the request. While unions already provide financial statements to their memberships, they owe no duty to do so for government or the public. Nor is there any legitimate purpose for creating such a duty.

If so, what should be included in these financial statements?

CUPE says that financial statements audited in accordance with generally accepted accounting principles, as already governed by unions constitutions and bylaws, meet the same threshold as is required of corporations, societies and charities.

[78] H.D. Woods *Canadian Industrial Relations: The Report of the Task Force on Labour Relations,* December, 1968, p. 154-5, para. 507-510

[79] N.U.P.G.E. – *Saskatchewan's Labour Law Review in Relation to its Compatibility with ILO Freedom of Association Principles and Jurisprudence.* p. 7-9

Should union members be able to vote on how their union dues can be used in a secret ballot vote?

CUPE says union memberships already vote on union spending and can request that such a vote be conducted by secret ballot whenever the majority of the assembly agrees with that request. No separate secret ballot votes are necessary.

Should union members be able to stipulate what their union dues are used for?

CUPE says union members already approve what their union dues are used for by voting on spending, approving financial statements and adopting strategic directions.

Should union members be able to opt out of paying that portion of union dues that is not used for labour relations purposes?

All funds spent by unions are for labour relations purposes in the broader community in which collective bargaining occurs.

Should union members have a mechanism to bring to the Labour Relations Board questions regarding whether their union has complied with the union's constitution and bylaws?

Union members already have internal mechanisms to assert breaches of the Constitution and Bylaws. Those documents have dispute resolution mechanisms with appeals. Additionally, in disputes between members and their union, there are TUA complaint processes available to members if a union fails to use the principles of natural justice in dealing with those disputes.

Certification and Decertification of Union

There is more than one way to demonstrate that a majority of employees wish to be represented by a union. While a mandatory vote is one method, it is also a method fraught with criticism for the delay it causes in processing certifications especially if the employer has taken the opportunity to engage in unfair labour practices. A process which avoids the danger of those infringements on a worker's right to decide can still be tested as to its majority. A certification provision which provides for a certification based upon card sign that meets or exceeds the majority level, while providing for a mandatory vote where the card signup does not meet that threshold, addresses both the issue of majority and the issue of the risk of interference with the fundamental freedom of association being exercised by workers in this sensitive time frame.

For example in the federal jurisdiction, certification based upon card signup is available when the 50% threshold is met.[80] Similarly, in the province of Quebec certification can be achieved without a vote where there is more than 50% support.[81] In Manitoba, certification without a vote can be achieved where support meets the 65% threshold.[82] In June, Newfoundland and Labrador the Conservative Government has passed changes to use card sign up as a measure of majority for the first time in their legislative history at the 65% threshold.

Further, many jurisdictions have a vote triggered by a lower threshold than the TUA. Federally, a vote can be triggered with as low as 35% support. [83] In many provinces a vote is triggered with support at 40% of the proposed bargaining unit: Alberta,[84] Manitoba,[85] Ontario,[86] Nova Scotia,[87] New Brunswick[88].

Thus, it can be seen that Manitoba and the federal jurisdiction have a combination, or stepped, method of measuring majority. Within a certain range of support, a vote is called for, while at higher levels of card sign support,

[80] *Canada Labour Code*, Section 28 (c)
[81] *Labour Code*, Section 21. , Quebec
[82] Manitoba *Labour Relations Act*, Section 40(1),
[83] *Canada Labour Code* RSC 1985 c. L-2 Section 29(2)
[84] Alberta *Labour Relations Code* c. L-1 Section 33
[85] Manitoba *Labour Relations Act* CCSM c. L-10 Section 40.
[86] Ontario *Labour Relations Act* S.O. 1995 C. 1 Section 8
[87] Nova Scotia *Trade Union Act* RSNS 1989 c. 475 Section 25
[88] New Brunswick *Industrial Relations Act* RSNB 1973 c I-4 Section 14

automatic certification is available. While B.C. has experienced the extreme pendulum swings between card sign certification to all vote certification, it did also at one time have a stepped method of evaluating majority. Where an application was supported by 55% of the membership or greater, certification was issued solely on the basis of the card signup. Where the application was supported by at least 45% but less than 55%, certification was issued after a certification vote was passed by a majority of those voting. Both methods allow for measuring a majority, and yet this approach does take steps to minimize the occasions of interference with the individual freedom of choice by the commission of unfair labour practices.

In contrast to the current provisions, the Priel committee comprised of himself as Chair/facilitator, M. Carr for the business community and H. Wagner for the union community, was unanimous that even at 25% card sign, the holding of a vote should be within the discretion of the Board, rather than being mandatory:

> Prior to the introduction of Bill 104 in 1983, if a Union were able to demonstrate 25 percent support among employees in a proposed appropriate unit, the Board was required to order a vote among employees to determine the representative trade union. The amendment provided by Bill 104 removed that mandatory requirement on the Labour Relations Board and left the matter in the discretion of the Board.
>
> Bearing in mind the fact that the consideration of whether a vote should be ordered is left in the discretion of the Board, and that the parties can be satisfied that the Board will exercise its discretion in a fair and reasonable manner, the parties agreed that the proposed amendment, that is Section 6(3), ought not to be enacted.[89]

If a discretionary vote with 25% card signup is a sufficient protection of employee choice, then clearly automatic certification with 50% card signup more than amply accomplishes that objective.

In the 2008 set of changes to the TUA a membership card being used to support an application for certification had its effective period reduced from 180 days to 90 days which shortens the organizing period. CUPE says that if that is maintained then the *quid pro quo* should be reducing the time of various steps throughout the process, starting with a short defined time for conducting the certification vote within 10 days of receipt of the application.

[89] L.T. Priel, Q.C., M. Carr, H. Wagner, *Report of Committee Considering Proposed Amendments to the Trade Union Act,* December, 1993, p. 11

Protection against unfair labour practices in vote situations can also be indirectly strengthened through regulated short time frames in which the vote must be conducted.

Voting constituency

The entitlement to vote is often dependent upon unique factual issues at different types of businesses. It is important that the decisions about voting constituency are dealt with in a way that is sensitive to those realities. Currently discretion to make decisions about that issue resides with the Labour Relations Board. That approach should be maintained in order to take into account any unique facts.

Voluntary Recognition

This issue is a serious concern as it opens the door to employer manipulation of a decision that is intended to be based solely upon employee wishes. It is of the greatest concern in industries such as construction where employers are already mobile and can operate in other jurisdictions, other locations of their own enterprise, or through contractors to evade certifications. If the concern is to use voluntary recognition to address temporary work (such as short construction projects), those concerns are better addressed by resourcing the Board to deal with certification applications expeditiously. Procedures for doing so include expedited hearings and 10 day windows for conducting certification votes. CUPE is adamantly opposed to any alteration to the current regulation of voluntary recognition.

Decertification for Abandonment

The suggestion that decertification for abandonment should be considered implies that this is an issue that has been attracting attention. A review of LRB decisions would demonstrate otherwise.

Unions are collections of committed volunteers who work to pursue and preserve rights and benefits for their members. Organizing is costly, time-consuming, requires patience, and commitment. It is not undertaken for the purpose of then abandoning those are successfully certified. While no system is perfect, it is exceedingly rare for a traditional union to become so dysfunctional that it fails to meet with its members or to pursue its member's rights with the employer. Any such conduct can be addressed by the members through a duty of fair representation complaint.

Further, there are many opportunities for members to participate if they believe their union is failing them is some way – at the election of officers, they have the opportunity to run for office, or defeat the election of any person whose efforts they believe fall short in favour of the election of some other person they believe will be more vigilant. They have the opportunity to vote against a collective agreement that is sought to be ratified as a means of voicing discontent if they believe it is deficient. Most constitutions have provisions for the enforcement of the oath that officers take that give members the opportunity to complain. In larger unions that have provincial or national levels of their organization, there are generally steps which can be taken at those levels to voice their concerns. Given that the Constitution is a contract between the Union and its members, internal actions are the appropriate first forum in which to deal with those issues.

Further, the LRB retains jurisdiction to amend its orders for certification and could rescind the certification in the extreme situation of absolutely no union activities after certification.

In any event, a new provision for member application should not be adopted as it is unnecessary. Even complete abandonment of representation can be dealt with either through the duty of fair representation or rescinding the certification. Thus it, and the other concerns posed in the question, are already adequately dealt with in the TUA by way of the duty of fair representation.

Employer Initiated Decertification

In terms of decertification where there have been no active employees for a time, CUPE notes that in some sectors business is cyclical or intermittent such that a hiatus in operations, even a lengthy one, is not a firm indicator of a permanent closure. The union's bargaining rights should not cease even during a prolonged hiatus.

If there are no current employees, then the collective agreement is not an ongoing cost to the employer. The question that is obvious is this: if they have no intention of reopening or reactivating the business why do they want the certification to be cancelled? The answer that is irresistible is that the employer will want to be free of the certification so that they <u>can</u> reopen

without the collective agreement and its obligations. The true purpose of such a provision is to permit employers to rid themselves of the union.

This measure has been the subject of experiment in other jurisdictions - a failed experiment. Such a provision was in place in B.C. from 1984 to 1992 following a 1982 review of the B.C. Labour Code. It provided for an employer-initiated decertification application where the employer had been without employees for two years, but also expressly authorized the LRB to decline the application where the conduct of the employer had been "unfair or unreasonable". [90] Further revisions were made in a 1987 amendment that gave the LRB an inquiry power upon receipt of the application, with the inquiry to be concluded within 30 days. If the inquiry confirmed an absence of employees for two years, and the conduct of the employer had been fair and reasonable, the granting of the decertification was compulsory. [91]

Multi-national or multi-location businesses can close one location in order to break the union and all the while rely upon income from the other locations to sustain them. This shifts the area of LRB activity from the fighting of a decertification to the prosecution of common-employer applications. Rather than reducing conflict, it may simply move the conflict to a different arena, as unions preserve representational rights in a more proactive way with more frequent successorship or true common employer applications.

In a 1992 Sub-Committee of Special Advisors review of B.C. Labour Code provisions, the advisory panel found a pattern of abuse of the prior provision and recommended against the expansion of that provision to allow for automatic decertification without the need to demonstrate the unlikelihood of reopening. They commented:

> We also recommend the deletion of those provisions in the existing legislation which permit an employer to apply for cancellation of a union's certification and/or collective agreement where no employee has been employed in the bargaining unit for a period of two years. During our tour we heard of cases of employers who discontinued operations in the Province for a two-year period, decertified the union, and then returned to the province to resume business. These provisions had a particularly devastating effect on building trades unions in the construction industry.

[90] British Columbia *Labour Code Amendment Act*, 1984, c.24 adding Section 52(8) to the Labour Code.
[91] British Columbia *Industrial Relations Reform Act* 1987, S.B.C. c.24

Even after the 2003 Review for the then Liberal government, these provisions were not restored.

Open Period for Bargaining Unit Variances and Scope

Most collective agreements expire on an anniversary of their effective date. The open period under the TUA, particularly as it relates to the last year in the term of a collective agreement, is timed very late in the life of the collective agreement.

This raises a concern when considered in the context of the limited resources allocated to the LRB which often delays the determination of representation issues. These include certification (amendments to vary the bargaining unit to add employees to the certification), scope issues to determine the inclusion or exclusion of certain individuals, decertification or raid (transfer) applications. All of these issues are dealt with only in the open period.

By placing the open period so close to collective bargaining there is a likelihood that the representation issues before the LRB will not be concluded prior to the commencement of bargaining.

In respect of certification variance, unless the new group happens to be very coincidentally interested in representation at the time of the open period, they have to either wait for the open period for a variance, or become separate stand alone bargaining units (that has to meet the threshold of appropriateness as an independent unit) pending a subsequent application for consolidation in the open period. If by some chance the LRB has been able to conclude the proceedings arising from such applications before the expiry of the collective agreement, this leaves both the employer and the union scrambling to address bargaining issues that may arise from their inclusion. Where the LRB has not been able to conclude such proceedings, these issues can disrupt bargaining for both parties. It adversely impacts both employers and unions, as they might not be able to conclude what might otherwise have been a very orderly set of bargaining because of the reluctance to miss the opportunity to deal with the issues related to the new group of employees.

Indeed, CUPE does not see any labour relations purpose that is served by limiting variance and scope applications to the same period as the open period that is used for decertification and raids, or the period for giving notice to bargaining. Particularly in the instance of variance applications, the current common practice of creating a separate unit for the group to be added and negotiating a collective agreement for that group and then applying to

consolidate the two units creates an unnecessary burden on the resources of the LRB in hearing matters, upon the resources of the employer and the Union in bargaining unnecessary collective agreements, and in uncertainty for workers. In CUPE's view, these matters do not deal with wholesale changes in representational relationships, but rather deal with nuances in existing relationships. All parties will be better served by the opportunity to consider their impact and craft bargaining proposals with greater periods of time for observation. CUPE suggests that there be no limitation on the period in which variances and scope matters be dealt with by the LRB. Those matters should be available to be brought to the LRB at any time in the life of the collective agreement.

Open Period for Decertification and Raid

The open period for decertification or raid applications raises similar issues regarding the proximity to bargaining. Any decertification or raid application which is underway disrupts collective bargaining. If the decertification application were to be successful, the employer and the union will have spent considerable efforts on collective bargaining for a unit which may ultimately not be covered by any collective agreement they reach. This is wasted effort and resources for the employer and the union.

In the event of a raid, the employer may spend considerable time in collective bargaining with the incumbent union only to find that the raiding union is successful and has different bargaining objectives given the mandate it receives in the raid vote for a change in direction. Such changes in direction could be expressed by votes defeating tentative agreements, for example. The incumbent union will have wasted all of its efforts in collective bargaining for a unit it will not continue to represent.

There are two methods for dealing with this disruptive confluence of the timing of the open period and the limit to the LRB's resources and the impact it has upon the pace at which matters are concluded. The most desirable method is to resource the Board sufficiently to be able to perform its current functions in a timely way. CUPE references the suggestions it has made in that regard earlier in this submission.

It is preferable to have an open period maintained, but to shift it slightly earlier in the life of each year of the collective agreement so as to avoid this collision with collective bargaining. CUPE suggests that the open period for decertification or raids be expressed as the period between 90 and 120 days

before each anniversary of the collective agreement such that there continues to be only one open period in each year of the collective agreement.

There are undoubtedly some employers who feign concern for employees' opportunities to change their representation. CUPE cautions those employers to be prudent in what they seek. A change in representation has its negative impacts on an employer as well. An opportunity to decertify or raid arises in each year of the collective agreement. While the agreement itself would continue in a raid, a change of representatives changes the dynamic in the workplace. And the time in flux waiting for the results of a representation vote can be a time of high anxiety and discord.

Is there a need to clarify who can vote on a certification and decertification application (i.e. laid off employees, probationary employees)?

CUPE notes that there is no discussion of this issue in the narrative that precedes this question

CUPE supports maintaining the current method of determining voting constituency as being within the discretion of the LRB based upon evidence they hear.

CUPE says that experience from other jurisdictions demonstrates that the parties can often reach agreements on voting constituency when assisted by mediators and informed by officer reports. CUPE supports adding those functions to the LRB.

Do the existing provisions adequately distinguish unlawful and lawful union avoidance strategies?

As the freedom to associate with a union is an individual freedom that is supported by the Supreme Court of Canada and expressed in the TUA, CUPE says that there is no <u>legal</u> union avoidance strategy.

Should provision be made to enable an employer to voluntarily recognize an existing union without conducting a vote? For example, should this be done where there are short periods of work? If so, under what circumstances?

CUPE opposes voluntary recognition.

Is it necessary to restrict applications for changing union representation or decertification of their union to the open period?

CUPE supports maintaining an open period for raid and decertification purposes only. However, to avoid these proceedings being disruptive and wasteful in collective bargaining, CUPE supports the open period being shifted earlier in each year of the collective agreement.

Is an option to permit such applications but limit the number of applications in a 12 month period? What issues would this raise?

CUPE says there should only be one open period in each year of the collective agreement.

Should an employer and/or union members be able to apply to the Labour Relations Board to rescind a certification order? For example, should this occur where a union is not representing its employees, either through meetings with members or collective bargaining on their behalf with the employer?

CUPE says that abandonment is not a source of concern as this question implies. CUPE also says that in the circumstances where it does arise, it is adequately dealt with by the duty of fair representation provisions of the TUA and each union's Constitution.

Members have remedies under their Constitution/Bylaws which are generally available to them to deal with those issues. Given that the constitution is a contract between the union and its members, that is the appropriate first forum in which to deal with those issues.

In any event, such a provision for member application should not be adopted. Even complete abandonment of representation is only the most extreme form of a failure to meet the duty of fair representation. Thus it, and the other concerns posed in the question, are already adequately dealt with in the TUA by way of the duty of fair representation provisions.

Under what other circumstances should an employer and/or union members be able to apply to the Labour Relations Board to rescind a certification order? For example, should this be available where the employer no longer employs workers? And, if so should there be a minimum time period before an application can be brought forward? Are there other issues to consider?

CUPE says that as the freedom to associate is an individual freedom, there should never be an occasion when the end of the representation relationship is employer initiated.

Decertification should only be available at the initiative of employee members and only upon the basis of the wishes of the majority. There should be no access by an employer to cancellation of a certification. Even if an employer has had no employees for a time, they have no cause for concern if there are no employees currently entitled to the collective agreement's protection.

Unfair Labour Practices

Professor Lynk discussed the linkage between the social goal of narrowing the income/wealth gap and the strength of workers bargaining power, which was in turn linked to union density, which was in turn linked to the strength of labour laws protecting worker choices to belong to unions, as well as other rights. The unfair labour practice provisions go to the very heart of the right to choose, and the achievement of union density by certification. Effectively, the unfair labour practice provisions are what animate the right to choose that underlies the certification process.

The presence of unfair labour practices in labour laws is a recognition that the right to choose to belong to a union is a right to be exercised without interference from others. The many decisions finding unfair labour practices committed by employers is a recognition of the imbalance of influence that an employer has upon the work force that is dependent upon that employer for its livelihood. That vulnerability informs the crafting of statutory protections such as the prohibitions against interference with a trade union, coercion, intimidation or penalty such as discharge for the exercise of any statutory right.

Employer Comment

The inequality of voice should also inform the consideration of the employer comment provision as well. The unfair labour practice sections of the TUA prohibit intimidation, coercion, threat, promise or interference in the choice to become a union member (Sections 11(1)(c) and 11(1)(f)), or in the exercise of a right in the TUA (Section 11(1)(a)), and interference with the administration of a union (Section 11(1)(b)). Employer communications can violate any one or several of these prohibitions. Similar prohibitions across the country recognize the unique power that employers have over their employees as a consequence of the employees' economic dependence upon the employer. It is for this reason that many labour boards have rejected the concept of treating organizing drives as a time for all out electioneering.

On this issue the recognition of the need for employer's to be circumspect is long standing. The Woods Task Force commented:

> 529. Freedom of speech for management ought to be recognized as a general right; any infringement thereon should be justified in specific terms. There is one circumstance in which restriction is justified: where union representation is in issue. An employer who opposes

> certification of a union should be limited to defending his record as employer through the statement of facts, and to rebutting union allegations and promises, without threat or promise of future action. In other circumstances we see no case for restraining free speech beyond prohibiting threats of unlawful consequences.[92]

The employer comment provisions should be moderated when considered in the context of the extraordinary and undue influence that employer comments have upon the exercise of the freedom of association by those who are in a position of economic dependence. The union has no comparable power to influence an employee's freedom to choose.

In the alternative, at the very least the provision should be clarified to ensure that the comments be limited to facts (not opinions) about the business itself, and not about the union or unions generally. Further, it should be clarified to make clear that the manner of the communication may still constitute an unfair labour practice, even where the content was permissible.

Reciprocity with Decertification

The fragility of the exercise of the certification process makes that freedom much more vulnerable to interference than the decertification process. At the time of certification, the potential member has not yet had any experience of membership with which to balance any employer's views. At the time of potential decertification, members have had that experience through collective bargaining and collective agreement wages and terms. Thus it is sensible for the unfair labour practices at certification to be interpreted in a manner sensitive to those realities.

Some may point to the authority for the dismissal of a decertification application in the presence of an unfair labour practice by an employer and argue that there is not a reciprocal power to reject a certification where an unfair labour practice is committed by a union. The balance is indeed present, though given its placement in the Act, is not as readily apparent: the LRB has a power to deny any application because of improper conduct. However, it is also the case that unfair labour practices filed against unions in the context of certification are statistically rare, and even more rarely meet with success. That is probably a reflection of the unequal opportunity to have influence. The union is not able to make promises of any favorable consequence or impose

[92] H.D. Woods, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations.* December 1968, p. 159, para. 52

any negative consequence as they do not control the workplace. The employer does.

Impact on Strike or Lockout

The TUA makes it an unfair labour practice to conduct a strike or lockout while a proceeding is pending before the LRB, or a matter with a conciliation board or special mediator. While this provision is sensible in connection with some proceedings or matters, it is not sensible in others. It should not apply where it can be used to deliberately thwart the other party's access to its rights under the statute to strike or lockout, or where the proceeding is one which itself arises during or directly out of the bargaining itself. We discuss this issue at greater length under the "Strike and Lockout" portion of our response.

Procedural Protections

CUPE is very concerned that the protections that do exist be real and not illusory. The delays experienced between an application for certification and the conduct of a vote give too great an opportunity for the potential of unfair labour practices to be committed. Further, the unfair labour practices that is most illustrate an employer's power over the employee group, and the ones which have the most dramatic chilling effect upon an organizing drive are the termination, lay-off, suspension or transfer of employees. While the purpose of the unfair labour practice provision is to protect the freedom of choice, that freedom cannot be truly exercised in the presence of employer messaging of this nature that goes without remedy for long periods of time. Quite simply, for those provisions to truly serve their purpose, the access to the justice they are intended to provide must be far more timely than the current staffing of the LRB enables the Board to accomplish.

CUPE proposes procedural provisions to make access and remedy sufficiently timely to undo the impact of these unfair labour pratices.

The 1992 review in B.C. by the Sub-Committee of Special Advisors considered the impact of this type of unfair labour practice not only upon unions, but also upon employers:

> Any substantial alteration in any employee's job security can have a chilling effect on an organizing drive. It is therefore important that complaints that an employee has been discharged, suspended, transferred or laid-off for reason of his or her union involvement should be determined as soon as possible.

> Quick adjudication is in the best interests of the employee involved, the union and the employer. If an unfair labour practice has occurred, it is in the union's interest to have the situation remedied quickly so that the effects of the violation on any organizing drive or ongoing collective bargaining will be minimized. If no unfair labour practice has been committed, it is in the employer's interest to "clear the air" quickly if employees hold the belief that the employer has acted contrary to the Code. To that end, we have recommended amendments to the existing Section 2(5) to include references to suspensions, transfers or lay-offs and to shorten the time periods for adjudication. We recommend that the legislation direct that hearings be commenced within three days and that a decision be rendered within two days of the conclusion of the hearing.[93]

CUPE therefore proposes that the TUA be amended to require that in every certification application, a vote be held within 10 calendar days of the filing of the application. This reduces the time frame in which unfair labour practices can influence the outcome of the vote. CUPE further proposes that in every case where an unfair labour practice involves a termination of any employee, the LRB commence a hearing of that application within 3 days of its filing. Further, consistent with the views stated above, CUPE asserts that not only must the currently unfilled Vice-Chair position be filled, but also that additional Vice-Chairs be appointed in order to truly serve the need for access to justice of all sorts, but particularly in cases of this nature.

Keeping in mind the social objective of the pursuit of equality of opportunity created by narrowing the gap in income/wealth, CUPE also asserts that unfair labour practice should be expanded to include the prohibition of the use of an ally to perform struck work that the struck employer would be unable to perform themselves. This includes the provision of services to clients of the employer by an enterprise with which the struck employer had entered into an arrangement, or the manufacture or supply of substitute goods from alternate locations. CUPE also asserts that the unfair labour practice provisions should be expanded to include a prohibition against the use of replacement workers during a strike. Both of these practices unduly benefit the employer in permitting them to resist the normal pressures of the exercise of the economic weapon of a strike by giving the employer the access to resources beyond their own, and in a way that has no reciprocal balance that would permit unions to resist the normal pressures of the exercise of the economic weapon of a lockout. These practices both distort the normal pressures exerted by the

[93] J. Baigent, V. Ready, T. Roper *A Report to the Honourable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform* (1992) at p 20.

resort to the economic weapons in the pursuit of compromise. Thus, unfair labour practices to eradicate this distortion will serve the public interest in bringing strikes and lockouts to a more expeditious end.

Are the unfair labour practices identified in the TUA adequate? Why or why not?

CUPE says that the current unfair labour practices are insufficient protection of the right to choose to belong to a trade union as an exercise of the freedom of association in that they are not accompanied by sufficient procedural protections to make them effective.

Further, in pursuit of the avoidance of interference in the exercise of the right to strike and lockout, further unfair labour practice prohibitions should target the practices of the use of allies and strikebreakers.

Should this section be re-written to clarify the obligations of employee, employers, employer agents and union?

The provisions should be rewritten to eliminate the reference to employer comment because any comment in the time frame of an organizing effort or collective bargaining is targeted at an audience that is economically vulnerable and has insufficient information with which to measure or balance such employer influence.

The provisions should also be rewritten to add procedural processes to make the current provisions effective.

Province-wide Collective Bargaining

There are two statutes that provide for some format of multiple employer/ multiple union collective bargaining: *The Construction Industry Labour Relations Act, 1992*, (CILRA) and *Health Labour Relations Reorganization Act* (HLRRA). CUPE says that there should be independent consultation with each sector covered by those statutes (construction and health provider groups), about the appropriateness of any alterations to the current version of multiple employer bargaining used in their sector. Similarly, if any other industries or sectors are to move to multi-employer bargaining, there should be independent consultation with the stakeholders regarding the structure that bargaining should utilize.

As CUPE represents many members in the health provider union group, we take this opportunity to canvass its structure. There are three unions that represent workers in these jobs: CUPE, SEIU-West, and SGEU. Each union commences bargaining independently with the employer health regions through their bargaining association, the Saskatchewan Association of Health Organizations (SAHO). That bargaining is conducted between that single union and SAHO on behalf of the multiple health regions whose health provider employees are represented by that union. However, larger monetary issues are bargained at a common table that includes all three unions and SAHO. The bargaining at the common table tends not to begin in earnest until most union-specific issues have been concluded or nearly so, at the individual tables.

CUPE has concerns about the potential for a new series of amalgamations of health regions. In that regard, we note that the HLRRA contemplates the commissioner appointed under its terms having power to make regulations on a number of topics. The first of these is to establish appropriate bargaining units at health sector employers. From that choice of bargaining units flows the power to make regulations to determine trade union representation of employees in such a unit and integration of employees into those units. In addition, the HLRRA itself provides that where a clear majority of employees belonged to a single union, that union would become the representative of the whole bargaining unit (See Section 11.3(4)). Where no clear majority existed, representation could be dealt with by way of union merger, amalgamation or transfer of jurisdiction agreements, or, in the absence of such an agreement, a run-off vote (See Section 11.3 (60 and (7)). In the amalgamations of health regions that have occurred to date, the representation of employees has been determined by run-off votes among those unions whose members then fell

under a larger amalgamated health authority. CUPE observes that the conduct of such votes was disruptive to workplaces as well as to the unions. Residual strife still exists in some bargaining units. CUPE says that the health sector already includes many bargaining units at each health authority. Additional bargaining units can be tolerated in that already diffuse format. CUPE says that as a consequence, representation votes ought not to be held if further amalgamations are contemplated. Instead, units for members of each of the health provider unions should be maintained.

The Commissioner also has the power to establish articles of association for bargaining councils (comprised of multiple trade unions). This has not been done to date. However, CUPE recognizes that the statutory potential exists for such a council if further amalgamations are contemplated. We observe that this model has been utilized in some other jurisdictions (for example in British Columbia) in a way that permits each union to preserve its own membership, while the Council functions in bargaining as a single bargaining party.

Given these options that would be available, CUPE says that sector specific and independent consultation should occur before any particular option or format is selected, by which we mean independent of the current process.

Should legislation make provision for multi-employer, multi-union collective bargaining? Why or why not?

Such bargaining should be the subject of independent consultation with the relevant sector to determine whether it is sector-appropriate.

If so, are there particular sectors that should be referenced in legislation where province-wide collective bargaining relationships are permitted or encouraged? Why?

Such inclusion would be premature until independent consultation had occurred and a consensus reached.

Transferring Certification

Where successorship occurs, the new employer is bound by the certification and the collective agreement of the previous employer. They are also required to retain the existing employees. The provision provides protections for workers at a time when they need it most. The decision to sell, or otherwise transfer all or part of the business is made wholly by the employer. The employees through their union have no real input into whether that event occurs. The collective agreement and its provisions are the only means by which the workers are able to protect their employment and their bargaining rights. Thus the preservation of the collective agreement is vital to maintaining their access to the work. An employer that becomes bound by that collective agreement has the right to renegotiate its terms at its conclusion in a way that may suit its method of operation.

Where common employers are found, similarly, the movement of work between the common employers can have the effect of defeating the workers' rights to access to the work. This shifting of business between the employer and its related company is likewise a decision into which the employees through their union have no real input. The collective agreement and its provisions which become binding upon the common employer are the only means by which workers are able to protect their employment and their bargained rights. Thus the preservation of the collective agreement is likewise vital to maintaining their access to the work. An employer that becomes bound by that collective agreement has the right to renegotiate its terms at its conclusion in a way that may suit its method of operation.

Specific sector successorships

In the public sector, despite the appearance of individual or grouped employers, the true governance of the workplace comes from those who hold control of the purse strings – government. Government is in a unique position of controlling the passage of laws that benefit itself in their capacity as controllers of public sector workplaces. A review on government conduct across the country demonstrates how irresistible it is to engage in this unique exercise in self-help that is not available to other employers. And that conduct is condemned throughout the world – by the ILO, by the Supreme Court of Canada (SCC), and by provincial courts as well.

The removal of this provision from the TUA can only have one purpose – to abuse that irresistible opportunity for self-help to serve the interests of government as the true controller of those workplaces. The removal of this

successorship protection clears the path for indiscriminate tendering of these public services.

The experience elsewhere with tendering is informative. A case in point is B.C.'s experience, particularly in the health sector. When government promoted the tendering agenda, it was initially accomplished by the issuance of contracts to subcontractors for services previously performed by employees of hospitals: long term care facilities, care services, food services, housekeeping services, laundry services. And contracts were flipped frequently. At the conclusion of the contract of one contractor, its contract would often not be renewed. Rather another subcontractor would be engaged. Each time many but not all of the same employees came to work for the new contractor at the facility, but the sub-contracting defeated their representational choices, and deprived them of the benefit of their collective agreement. They organized again, became certified again and the union and the subcontractor negotiated a new collective agreement (often lower than the agreement before). After several instances of this contract flipping, the unions began to find that the newly certified employers were discovering that they could not meet the obligations of the collective agreement and their obligations under the sub-contract to perform the service at a certain price. Then sub-contractors began to abandon some subcontracts. This led to more subcontractors, new organizing, new certification, new collective bargaining. This drain of resources by small subcontractors, the unions and the LRB alike also caused great uncertainty and apprehension for those who resided in these facilities.

Freedom of Information Request responses made it evident that tendering agreements with large transnational subcontractors had extracted guarantees of profit levels even if labour laws were changed during the subcontract. That guarantee of profit is in sharp contrast to the downward spiral of wages experienced by those workers who were at the mercy of the contract flipping and abandonment.

To remove the prohibition against contracting out of the cafeteria, janitorial and security services in government owned buildings will lead to the upheaval of the B.C. experience and should be avoided.

CUPE does not support any alteration to this legislative provision.

Collective Agreement Terms

Collective agreements are not secret documents. They are subject to filing. Further the purchaser of any new business can make it a condition of their transactions that financial obligations be disclosed. These would include obligations under the collective agreement. That knowledge will be taken into account by the purchaser of any business and therefore that purchaser/new employer goes into their transaction aware of the obligations they inherit.

Their price arrangements will take those obligations into account. Thus there is no need to make any topic covered by the collective agreement the subject of any automatic renegotiation. Having said that, a collective agreement is a contractual document. And like any contract, the parties can seek to amend it by mutual agreement at any time. If the parties to a collective agreement, the union and the new employer, are of the view that any provision does not serve their mutual interests, they can agree to alter it even before collective bargaining at expiry. In the absence of such agreement, however, the terms of the collective agreement stand as would those of any other contract. Thus, at the point of the successorship or a common employer's declaration all conditions contained in the collective agreement should bind the new employer.

Is the successorship and common employer declaration appropriate?

CUPE says these provisions remain appropriate.

Should businesses who bid on contracts to provide cafeteria, janitorial, or security services in government-owned buildings be automatically subject to existing certification orders and collective bargaining agreements?

CUPE says that governments should lead the way in preserving employment opportunities for the citizens it employs. CUPE further says that work done within the province should be done in circumstances where the benefit of the work and the economic prosperity that it generates remain in this province's economy. Consequently, CUPE says that the current provision should be maintained.

Are there conditions that should apply and others that should be negotiated in the new employer-employee relationship? Please identify conditions that should transfer to a new employer?

CUPE says that all collective agreement terms should be retained until the normal expiry of the collective agreement, at which time the parties can address issues in an informed way as to whether and what adjustments may be necessary. Given the symbiotic relationship between enterprise and labour, each needing the other to survive, it is not in either's interests to have the continued prosperity of the enterprise jeopardized. If the enterprise cannot tolerate the existing collective agreement provisions, the parties to a collective agreement are in the same position as parties to any other contract, in that they may agree to alter the terms of the contract at any time when they reach a mutual agreement.

Negotiations

> [60] The ability of employees to bargain collectively in a meaningful way requires three interdependent elements:
>
> (1) The right of employees to speak with one voice through a recognized bargaining representative;
>
> (2) The right of employees to bargain collectively with their employer through that representative; and
>
> (3) The right of employee to strike[94]

Strikes have pre-existed formalized collective bargaining. They and the collective bargaining that they support are essential elements of the freedom of association. CUPE says it is inappropriate to consider negotiations in isolation. Whether the statutes adequately promote free and fair collective bargaining as part of our constitutional protections requires a more holistic perspective. For example, it does not promote free and fair collective bargaining if the certification changes and weakened unfair labour practice provisions prevent workers from becoming certified in the first place. It does not promote free and fair collective bargaining when employers can have direct access to employees through employer comment provisions and final offer votes. It does not promote free and fair collective bargaining for employers to have access to hiring replacement workers to alter the balance of power in that bargaining. It does not promote free and fair collective bargaining when bargaining agents funded by the government are immunized from freedom of information disclosure. If does not promote free and fair collective bargaining for government to interfere with the union/member relationship. It does not promote free and fair collective bargaining to utilize essential service legislation that deprives individuals of a critical feature of the freedom of association – the right to strike.

While the regulation of the mechanics of bargaining (notice of bargaining, strike notice, etc) are appropriate, when considered in this holistic way, it is an irresistible conclusion that the labour relations legislation of the province does not promote free and fair collective bargaining. Indeed it is, more accurately, aimed at preventing free and fair collective bargaining.

Collective bargaining is as varied as every collective bargaining relationship is varied. It varies by industry, by sector (public or private), by employer and

[94] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) p. 14-15

union structure. Even within a collective bargaining relationship, bargaining is different from round to round, dependent upon the internal, external and political events that form the context for that round. That being so, it is the parties who are best positioned to know when and whether mediation would be of assistance and when access to economic weapons are necessary. Labour and enterprise have a symbiotic relationship and understand those choices have risks to their mutual preservation. It should therefore be left to the parties, to seek to access mediation and to determine when the use of lockouts or strikes are appropriate for the circumstances.

We have had the benefit of reviewing the submission of NUPGE and adopt their description of the international standards applicable to the mechanics of negotiation.[95]

CUPE takes this opportunity to address media communications during bargaining. CUPE observes that this is not a significant issue in the private sector as few private sector employers spend large sums on advertising in bargaining. However, public sector employers funded from taxpayers dollars spend larger, in some cases, oppressive amounts of tax dollars on media campaigns during bargaining. Under the pretext of informing the public, the material is by its tone and language, clearly aimed at union members. Health care bargaining is an example of bargaining timed and distorted to suit the media strategy, rather than media supporting the bargaining strategy. CUPE views this as the byproduct of the employer comment provision. We will comment more fully on that subject elsewhere, but note here that the effects of that change may disrupt negotiations.

Do the provisions of the various Acts adequately promote free and fair collective bargaining?

CUPE says that when examined in a holistic way, provisions of the Act do not adequately promote free and fair collective bargaining.

[95] N.U.P.G.E. – *Saskatchewan's Labour Law Review in Relation to its Compatibility with ILO Freedom of Association Principles and Jurisprudence.* p. 9-10

What does bargaining to an impasse mean to you?

Impasse will be at a different point in different sets of collective bargaining and it should be left to parties to determine whether they see themselves at an impasse. CUPE has had the benefit of reviewing the submission of SEIU-West and adopts their description of "impasse" as follows:

> Bargaining in good faith means that the employer and union representing concerned employees should deal with each other with open and fair minds and make every effort to overcome obstacles existing between them with an earnest effort to create a climate of stable, positive labour relations and with a purpose of achieving a collective agreement. The parties reach an impasse if there are certain provisions that remain outstanding, even though there have been considerable efforts to bargain in good faith, as the parties simply cannot reach any compromise or resolution.[96]

If impasse, by this definition, were adopted as a pre-requisite to any access to a provision of the code, it may impede rather than encourage collective bargaining.

Do you believe it is important to the employer and the union to negotiate, without interference, to a point of impasse?

Collective bargaining being a constitutionally-protected process, it should be left to the parties to determine its trajectory without any statutory limitations beyond those that already exist.

Are the provisions respecting re-negotiation of a collective agreement appropriate?

CUPE says the current provisions should be maintained.

[96] B. Cape *The Consultation Paper: Renewal of Labour Legislation in Saskatchewan,* SEIU-West Submission, July 11, 2012 at p. 28

Should employers and unions be required to go through conciliation or mediation prior to taking strike or lock-out action?

CUPE says the parties should be left to determine the trajectory of their collective bargaining. As a constitutionally protected right the right to strike should not be subjected to any additional restrictions. However, wherever mediated negotiations could be of assistance, mediators attached to the LRB should be available.

With respect to the firefighters and the cities, is there a need to change the arbitration process? If so, how? For example, should both parties have to agree to arbitration prior to a request made to the Lieutenant Governor in Council for the appointment of panel members?

CUPE's position is that the discussion of this issue should be limited to those parties to whom its provisions apply in a consultation that is industry/statute specific.

Third Party Dispute Resolution

The current process for resolution in the TUA is cumbersome, with times for appointments and steps requiring reporting to the Minister. CUPE says that having a cohort of mediators attached solely to the LRB will enable appointments within minutes where matters are urgent and time-sensitive. CUPE also says that the requirements for reports to the Minister are unnecessary and time-consuming. In collective bargaining the mediator's role is to be responsive to the parties whose interests are immediately affected. The role of preparing such a report should be limited to circumstances of a first collective agreement.

Are there processes adequate to assist the parties in resolving disputes? Why or why not?

CUPE says the current processes are cumbersome and time-consuming on steps which do not advance the parties towards reaching a collective agreement, such as reports to the Minister.

Are these dispute resolution processes effective in achieving their intended purpose? Why or why not?

These processes are only effective if parties have confidence in the skills of the people who are assigned to these tasks and if they are available readily enough to meet the short term needs of the parties. This means there must be a sufficient number of them to do the work in short time frames.

Duty of Fair Representation

The duty of fair representation is an important provision of the TUA. It is the companion piece for the exclusive bargaining agency the union obtains from the certification process. If the union is to be the only party entitled to speak on behalf of its members, then there should be a standard expected for their conduct and members should have access to a process to address occasions when that standard is not met.

However, the frequency with which duty of fair representation complaints are dismissed as being without merit demonstrates that there is a misunderstanding of what the duty actually is. In CUPE's view there are methods by which to dispel the myths in that regard, as well as to prevent significant LRB resources from being used on complaints that are ill-conceived.

In 1992 in B.C. the Sub-Committee of Special Advisors recommended revamping their procedure for dealing with duty of fair representation complaints. They observed:

> We are also recommending a new procedure for the adjudication of unfair representation complaints. Our purpose in doing so is to provide for the expeditious resolution of these complaints without requiring the parties to incur the costs of a full exchange of submissions, or a hearing, where those procedures are unnecessary. Our concern is that unions, employers and the complainant are often forced to expend considerable amounts of time and financial resources in circumstances where the complaint may not be justified. The ability to avoid unnecessary costs is a desirable objective in itself. Unless the tribunal can quickly adjudicate duty of fair representation complaints, the potential of protracted fair representation proceedings can adversely affect the resolution of disputes between a trade union and an employer. It is not uncommon for a trade union today to proceed with a grievance arbitration, where it might otherwise not have done so, to avoid the cost of defending a fair representation challenge, even though that challenge may be unmeritorious. Simply stated, it may be less expensive and more expeditious for a trade union to simply run a case through arbitration rather than defend an unmeritorious fair representation complaint. Accordingly, the process by which duty of fair representation complaints are adjudicated can have a very real negative impact on the labour relations between an employer and a trade union and on the settlement of grievances. Our recommendation would provide a process by which the Board could effectively adjudicate fair representation complaints without requiring submissions, or holding hearings, in every case.[97]

[97] J. Baigent, V. Ready, T. Roper, *A Report to the Honorable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform* (1992)at page 22

Acting upon that recommendation, the B.C. government enacted the following procedural provision:

> S. 13(1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure must be followed:
>
> > (a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;
> >
> > (b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it must
> >
> > > i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers' organization, and
> > >
> > > ii) dismiss the complaint or refer it to the board for a hearing.
>
> (2) If the board is satisfied that the trade union, council of trade unions or employers; organization contravened section 12, the board may make an order or direction referred to in section 14(4)(a), (b), or (d).

Section 13 requires an initial vetting of all complaints against the threshold of a *prima facie* case. It is at that stage that most complaints are dismissed. This procedure is not triggered by a union application for dismissal, as in Saskatchewan. It is initiated administratively by the LRB in every instance of a duty of fair representation complaint. At this stage the union is not called upon for a submission. The Vice-Chair assigned to the file considers, assuming that all of the facts as stated by the complainant were true, whether the conduct alleged potentially constitutes a breach of the duty of fair representation. To assist these individual complainants, who are seldom represented by counsel, the B.C. LRB has available on its website *Practice Guidelines*. These are information circulars that summarize the Board jurisprudence on various subjects, one of which is the duty of fair representation. [98] To automatically engage in such a review at this juncture in the process, and given the high volume of complaints that even on a generous reading do not meet the threshold, it is a significant savings of time and other resources of the Board to dismiss cases before the union is called upon to

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[98] http://www.lrb.bc.ca/bulletins/section%2012%20guide.pdf

make a submission on the merits, or even on whether the application meets the threshold. In the event the complaint is found to potentially have merit, the union is called upon to make its submission on the merits of the complaint, and the complainant may file a reply. A Vice-Chair may then issue a decision based upon the written submissions, without an oral hearing. At this stage another large proportion of complaints are dismissed. If the Vice-Chair is unable to do so, generally because some key fact is in dispute, the file may be referred to a Settlement Conference facilitated either by a Vice-Chair or one of the Board's Industrial Relations Officers. Many more complaints are resolved at this stage. This leaves few matters in need of an oral hearing. Even of those which go to hearing, few are successful.

This is a contrast with Saskatchewan's provisions which merely permit a union to make an application for summary dismissal. That procedural development was an improvement on the prior practice of having all such matters go to a full hearing. However, it is still an avoidable drain on the limited resources of the Board in that it still requires the union to make a response on both dismissal, and the merits (in case the dismissal is unsuccessful), and similarly the employer, as well as giving rise to a right of reply by the complainant. This is a full set of submissions requiring Board review, on a case that will potentially result in a dismissal.

In the 2003 Report of the B.C. Labour Relations Code Review Committee,[99] the B.C. Review Committee considered whether B.C. should engage further refinements of its process. In doing so they described processes being utilized in other jurisdictions.

> In Ontario, after an application is filed, a Labour Relations Officer is generally assigned to meet with the parties to help them reach agreement. Before or after the parties meet with the officer, the board can dismiss an application if it does not make out an arguable case. The officer does not have the authority to decide the case and they do not speak to the panel that will be deciding the case.
>
> If there is no settlement, a consultation (or in some cases, a hearing) will be held with a Vice-Chair. A consultation process is less formal than a hearing and the Vice-Chairs play a more active role including questioning the parties and their representatives, expressing views, defining or re-defining issues, and making determinations as to what matters are agreed to or are in dispute. The giving of evidence under oath and cross-examination of witnesses are normally not part of a consultation.

[99] D. Johnson, J. Bowman, E. Harris, B Laughton and M. Smith *Report of the B. C. Labour Relations Code Review Committee to the Minister of Skills Development and Labour*, (2003) at 28

> Consultation processes normally last no longer than one day and a decision with brief reasons are given with one of four results: the Board may exercise its discretion not to inquire further into the application, it may dismiss the application on its merits, it may grant the application or it may schedule the application for a full hearing before the Board.
>
> In Alberta, after a complaint is filed, it is reviewed by the Director of Settlement to determine if it contains adequate particulars and might amount to a breach of the code. If the complaint is accepted, a Board office contacts the parties involved and asks for a response. The Director then recommends a dispute resolution procedure. This may involve a settlement meeting with a Board officer or a resolution conference held by a Chair or Vice-Chair. A Board officer may also investigate the complaint. That officer may write a report outlining the facts and/or ask the parties for additional information.
>
> If resolution is not possible, the matter is sent to a documentary review panel. That panel assesses the case based on the documents received to decide if the complaint has merit. If not, the complaint is dismissed. If the panel decides the complaint appears to have merit, a Board hearing is scheduled.[100]

In considering adaptations to B.C.'s practice the Review Committee made comments that are useful to the current undertaking:

> The committee's research on this issue supports concerns raised by unions and employer regarding the significant amount of board resources devoted to resolving duty of fair representation complaints.
>
> The Board receives approximately 200 such complaints a year of which less than five percent are successful. In 2002, it took an average of 245 days from the date of application for the complaint to be resolved.
>
> In the most recent case dealing with this issue, *James W. D. Judd,* BCLRB No. B63/2003 ('*Judd*'), the Board references the "excessive demands" placed on it as a result of Section 12 complaints. The Board states:
>
> > While this may be due to an increased level of sophistication amongst employees in the workforce in general, in our view it may also flow from a fundamental misconception regarding the nature of the rights and obligations arising under Section 12…this has resulted in a consistently large number of unmeritorious complaints, which is contrary to the goals of the labour relations system identified earlier, and diverts critical resources both from unions and from the system as a whole.

[100] D. Johnson, J. Bowman, E. Harris, B Laughton and M. Smith *Report of the B. C. Labour Relations Code Review Committee to the Minister of Skills Development and Labour*, (2003) at 28-29.

> In order to deal with these concerns, the Board in the *Judd* decision set out a clear explanation of the scope of Section 12 in the hopes of largely eliminating the need for lengthy decisions in response to each complaint.[101]

In their discussion of the issue the Review Committee said:

> The committee views this issue as one where concerns arise not because of poorly worded or ineffective legislation but rather because of the way in which complaints are processed. Streamlining of such complaints is clearly required and the Board's recent ruling on this in the *Judd* case may assist in producing a more efficient, but still fair, process.…
>
> Complainants must be provided with a means to raise their concerns and have them dealt with. However, the principles of natural justice do not require a full evidentiary hearing in every case and the Board may need to consider alternative adjudicative models. Some of those other models may require legislative change (e.g. a model that would provide administrative officers with decision-making power).[102]

Are these processes adequate to assist the parties in resolving disputes? Why or why not?

CUPE finds that the legislative statement of the duty of fair representation is appropriate. However, for the reasons stated above, the "processes" used to handle such complaints are not sufficiently expeditious to resolve such complaints. The current method requires the expenditure of too many resources both by the LRB and the parties to the complaint. A streamlined method should be adopted which provides for an automatic review of complaints for merit prior to seeking submissions. For those complaints which demonstrate that they have met the threshold, upon the closure of submissions, a Vice-Chair should be permitted to make a decision without an oral hearing in every case. And resources to assist the parties in resolving complaints should be provided for.

[101] D. Johnson, J. Bowman, E. Harris, B Laughton and M. Smith *Report of the B. C. Labour Relations Code Review Committee to the Minister of Skills Development and Labour*, (2003) at 26.
[102] D. Johnson, J. Bowman, E. Harris, B Laughton and M. Smith *Report of the B. C. Labour Relations Code Review Committee to the Minister of Skills Development and Labour*, (2003) at 29.

Are these disputes resolution processes effective in achieving their intended purpose? Why or why not?

CUPE supports revisions to the dismissal process from an application to a universally applied voting process. CUPE says they would benefit from this procedural adjustment.

Is this provision sufficient to ensure that union members are represented appropriately and adequately? Why or why not?

CUPE says the current provision sets an appropriate threshold for union conduct toward its members and should be maintained.

Should the TUA specify mechanisms that union members can apply to seek redress? For example, applications to the Labour Relations Board?

CUPE says the TUA currently provides for an application to the LRB which CUPE says is appropriate to continue. However, CUPE suggests the procedural adjustment described above in the handling of those applications.

Picketing

Two issues which have arisen in regard to picketing are the issues of leafleting and secondary picketing, on which the Supreme Court of Canada has made pronouncements as to their constitutionality. The principles contained in *UFCW, Local 1318 v. K-Mart Canada Ltd.,*[103] and *RWDSU Local 558 v Pepsi Cola Beverages (West) Ltd.,*[104] should be incorporated into the picketing provisions of the TUA.

Should picketing activities be regulated in the TUA?

CUPE says the principles for the functioning of picketing enunciated by the SCC should be incorporated into the TUA.

If so, what types of activities should be permitted or restricted? For example, should restrictions be placed on where picketing can take place?

CUPE says there should be no restrictions on picketing that infringe upon one's freedom of expression.

Should the LRB be able to grant injunctive relief in resolving allegations of unlawful picketing?

The granting of injunctive relief relies upon the inherent jurisdiction of a superior court. The granting of injunctions cannot and should not be undertaken by administrative tribunals.

[103] *UFCW, Local 1318 v. K-Mart Canada Ltd.,* [1999] 2 SCR. 1083
[104] *RWDSU, Local 558 v. Pepsi Cola Canada Beverages (West) Ltd.* [2002] 1 SCR 156.

Technological Change

The TUA currently defines technological change as the adoption of "equipment or material of a different nature or kind", a change in the manner of doing business as a consequence of that adoption, or the "removal or relocation" outside of the bargaining unit any part of the employer's work, undertaking or business.[105] If the last portion of that language were interpreted broadly, then it should be the case that the closure of all or some part of the business was included as a technological change.

The negotiation of an adjustment plan, is another role for the mediators under the auspices of the LRB. The notice of a technological change should be given solely to the union, without notice to the Minister. This could be followed by the request of either of the parties to the Registrar of the LRB for the assignment of a mediator without the necessity of involving the Minister. That mediator could assist the parties in mediating the collective bargaining of the adjustment plan. If the negotiation was unsuccessful, the mediator could make that report with or without recommendations to the parties rather than to the Minister. Given that the TUA does not create any consequence upon the receipt by the Minister of that report, it is not necessary that the report go to the Minister.

Is the definition of technological change appropriate?

CUPE says that the definition is sufficient to address modern issues that arise in business changes.

Should the definition of technological change include closure or ceasing a portion of a business?

CUPE says that the definition should be altered sufficiently to communicate to the LRB that there is a clear intention that closures of part or all of a business (that would not otherwise attract the successorship or common employer provisions) constitute technological changes that should be addressed in an adjustment plan.

[105] Saskatchewan *The Trade Union Act* RSS 1978 c. T-17 Section 43

First Collective Agreement

Unless they agree otherwise, the parties to a new certification must commence bargaining within 20 days of the certification order. Where they have bargained collectively and failed to reach an agreement, either of the parties can seek assistance if one of four circumstances is present: the union has taken a successful strike vote, the employer has instituted a lock-out, the LRB has made a finding of a failure to bargain in good faith and is of the opinion that it is appropriate to assist the parties with bargaining, or 90 days have passed since the certification order.

CUPE repeats its observation that there can be no free and fair collective bargaining in the absence of a representational relationship as the starting point. Thus while certification is a vulnerable period for the bargaining unit, so too is the negotiation of a first collective agreement. The negotiation of a first collective agreement is a vulnerable time as all of the participants – members, union and employer – are unfamiliar with their new relationship with each other. In many instances the members and the employer may be novices at unionized labour relations. To be generous, at times they may be unaware of the statutory limits placed on their conduct. More commonly, and therefore more accurately, employers set out to deliberately do what they were unable to do in the organizing phase – rid themselves of the union by defeating the employees' expectations. This is generally accomplished by engaging in unfair labour practices.

The vulnerability of this period makes a somewhat more interventionist approach for the LRB during this set of collective bargaining a supportable departure from the more traditional non-interventionist approach to bargaining. Consequently, the success of the first collective agreement provisions are dependent upon maintaining strong protections for employees in the period between certification and achieving a first collective agreement.

We have had the benefit of reviewing the submission filed by NUPGE and adopt their description of the international standards applicable to first collective agreements.[106]

[106] N.U.P.G.E. – *Saskatchewan's Labour Law Review in Relation to its Compatibility with ILO Freedom of Association Principles and Jurisprudence.* p. 117

Do the timelines and process permit the parties the appropriate time to bargain a first collective agreement?

CUPE says the timelines and process to permit the parties an appropriate time to bargain a first collective agreement.

Are there other conditions that should have to be met before the Labour Relations Board becomes involved? For example, should there be a requirement for a report to be presented to the Board following conciliation by the parties?

CUPE says the current procedures are adequate and appropriate.

If so, should the conciliator have the ability to make recommendations to the Labour Relations Board that the parties continue to negotiate?

CUPE says that a continuation of bargaining is one of the outcomes a mediator should be able to recommend.

Final Offer Votes

Employer groups commonly seek to justify the opportunity to have final offer votes on the basis of suspicions that unions are not truly speaking for employees or are not acting in, what in their view, is the best interests of employees. They want the chance to put their position directly to the employees.

The first premise of labour relations statutes is that upon certification, the union becomes the exclusive bargaining agent for the employees in the bargaining unit: that it is only through the union that the employer communicates with employees and only through the union that employees communicate with the employer. The Union does not owe any duties to the employer, only to its membership. In addition to the union's own internal processes, those employees, if they believe that the union is not conducting bargaining appropriately, have access to the duty of fair representation provisions of the TUA by which to complain.

For the employer to have any opportunity to go behind that exclusive bargaining agency in a final offer vote is an intrusion upon that bargaining agency – an intrusion based upon the assumption that the union is not speaking with its membership's voice.

At the outset that premise is faulty. Before a final offer vote under the TUA can occur, there must have been a strike vote that favored strike activity, and that strike activity must have been ongoing for 30 days. Firstly, we observe that strike action is a significant decision for a bargaining unit. Being without income is not a choice made lightly. Consequently, strike action is rarely undertaken in the presence of a bare majority strike vote. Strike action is generally only undertaken in the presence of very significant support.

In reality, the membership's wishes and resolve will have been tested at least 31 times before a TUA final offer vote is available – once when the strike vote was taken and then again each day that the strike activity occurred. Had the membership disagreed with the activity, they would have disregarded the overtime ban, not attended the study session, not carried the picket sign. To suggest that at that point the membership's support of their bargaining agent's collective bargaining position was still in need of testing, is absurd. That absurdity is reflected in the results of those votes which have occurred – NOT

resulting in the adoption of the employer's final offer and therefore, not resulting in the conclusion of a collective agreement.

Given that in practical terms the votes do not result in collective agreements, it is prudent to reflect upon whether the access to a vote, as theoretical as it may be, results in prolonged collective bargaining conflict. If employers, in the misplaced anticipation of a potential vote in favour of their final offer, delay making compromises at earlier stages of the collective bargaining, or if the unions in an effort to rally the troops to defeat a vote, deliberately leave a gap between their position and that of the employer, then the potential for a vote may have prolonged a work stoppage unnecessarily.

To add a second "final" offer (one might suppose these could be called the 'penultimate final offer' and the 'ultimate final offer'), would be to perpetuate the myth of a rogue union ignoring the mood of its membership. And it will only further prolong strike activity as parties keep in their arsenal a compromise position for the 'ultimate final offer vote' in hopes it will be sufficient to sway the unit in their favour if the penultimate final offer vote does not.

To anticipate that a second final offer vote would have any different result than a first final offer vote misapprehends the communication with members in which unions engage during bargaining. As a consequence, employers find that the membership already has strong views about the employer's bargaining position. Or alternatively, the use of this manipulation acts to galvanize the membership's resolve. This is especially so when the employer has sought to access the employer comment protections of the unfair labour practice provisions. A clear example is the level of direct communication with members during the last round of health care sector collective bargaining and the employer's efforts to manipulate a "final" offer vote (when they were not entitled to one under the TUA). Those actions galvanized membership support of the bargaining units to even higher levels than had been the case at the time of the strike votes and the bargaining team received clear endorsements to continue bargaining their bargaining objectives.

Further, legislative intent should be clear by using words with their plain meaning. If a purpose of this review process is to clarify statutory language, then we should promote the use of words with the plain meaning that the public, as readers, would anticipate those words to have. A final offer vote should be "final" in the clear meaning of that work. Employer's ought not to be

able to orchestrate a 'redo' just because they are dissatisfied with the results of the vote.

Further, there is no reciprocity in that the union does not have any opportunity to put their position directly to an employer's board of directors or shareholders, or municipal councils, or other employer entity.

In any event, this procedure does not advance collective bargaining and so serves no useful purpose. In instances where the criteria of the TUA are met and a vote is held, there is no success for employers in that votes do not result in employee acceptance of the employer's "position". In the 2003 B.C. Review, the Committee commented about final offer votes:

> Since this section is rarely invoked and since, in many cases, employees reject the final offer, our committee does not see this issue as one that has significant effects on the dynamics associated with collective bargaining.[107]

A procedure that does not result in the conclusion of collective agreements is not a procedure which makes any positive contribution to labour relations and is not worth retaining. CUPE says that the final offer vote should be deleted from the TUA. This will remove the incentive for any delays in reaching consensus, and thus foster the collective bargaining necessary to reduce or avoid work disruptions. It is also a waste of limited Board resources.

Is the current final offer vote process appropriate for achieving the objective of enabling employees to vote on the employer's final offer?

CUPE says that the current procedure does not enhance, but rather distorts collective bargaining and should be removed. If retained, it should not be expanded.

Is there value in requiring a special mediator be appointed before a final offer vote can be conducted?

CUPE says there is benefit to mediators and prefers there be mediators directly under the auspices of the LRB who do not report to the Minister.

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[107] D. Johnson, J. Bowman, E. Harris, B Laughton and M. Smith *Report of the B. C. Labour Relations Code Review Committee to the Minister of Skills Development and Labour*, (2003) at 59.

Is there a better process? If so, what would it look like?

CUPE says there is benefit to mediators and prefers there be mediators directly under the auspices of the LRB who do not report to the Minister.

The TUA currently limits the number of applications for a final offer vote to one. Should there be a limit?

CUPE says that final offer votes should be removed from the TUA. However, if they are retained CUPE says there should only be a single final offer vote.

Should a strike have to carry on for 30 days before a vote can be conducted? If not, what is the appropriate time period?

CUPE says the current procedures are appropriate.

How should a strike be defined? Should it be continuous or total days on strike? Should all employees in the bargaining unit be allowed to vote on a final offer?

There is no final offer voting process which advances labour relations, and thus the current provision does not serve any rational objective. It should therefore be eliminated.

Strike and Lock-out

CUPE observes that it is more commonly the risk of a lockout or strike that animates the parties' bargaining positions, than an actual lockout or strike. The greater the risk of those choices for both parties, the greater the likelihood that a collective agreement will be achieved without resort to these economic weapons. However, even that statement presumes that a lockout is the employer equivalent of a strike. CUPE observes a very different reality. The employer equivalent of a strike is its ability to resist a strike. Current limitations on strike activity when paired with the absence of some important unfair labour practices (such as the absence of the prohibition against hiring replacement workers, or against the use of an ally to perform struck work), and the presence of the employer comment permission (which has emboldened employer rhetoric in their discourse with their employees) have all created an extraordinary level of employer resistance. That resistance was taken to stratospheric heights during the health care negotiations under the PSESA.

CUPE says that to more severely restrict strike action by requiring that impasse be proven as a prerequisite to taking strike action, reduces that threat of the economic weapons and therefore distorts collective bargaining. Without effective economic weapons, neither side will make compromises that will conclude collective bargaining rapidly, which is the only guaranteed way of avoiding the strike that may inconvenience the public.

Further, it would be naïve to think that requiring impasse will solve collective bargaining issues. It will only shift the *loci* of the focus from bargaining itself to spending resources on legal proceedings to evaluate the presence of impasse. That will be as much of a delay for the employer seeking to institute a lockout as it is for the union seeing to commence a strike.

Length of Notice

Notice of strike action permits employers to prepare if there are sensitive materials in their business such as perishables or items in need of additional security. CUPE suggests some notice is appropriate and that 48 hours is sufficient.

Outstanding Proceedings

Although it is not specifically raised in the questions posed in the paper, CUPE wishes to address the impact Section 11(2)(b) has upon the right to strike. This provision makes it an unfair labour practice for the union to commence a strike while an application is pending before the LRB or any matter is pending before a conciliation board or special mediator. A parallel provision limiting the employers right to commence a lockout in these circumstances appears in Section II (1)(j).

The Priel committee report describes employers as having been in favour of removing s. 11(1)(j) and (2)(b) from the TUA:

> Sections 11(1)(j) and 11(2)(b) make it an unfair labour practice for an employer and a trade union respectively to lockout or strike while an application is pending before the Labour Relations Board. Business takes the view that pending applications may have nothing whatsoever to do with the matters in dispute which give rise to a potential strike or lockout and can be the subject of abuse. Business takes the view, therefore, that Section 11(1)(j), Section 11(2)(b) and Section 11(3) of the Act should be deleted.[108]

CUPE sees logic in delaying the use of strikes and lockouts while the parties are actively in pursuit of a collective agreement by some other means such as conciliation and mediation. Those are all steps that have the same objective. Further CUPE supports the delaying of the commencement of strike or lockout activity while essential service designation proceedings are actively before the Board, so long as those proceedings are including mediation and adjudication beyond the Board's normal hours of operation.

However in the instance of unfair labour practices arising during bargaining or arising out of the bargaining itself, the proceeding before the Board should not delay access to the right to strike.

We observe that the filing of unfair labour practices can be used as a manipulation of the other parties' rights. A union expecting to be locked out or the employer expecting to be struck can file a complaint. This would then prevent the respondent's access to their statutory rights in a way that defeats rather than advances collective bargaining.

[108] L.T. Priel, Q.C., M, Carr, H. Wagner *Report of Committee Considering Proposed Amendments to the Trade Union Act,* December 1993, p.44-45

Further where there are legitimate complaints, such as bad faith bargaining complaints, it puts the applicant in a "Hobson's Choice" position of having to withdraw the complaint in order to access their other rights. Unfair labour practices committed during collective bargaining erode the relationship and interfere with collective bargaining. Left unresolved they will fester and lengthen any strike or lockout that follow their withdrawal. It is better for collective bargaining and in the public interest not to have such issues left unresolved.

CUPE supports a refinement to this provision that would limit its application. CUPE proposes an exception to Sections 11(2)(b) and 11(1)(j) so that they do not include LRB proceedings commenced under any part of Section 11.

Benefits During Strike

CUPE supports the continuation of provisions permitting the union to pay the costs of employee benefits during a strike. This issue was addressed by the Sub–Committee of Special Advisors in B.C., in 1992:

> It is often the practice in this Province that during the course of a lawful strike or lockout, the employer will agree with the union to maintain health and welfare benefits for the duration of a strike so long as the union pays both the employee and employer costs of maintaining the benefits. In the absence of such agreements, an employee may well find it difficult, if not impossible, to replace these coverages during a lawful strike or lockout. This exposes the employee and his or her family to substantial risk in the event of illness, disability or death.
>
> In the absence of an agreement, the question of the benefit continuation can be a significant obstacle to a resolution of the collective bargaining dispute. We believe that the legislation should ensure that employees and their families are not left without benefit coverage if the union is prepared to undertake the full costs of maintaining the benefits. Accordingly, we have recommended an amendment which would provide for the continuation of health and welfare benefits (excluding pension) for the duration of a lawful dispute, so long as the union absorbs the total cost. With this amendment, an issue which can, but need not, stand in the way of resolving the collective bargaining dispute can be removed. [109]

On the issue of benefits to striking or locked out employees the Priel committee was unanimous.

> The committee was unanimous in its support for the introduction of a provision which would provide a mechanism to ensure the continuation

[109] J. Baigent, V. Ready, T. Roper *A Report to the Honourable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform* (1992) at p 43.

> of benefits to striking or locked out employees. They have agreed that the amendment should refer to benefits other than wages, to which the employees are entitled by the collective bargaining agreement in existence at the time the strike or lockout began.
>
> The parties further agreed that the concept of proposed Section 47 should be amended to provide that the benefits would continue provided the Union tendered to the employer or to the insurer the cost of the benefits but that it would be a matter which was voluntary on the part of the Union. In that way, a Union would not be fixed with being required to tender the cost of the benefit in a situation where it simply could not afford to do so. Further, the parties agreed that the benefits referred to in the third line of Article 47(1) should refer to the benefit referred to in Section 11(1)(i).[110]

For these reasons, CUPE supports the continuation of the opportunity to pay benefits costs to avoid benefit disruption during a strike or lockout.

Are the notice provisions respecting strike and lock-out appropriate and adequate? Why or why not?

CUPE says the current notice provisions are sufficient and should be maintained.

Are the requirements prior to commencing a strike and lock-out appropriate and adequate? Why or why not?

CUPE says the current requirement prior to resorting to economic weapons (vote and notice) are sufficient and should be maintained.

Are the reinstatement provisions appropriate and adequate? Why or why not? Is the continuation of benefits provision appropriate and adequate?

CUPE says the reinstatement and benefits continuation provisions are appropriate and sufficient. They should be maintained.

[110] L.T. Priel, Q.C., M.Carr, H. Wagner. *Report of Committee Considering Proposed Amendments to the Trade Union Act,* December 1993, p. 8

Union Dues

Majoritarian Principles

The starting point for a consideration of union dues is the community's acceptance of majoritarian principles in establishing the representational relationship at the outset. Regardless of the means by which majority is tested, all Canadian jurisdictions accept that the result of that majority is the decision about whether to become certified. It is a reality that in every bargaining unit there will be differing levels of interest in participating in the activities of their representative. But we do all know that there has not been a groundswell of people who have said they would relinquish the wage increase that was bargained if it would mean they could cease to be a member of the union. Union membership at unionized workplaces as the threshold criteria for participation in the bargaining unit is a parallel to how membership in a professional body is the threshold criteria for being able to pursue most professions or trades. That the union is established in a workplace in this democratic way is consistent with human experience in this country and is not objectionable just because the membership is to a union.

The next consideration is the Constitution of the union. That document is a contract between the union and its members to which the individual members bind themselves when they sign their membership card, or take their oath of membership. That contract permits them to participate fully in union life: to elect officers who operate and manage the union on a daily basis, to participate in the selection of objectives, bargaining proposals, approve expenditures. It permits them access to all of the union's financial information at regular intervals. Again those decisions are made using the majoritarian principles that are accepted in a democracy. That not every member will approve of every measure the union adopts is also accepted in a majoritarian democracy. Not every taxpayer agrees with every measure a government adopts, but they do not have the option to opt out of paying taxes to fund its operations.

Historical Perspective

The recognition that all those covered by a collective agreement benefit from its terms regardless of membership and should consequently contribute to the union's expenses is a longstanding view.

> Canada's most famous battle for union security occurred in the fall of 1945 at the Ford plant in Windsor, Ontario. The issues of the dues

check-off and the union shop were at the heart of the dispute. When both sides refused to compromise, a bitter strike erupted. Despite strong public support and a sympathetic mayor, the Ontario Provincial Police and the RCMP were brought in to open the picket lines and allow scabs into the plant. The police cordon was matched when the workers surrounded the plant with a massive automobile blockade. The strike ended when both sides agreed to binding arbitration under Ontario Justice Ivan Rand.

The result was the now famous Rand Formula. Under Justice Rand's formula, every member of a bargaining unit was subject to a dues check-off. The employer would deduct the union dues from employees' pay cheques and forward the funds to the union office. If at the time a union was certified there was a minority who did not want to belong to the union, they would not be forced to join. They would, however, still be compelled to pay union dues. New workers hired by the employer after the original certification would be required to become union members. Union leaders across Canada welcomed the Rand Formula. Employers were not so enthusiastic.

The drafters of Saskatchewan's new Trade Union Act anticipated the issues addressed by the Rand Formula a full year before the Ford strike at Windsor. The CCF's 1944 labour law required that all employees who were hired subsequent to certification were obliged to become union members. The employer was required to check-off the employees' union dues if requested to do so by a majority of the employees in the bargaining unit. As with the Rand Formula, non-union employees at the time the original agreement went into place would not be forced to join the union against their will, but they couldn't freeload. They would be expected to pay their share of the financial costs of maintaining the union. New employees would be expected to join the union and pay dues as a condition of employment.[111]

The Woods Task Force said:

481. An important ingredient in the Canadian collective bargaining system is that a union gains exclusive bargaining authority and with it the duty to represent all employees in the prescribed unit in the collective negotiation of terms and conditions of employment. These policies, in our view, give the union a claim to general support from employees in the unit in the union's capacity as their collective bargaining agent, whatever other functions it may perform as an instrument of social transformation.

[111] J. Warren and K. Carlisle. *On the Side of the People,* 2005, p. 132

> 482. This rationale supports the agency shop form of union security. Under this form of union security an employee in a unit for which a union is the bargaining agent must pay the regular and reasonable dues of the union, whether he takes out membership or not, as an "agency fee". Such a fee is for services rendered and responsibilities assumed by the union in the collective bargaining system imposed as a matter of national labour policy.
>
> 483. We recommend that the compulsory irrevocable check-off of regular and reasonable dues be available to a certified union as of right upon the negotiation of its initial collective agreement and thereafter, and that this right be extended to a union recognized voluntarily by the employer.[112]

SCC and Charter impacts

Of union representation, it has been said:

> All employees in the bargaining unit are entitled by the duty of fair representation imposed by statue or common law to be fairly represented by the union. This means that all members of the bargaining unit receive the fruits of collective bargaining, regardless of whether they are members of the union and regardless of whether they actively participated in the exertion of economic power by the union which led to the agreement. …Thus, there exists the danger of the free rider, the person who is willing to accept the fruits of other persons' efforts without paying for them.
>
> … The union incurs substantial costs in providing the benefits of collective bargaining and it makes sense that unions should be able to demand that all who receive the benefits of collective bargaining pay for them. This justifies the inclusion in collective agreements of a requirement that all members of the bargaining unit, whether union members or not, pay union dues…[113]

The SCC has made comment on dues under the Charter, firstly in Lavigne and then in subsequent cases which MacNeil, Lynk and Engelmann described:

> The first major post-Charter case on union security provisions is the decision of the Supreme Court of Canada in Lavigne v. OPSEU. A Rand formula provision was included in a collective agreement between the Ontario Council of Regents for Colleges of Applied Arts and Technology and the Ontario Public Service Employees Union (OPSEU) representing teachers at Ontario community colleges. Lavigne complained about some union expenditures, including support for a political party, support

[112] H.D. Woods. *Canadian Industrial Relations: The Report of the Task Force on Labour Relations.* December 1968, p. 149, para. 481-483

[113] M. MacNeil, M. Lynk, P. Engelman *Trade Union Law in Canada,* Canada Law Book 2012

> of campaigns favouring abortion rights and disarmament, and support of a campaign against the building of a domed stadium in Toronto.
>
> Lavigne sought a declaration that provisions of the applicable collective bargaining legislation which permitted the negotiation of a Rand formula dues check-off clause were constitutionally invalid because they contravened the Charter guarantees of freedom of association and expression. The council of Regents was held to be a government agent to whose actions the Charter applied.
>
> The court unanimously concluded that there was no violation of the Charter, albeit for widely varying reasons…[114]

The authors described the impact of the Lavigne decision:

> The consequence of the Lavigne decision for unions is that they are assured that the present system of Rand formula union security arrangements withstands constitutional scrutiny. It can also be argued that the judicial recognition of the legitimacy of union participation in broader social, economic and political debates in our society is an important development, reinforcing changing union perspective on their appropriate roles.
>
> The Lavigne decision only addressed the legitimacy of Rand formula union security provisions. Only one province, Saskatchewan, goes further in actually imposing a modified union shop security provision in collective agreements. In *RWDSU v. Remai Investment Co.*, the Saskatchewan Labour Relations Board held that the mandatory Saskatchewan provision violated the guarantee of freedom of association, but that the infringement was justified both to prevent free riders, and to enhance union solidarity for the purposes of making unions more effective representatives of workers' interests. Similarly in *Association Of Professional Engineers of Saskatchewan v. SGEU* it was held that the provision did not violate the freedom of association guaranteed by the Charter, at least in part because allowing members to opt out would, according to the judge, create chaos and skew the balance of interests that has been developed in the legislative development of labour relations policy. [115]

An Alberta decision had at one time decided that the right to collect dues, as the right to bargaining or the right to strike, were not fundamental rights and so not protected. However, since the decisions in *Health Services* and in *SFL* cases, that reasoning is less convincing.

[114] M. MacNeil, M. Lynk, P. Engelman *Trade Union Law in Canada* Canada Law Book 2012 at 2-8
[115] M. MacNeil, M. Lynk, P. Engelman *Trade Union Law in Canada* Canada Law Book 2012 at 2-9

The authors comment:

> Indeed, the Supreme Court decision in *Health Services* has led the Alberta board to the conclusion that the failure to include union security guarantees similar to the Rand Formula in The Alberta *Labour Relations Act* violates the Charter's guarantee of freedom of association. …
>
> …the Board noted the radical shift in our understanding of freedom of association and protection for collective bargaining brought about by the Health Services decision and concluded: "[g]iven that the freedom of association now extends to protecting the process of collective bargaining and accepting that payment of dues to a trade union falls within the scope of this freedom, it would seem to follow that a Rand formula type of union security is included within the protection that s.2(d) provides to the members of the Union to engage in the process of collective bargaining with the employer. The board declared the absence of such protection in the statute to be a violation of the Charter, but suspended the declaration for 12 months to give the legislature the opportunity to address the repercussions of the decision. The Board also concluded that, in light of its revised view of the centrality of the union security provision to collective bargaining the bargaining to impasse over the issue was a violation of the duty to bargaining in good faith.[116]

However, the decision was overturned on other bases. In any event, the lower court decision that deals with the issue, acknowledges that the *Health Services* case alters the landscape of our understanding of the freedom of association. Thus to remove the current provision from the TUA will, quite predictably, result in a Charter challenge to whatever new provisions were to replace it. This will leave the state of labour relations in disarray.

Among the functions with which a union is tasked is the prosecution of grievances. An arbitration costs what an arbitration costs regardless of the identity of the grievor. To suggest that some persons should be able to obtain discounts on dues, or be able to opt out of the payment of dues or membership ignores the statutory obligation the union continues to have to represent the whole of the unit regardless of that member's identity. This phenomenon of the "free rider" is inconsistent with the majoritarian principles upon which all of our democratic institutions are based, from the service club to the government itself. Decisions made by the majority are binding upon the whole. Thus if the union determines to proceed with a grievance, then all should share in the expense of doing so according to their Constitution.

[116] M. MacNeil, M. Lynk, P. Engelman *Trade Union Law in Canada* Canada Law Book 2012 at 2-12

Of those for whom a discount on dues is queried are students, causal or part-time workers. CUPE observes that these are workers for whom the accumulation of shifts of work is irregular and unpredictable. For them the completion of a probationary period may take considerably longer than for full-time workers. CUPE further observes that the consequence is that they are vulnerable to termination at that lower threshold of proof for a much longer period. Terminations during a probation period are a common type of grievance. And those workers contributing even the full calculation of dues for their work volume would not realistically have ever contributed sufficient dues to pay the costs of prosecuting those grievances. The costs of grievances for those individuals are already commonly carried by the larger group. To expand that could lead to rifts in the bargaining unit that often then find their way to the bargaining table in proposals: in the divisions of a bargaining team that can stall the negotiation of a collective agreement or which may defeat a ratification vote of the same. Those issues generally find their way into the full spectrum of labour relations in a way that also negatively impacts upon the employer's enterprise. CUPE opposes discounted or opting out of dues based upon the frequency of work, income levels or other financial considerations.

The deduction of dues from payroll is a process which benefits employers as much as it does unions. While at first blush that may appear counterintuitive, one must consider the impact upon the employer of alternative means of collection. If dues were not collected in this way, there is a risk of some person becoming the focus of unease among their co-workers who developed resentment for their failure to contribute to the cost of their representation while accepting the benefits of it. This may spill over into workplace conflict or harassment that the employer must then deal with.

If members failed to pay, alternative means of collection would have to be developed, which may include personal efforts to collect, or include pre- or post-judgment garnishments of wages if the union were to repeatedly sue free riders. Garnishment disrupts the employer's orderly payroll and cannot be avoided since they are court-based proceedings. CUPE suggests that it is more orderly for employers to simply make payroll deduction and remittance using computerized payroll programs, than to have to customize payroll to accommodate garnishment. Alternatively, collection processes will become an issue in bargaining which may contribute to disruption in collective bargaining.

We have had the benefit of reviewing the submission filed by NUPGE and adopt their description of international standards applicable to the collection and use of dues.[117]

Are there situations where employees should be able to opt out of the union for reasons other than religious grounds? If so, in what situations?

CUPE opposes the ability to opt out of the union for reasons other than religious grounds.

Are there any instances where union dues should not be collected in a situation where the employee has opted out?

In all instances dues should be collected even in a situation where an employee has opted out for religious grounds.

Should legislation make provision for the collection of dues or should this be a matter of negotiation between the parties?

CUPE says the TUA should continue to make provision for the collection of dues.

[117] N.U.P.G.E. – *Saskatchewan's Labour Law Review in Relation to its Compatibility with ILO Freedom of Association Principles and Jurisprudence*. p. 127

Fines

The issue of fines has commonality with the dues issue. Those who benefit from the efforts of the union should make their contribution to the machinery of the union that makes those benefits possible. Those members who work during a strike make the achievement of those benefits more difficult and more costly. Fines are a means by which those impacts are recognized and recompensed.

The TUA provisions are in part a codification of existing rights. However, the methodology for regulating collection of fines is of a benefit to the employer as well as the union. The alternative is litigation for the recovery of the fine, the ultimate consequence of which is likely to be garnishment of the workers' wages as that is the easiest and most cost efficient means for the union to recover on a money judgment. Given the limits on the proportion of a pay cheque that can be garnished in a single period, repeat garnishment orders are likely to destabilize an employer's payroll for several pay periods. This inconvenience is likely to make payroll preparation more expensive for the employer. According to Section 36(5) of the TUA, a fine can only be imposed if the unions' constitution provides for it.

As with all other matters, the TUA requires to be conducted according to the principles of natural justice. A member concerned about due process issues could access that provision. Thus due process issues are already adequately regulated.

Is it necessary for the TUA to facilitate the collection of fines and assessments of a union and stipulate that a debt is owing as if a contract in a court of law? If so, what must a union do to demonstrate due process was followed in the levying of the fine or assessment?

The TUA's provisions making a fine or assessment a debt has the ultimate benefit to the employer of regularizing and minimizing the impact on an employer's payroll system. The TUA also adequately regulates due process issues in the proceedings which lead to the imposition of any fine or assessment.

Is it more appropriate for unions to seek remedies available through civil court procedures and small claims?

The current system provides for the least intrusive impact upon an employer's payroll functions. The current provisions should be maintained as they are of mutual benefit to both sides of the labour relations community.

Administration

Filing collective agreements

The purpose of the filing of collective agreements is for general information. In some jurisdictions the filing is with the LRB, as contrasted with Saskatchewan where the filing is with the Minister. In either case, the filing permits the observations of trends and the creation of composite data. It serves no purpose for the parties to the collective agreement and thus has no role in fostering free and fair collective bargaining. The labour relations of the parties would not be harmed by the abandonment of this requirement altogether, then there should not be an adverse consequence to the parties for failing to file it.

Further, filing does not cure any defect in the collective agreement. If a collective agreement is otherwise invalid, filing it does make it valid. Conversely, if a collective agreement is otherwise valid, that lack of filing it ought not to make it invalid.

One must also consider the factual context in which many collective agreements (or Memoranda of Agreement) are finalized: in the wee hours of the night, often on a weekend, and often when parties are near a breaking point. This is when the collective bargaining relationship needs to be able to rely upon the finality of the agreement they make to avoid future and perpetual distrust by the whole labour relations community in the collective bargaining process. To permit the finality and reliability of that agreement to be sabotaged by someone's failure to file, making it unenforceable UNTIL it is filed is antithetical to that purpose.

Moreover, the first provisions which will be relied upon are any which pertain to employees' return to work from a lockout or strike. These are the provisions upon which an orderly return to work relies and which need to be certain immediately upon the conclusion of the collective agreement. Making a collective agreement unenforceable at that juncture will have an incendiary effect upon work stoppages, just as they are about to conclude. That is not in the interests of the labour relations community and it is not in the interests of the public.

Filing arbitration awards

There is value to the labour relations community to the filing of arbitration awards and publishing them to the labour relations community at large. CUPE strongly supports the filing and publication of all arbitration awards. However, as with collective agreements, the filing of an arbitration award that contains errors of law does not make it any more valid. Likewise the failure to file an otherwise valid arbitration award should not make it invalid. The parties to an arbitration award should have immediate access to and enforceability of the determination of the arbitration board. In a termination award that finds that reinstatement is appropriate, an employer's liability for past wages will continue to accumulate until the employee is back to work. Thus any delay in enforcing that right of return works to the employer's disadvantage with damages continuing to accumulate just as it works to the employee's disadvantage.

While the majority of grievances are initiated by the union/member, employers can and some do access the arbitration procedure to address their complaints. Thus an employer successful in their own grievances would likewise be deprived of the right to exercise their remedy.

Arbitration must be considered in the context of the whole scheme of the legislation. The prohibition against mid-term strikes is balanced with the access to arbitration as a means by which to resolve mid-term disputes. If that access is denied for the procedural error of <u>failing</u> to file, that balance is eroded. If parties deliberately try to deprive the other of the benefit of their remedy by <u>choosing</u> not to file, that balance erodes even further. That in turn jeopardizes the effectiveness of the mid-term strike prohibition which is the companion piece to access to grievance arbitration to resolve disputes. One cannot make alterations to one part of the labour relations scheme in isolation. We must always consider whether a revision simply moves the real dispute to somewhere else in the system where it cannot be dealt with as effectively.

Should the requirement to file copies of collective agreements with the Minister continue? If yes, should the TUA include a provision that states that a collective agreement is not in force unless filed with the Minister?

CUPE supports continued requirements for the filing of collective agreements but opposes any amendment that would make a collective agreement ineffective or unenforceable pending its filing.

Should a requirement to file copies of arbitration awards with the Minister be included in the TUA? If yes, should the TUA include a provision that states that an arbitration awards is not in forces unless filed with the Minister?

CUPE supports a requirement for the filing of arbitration awards but opposes any provision that would make an arbitration award ineffective or unenforceable pending its filing.

Collective Bargaining in Education and Police Sectors

Whether a specific sector is appropriate for province-wide bargaining should be the subject of a consultation that is focused solely on that question and posed solely to those who are active participants in the collective bargaining of that sector. Consequently, CUPE makes no comment on the appropriateness of the constituency in which bargaining occurs for teachers or police. Those unions are better situated to respond to those issues.

Having said that, in the education sector, school workers who are not teachers should have a bargaining structure which is reflective of other workers in the education sector, and thus CUPE advocates the participation of those unions (including itself) in an independent inquiry into that issue.

Education and Police

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

Should the labour relations components of the Education Act, 1995 and the Police Act, 1990 be included in legislation that governs labour relations for all segments of the economy? Why or why not?

CUPE does not support consolidation of any of the labour statutes.

Are there distinct elements of the labour relations systems for the education sector and the police sector that should be maintained if included in a single labour relations act?

While there are going to be some sectors in which province-wide bargaining is appropriate, CUPE says that this should be done with involvement by those sectors only. This may occur by consultation with government independent of the current process, or by applications to the LRB by the parties pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

Is the current two-tiered bargaining structure in the education sector appropriate?

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

Are there aspects of the collective bargaining structure in the education sector that could be improved upon?

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

Who should be involved in the negotiation of a) provincial, b) local collective agreements? Why or why not?

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

Should Pre-Kindergarten to Grade 12 teachers be included within the scope of the Trade Union Act?

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

Relationship Foundations

CUPE believes that the best long-term results in a collective bargaining relationship are achieved when the parties not only work together on differences, but also when the parties work together on the relationship itself. CUPE therefore suggests some provisions which are novel in Saskatchewan, but which have been utilized elsewhere to assist in that objective. We make this suggestion despite that novelty because it is a suggestion that does not alter the rights and obligations of either party, nor does it alter the balance of collective bargaining. As a model CUPE has looked to some innovations adopted in B.C. through the 1992 review conducted by the Sub-Committee of Special Advisors. They described the purpose of such provisions:

> In the introduction to this report, we expressed the view that labour legislation should formally acknowledge the value and importance of ongoing consultation and cooperation between the employer and the trade union to address workplace issues. By its nature, labour legislation encourages an adversarial relationship. That is not necessarily undesirable. Given the fact that the interests of employees and the employer are not always aligned, it is not surprising that our legislation contemplates negotiation with the right to strike or lock-out and third party dispute resolution. An adversarial component to the relations is, therefore, inevitable. However, we think it important that the legislation strongly signal the desirability of a different relationship to deal with issues such as work reorganization, productivity, technological change and other operational concerns which affect both the competitiveness of the business and the working lives of employees. In finding the balance between these two themes we recognize that it is in each party's interest to build a viable enterprise while at the same time preserving their right to freely negotiate the division of the economic pie created by their joint efforts. Put another way, while labour and management might argue over how the pie is sliced, they should be working together to bake a bigger pie…
>
> We have also recommended that facilitators be made available to assist parties in developing a different relationship. Facilitators can assist the parties by providing training in joint problem solving, management by objectives and similar techniques. It will not be easy for employers or unions to quickly adapt from a confrontational/adversarial approach to one of consultation and cooperation. However, in both the written submissions made to our subcommittee and during our public meetings, both the employer and trade union representatives expressed a strong desire for a new relationship. Through our proposed amendments to the purposes section and this joint consultation provision and with the assistance of facilitators, we believe that a message can be sent to the

> labour relations community that cooperation and codetermination in the workplace are desirable and necessary. [118]

Following the recommendations of the advisors, the government added provisions dealing with joint consultation. That provision remains intact, 20 years later. It provides:

> 53(1) A collective agreement must contain a provision requiring a consultation committee to be established if a party makes a written request for one after the notice to commence collective bargaining is given or after the parties begin collective bargaining.
>
> (2) The consultation committee provision must provide that the parties consult regularly during the term of the agreement about issues relating to the workplace that affect the parties or any employee bound by the agreement.
>
> (3) If the collective agreement does not contain the provisions described in subsections (1) and (2), it is deemed to contain the following consultation committee provision:
>
> > On the request of either party, the parties must meet at least once every 2 months until this agreement is terminated, for the purpose of discussing issues relating to the workplace that affect the parties or any employee bound by this agreement.
>
> (4) The purpose of the consultation committee is to promote the cooperative resolution of workplace issues, to respond and adapt to changes in the economy, to foster the development of work related skills and to promote workplace productivity.
>
> (5) The associate chair of the Mediation division must on the joint request of the parties appoint a facilitator to assist in developing a more cooperative relationship between the parties. [119]

In furtherance of this provision and the objective of assisting parties to develop sound, functional relationships, the B.C. Labour Board has among its mediators, indeed the current Associate Chair of the Mediation Division, a mediator with special training and expertise in this area.

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[118] J. Baigent, V. Ready, T. Roper *A Report to the Honourable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform* (1992) at p 38-39.
[119] British Columbia *Labour Relations Code* RSBC1996 c. 244

There is no reason in principle, then, why governments should not be required to negotiate mutually acceptable wages and other terms and conditions of employment with their own employees. This is one explanation why the right to bargaining collectively and the right to strike have been extended to all employees, including those in the public sector.[120]

Mr. Justice Dennis Ball

[120] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) at para. 99 at p 23

Essential Services

Essential: absolutely necessary; indispensable, fundamental, basic[121]

The purpose of essential services legislation is to protect the public from the effect of strikes in areas of public service, the absence of which represent an immediate and serious danger to life, health and safety of the public. These include firefighting services, policing services, and health services. This was accepted by Mr. Justice Ball in the constitutional challenge to the enactment of the PSESA.

The application of such legislation should be limited to those services which are truly essential by which we mean those which are absolutely necessary.

A choice of model must be made for every service that is essential – a no-strike model accompanied by an alternative means to resolve collective bargaining, or a designation model in which the levels of designation permit an effective strike. At its heart the fundamental problem with the PSESA is that it combines the two models in that it purports to use a designation model but results in designations at so high a rate as to be actually a no-strike model without the accompanying alternative collective bargaining dispute resolution mechanism.

CUPE supports independent consultation with essential service sectors, particularly the health care sector, before new legislation is tabled dealing with essential services.

Moderation in Legislative Change

Throughout this response we have advocated for few substantive changes in the current law. Where we have proposed changes we have tried to suggest moderate ones which are based on a survey of legislation across the country. We have done so in order to prevent wild pendulum swings that are harmful to labour relations in the long term. We have also tried to achieve change through procedural options as much as possible.

However in the area of essential services, in light of the SFL decision finding the new PSESA to be unconstitutional, we depart from our preference for moderation. This is rather an occasion for a more comprehensive evaluation of international obligations, public interest and a focus on "getting it right".

[121] *The Canadian Oxford Dictionary*, Oxford University Press, 1998

Balancing of Interests

As far back as the Woods Task Force, Canadians have recognized essential service disputes as requiring a balance of interests.

> 575. Having endorsed the collective bargaining process, including the right to strike and lock out, as the system most compatible with a mixed enterprise economy operating in a pluralistic society based on liberal democratic values, we now concern ourselves with the issue of protecting the public interests where the collective bargaining process so operates as to create intolerable public hardship.
>
> 576. The public interest in collective bargaining has three competing ingredients. First, the public has an interest in the system of collective bargaining as an instrument for the pursuit of social and economic justice and progress in an industrial society. This is the interest that attracts basic endorsation of the system. Second, the public has an interest in the results of collective bargaining as they affect the distribution of resources in the labour market and as those results relate to and are reconciled with a host of other competing policies. This latter interest is the subject of extensive comment in Part 3 and a specific recommendation later in this Part. Third, even though the right of recourse to economic sanctions is an integral part of a normal collective bargaining system, the public has an interest in being protected from the hardship caused by work stoppages which interrupt the supply of essential goods and services. This is the public interest that demands our primary attention of the present section of the Report. These three public interests at best are in a condition of uneasy balance, and not infrequently are in a state of disharmony.
>
> 577. It is necessary, in these latter circumstances, to determine which of the foregoing public interests should prevail. Our concern is to uncover a scheme by which that selection may be made in a manner that does least violence to the integrity of the system and to the fundamental values on which the validity of collective bargaining is based.
>
> 578. The expression of the public interest in being protected from the hardships of work stoppages takes many forms. Generally, they refer to protection of life and health, maintenance of public safety and order, and preservation of the state. From our studies of Canadian experience and of events and experiments in countries with comparable industrial relations systems and social matrices, we make seven observations which are fundamental to the determination of a scheme for containing

these disputes. First, it is extremely difficult to say with certainty or conviction in advance of actual events in what industry or service and at what time resort to economic sanctions ought to be curtailed. Second, the length of a strike or lockout frequently is a critical factor in making such an assessment. Third, there can be no one policy or procedure that works with uniform success. Fourth, flexibility of approach is essential less the parties build the existing policy or procedure into their strategies. Fifth, a determination that a given stoppage of work ought to be terminated in the public interest is essentially a political decision. Sixth, the political element in a potential emergency dispute is an inducement to the parties to drive the dispute beyond any procedural device for settlement and into the political arena. Seventh, circumstances may be expected to arise in the eventual course of industrial conflict in which disobedience to and defiance of the law will not be forestalled by that law.[122]

Scope of the Public Service Essential Services Act

Scope Determined by International Standards

> Canada has long been active in supporting international labour standards. Such standards work to protect countries against the labour equivalent of product dumping. Few countries, for example, can compete with a nation that exploits child labour. Canadian society would never tolerate such a social policy at home. To protect our competitive position, we encourage other countries to abandon such practices as well. We attempt to ensure minimum standards for the treatment of labour by accepting for ourselves, and enforcing against others, a series of standards through our international treaties.[123]

The scope of the essential services legislation should parallel our international obligations. In the *SFL* decision the Court quoted from the report of the Committee on Freedom of Association (CFA) of the International Labour Organization (ILO):

> **370.** At the outset, the Committee recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State: or (2) in essential services in the strict sense of the term (that is, services the interruption of which

[122] H.D. Woods. *Canadian Industrial Relations: The Report of the Task Force on Labour Relations.* December 1968. p. 169-170, p. 575-578
[123] A.Sims, R. Blouin, P. Knopf *Seeking a Balance Canada Labour Code Part 1 Review* (1995) p. 29

would endanger the life, personal safety or health of the whole or part of the population [*see* ***Digest, op.cit., para.576]***[124]

Mr. Justice Ball went on to say:

> [96] However, all of the services provided by public sector workers are not essential. It cannot be credibly argued, for example, that the services provided by every employee of every government ministry, Crown corporation and agency, every city, town and village, and every educational institution are so essential that their discontinuance would jeopardize the health and safety of the community. Can it be said that the community would be at risk if employees at casinos and liquor stores in Saskatchewan decided to withdraw their services in support of higher wages?[125]

He added:

> [101] The presumption of conformity with international law is a rule of legal interpretation whereby domestic law is read, wherever possible to be consistent with international law. It is a presumption that can be rebutted by legislation that "with irresistible clearness" is intended to violate international law obligations. 32
>
> 32 See: Van Ert, Gib *Using International Law in Canadian Courts,* 2nd ed, (Toronto, On: Irwin Law, 2008) at p. 120*;R v.. Hope 2007 SCC 26, [2007] 2 S..C.R.* 292 per LeBel J. at para. 53. [126]

He went on to say:

> [128] The following summary of decision of the CFA Committee and the ILO Committee of Experts was also prepared by Professor Michael Lynk, which I accept as accurate and reliable:
>
> > *The Right to Strike and Public Sector Essential Services*
> >
> > 29. The two Committees have given essential services a specific meaning: those services where the withdrawal of labour would result in a clear and imminent threat to the life, personal safety or health of the whole or part of the population. As indicated above, the Committee on Freedom of Association has also said that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.
> >
> > 30. A government would be entitled to legislate restrictions or even prohibitions on the right to strike for public sector employees working in essential services. However, to be

[124] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) at p. 9
[125] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) at p. 22
[126] *The Saskatchewan Federation of Labour v. Saskatchewan* 2012 SK QB 62 (Canlii) at p. 23

compliant with the ILO standards, a government would have to ensure the following:

(i) the public services that are targeted for the withdrawal of services genuinely meet the definition of essential services in its strict and proper sense;

(ii) the guiding test for the restriction or prohibition of the right to strike would be based on the minimal and proportional analysis;

(iii) the first permissible exception to the broad and general right to strike that is to be explored would be a partial and restricted right to strike;

(iv) the scope for a partial and restricted right to strike is to be drawn as purposively as possible in order to establish the minimum amount of services that can be offered during a strike that are sufficient to avoid endangering the life, personal safety or health of the whole or part of the population, while allowing for as comprehensive an exercise of the right as possible in the circumstances;

(v) a partial and restricted right to strike that compels an unnecessarily broad number of employees to continue to work and leaves only a relatively small number of employees with the ability to strike would make the exercise of the right futile, and the right to collectively bargaining a hollow guarantee;

(vi) In determining the appropriate level of minimum services for a partial and restricted strike, provision is to be made for the meaningful involvement of the trade union(s) to establish the appropriate levels;

(vii) that, if it is genuinely determined that even a partial and restricted strike would nevertheless endanger the life, personal safety or health of the whole or part of the population based on the minimal and proportional analysis then the right to strike can be prohibited;

(viii) where the right to strike in an essential service cannot be permitted, then the government must erect an "adequate, impartial and speedy conciliation and arbitration proceeding in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented." In such mediation and arbitration proceedings, it is essential that all the members of the bodies entrusted with such functions should be impartial and seen as such by both the employer and the workers concerned.

…[130] In summary, Canadian and international law supports the restriction or prohibition of strikes by essential services employees provided that it is based on a minimal and proportional analysis and,

where strike action is substantially abrogated, accompanied by a fair and adequate dispute resolution scheme.[127]

CUPE will return to some of these issues below.

We have had the benefit of reviewing the submission filed by NUPGE and adopt their description of the international standards application to essential services and their references to the ILO decision regarding the PSESA.[128]

At this juncture, CUPE says that in keeping with this utilization of international law, the scope of the definition of "essential services" in the PSESA is far too broad.

Overly Broad Definition of Public Employer

The overly broad definition goes to the government's purpose in enacting the PSESA:

> [163] Quite apart from the political environment of the time, it may also be that the Government did not consult with the unions because the PSES Act was intended to have not one, but two, objectives: the first, being to ensure the continuation of essential services during a labour dispute; the second, being to alter the balance of power at the collective bargaining table. The most obvious way to alter the balance of power would be to empower every public employer to prohibit any meaningful strike activity by employees while ensuring that the employees would have no access to any alternative dispute resolution process. [129]

Another means of altering the collective bargaining balance of power is to have the essential services limitations of strike activity apply to too broad a range of services or activities.

The PSESA currently defines "essential services" as follows:

> 2(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

[127] *The Saskatchewan Federation of Labour v. Saskatchewan 2012 SK QB 62 (Canlii) at p. 30-31*
[128] NUPGE – *Saskatchewan's Labour Law Review in Relation to its Compatibility with ILO Freedom of Association Principles and Jurisprudence. p. 12-15, para. 142*
[129] *The Saskatchewan Federation of Labour v. Saskatchewan 2012 SK QB 62 (Canlii) at p.38*

(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;

Those which are "prescribed" appear in Regulations which list various services and programs provided by the Government of Saskatchewan.

The utilization of this definition of "essential services" permits too broad an interference with the right to strike. For this reason, CUPE says that in keeping with the definition used in international obligations, 2(c) (i) (B) should be limited to the machinery, equipment or premises used to prevent danger to life, health or safety. Similarly 2(c) (i) (C) should be limited to serious environmental damage that would cause danger to life, health or safety. Those limitations should also be carried through in the 2(c) (ii) (A) reference to (i). Further only those "prescribed" services and programs which truly have the potential to endanger life, health and safety should continue to be subject to the PSESA.

Another element of concern in regard to an essential services restriction on the right to strike being too broadly applied is in the definition of a "public employer". Mr. Justice Ball noted that issue saying:

> [184]…There is no evidence that some of the public employers employ any employees who are engaged in the delivery of essential services. Examples include SIAST and Saskatchewan Gaming Corporation, a Crown corporation that owns and operates Casinos in Regina and Moose Jaw.[130]

Resort villages do not provide essential services, for example. CUPE says the list of those included in the definition of a "public employer" should be reduced to include only those regarding which there is no doubt that their employees perform essential services as defined by Canada's international obligations.

[130] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 41

Negotiation of an Agreement

Negotiation Favoured Method

Negotiation of essential services is the approach supported by the ILO and adopted by Mr. Justice Ball in the *SFL* decision when he quoted the ILO's comments:

> [36] After determining certain essential services listed in the PSES Regs should not be unilaterally declared as "essential", the CFA Committee stated at para. 372:
>
> > 372. The Committee further recalls that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a full and frank exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum services does not result in the strike becoming ineffective in practice because of its limited impact. And to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services. *[see **Digest**,op. cit., para. 612]* The Committee considers that a requirement to negotiate an ESA is in conformity with the principle above. [131]

The negotiations must be premised on the understanding that the result of the negotiations will not be "business as usual", or even near to it. Further, they must be premised upon the understanding that no person's job is 100% essential. They must also be premised upon the understanding that managers and other excluded personnel will perform some essential duties of the bargaining unit. They must be premised upon the understanding that no new volunteers will be engaged by the employer, and no expanded duties will be performed by existing volunteers. In addition, when not actively engaged in providing essential services, employees are free to participate in their union's job actions.

[131] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 9

Timing of Negotiations

CUPE sees the negotiation of the essential services designations as a process separate and apart from the collective bargaining toward a collective agreement.

Every collective bargaining relationship is unique, and every round of negotiations within a collective bargaining relationship is unique. Similarly, every workplace is unique, and that workplace changes over time so as to make different staffing issues significant at different points in the history of that collective bargaining relationship. The parties are the ones best situated to assess when the timing for negotiation of an essential services agreement is appropriate for that relationship that set of bargaining and that workplace. However, CUPE says the very earliest an essential services agreement should be negotiated is when strike notice is served. If one party is engaging in delay, there should be provision for a unilateral application to the LRB for a mediator and, if necessary, subsequent adjudication.

Consequently, CUPE says that there should be no statutorily mandated timeline for when the negotiation of an essential service agreement must be conducted other than to provide that such negotiations will commence when either of the parties gives notice to do so to the other.

The negotiation of essential services agreements has met with considerable success in other jurisdictions. And negotiation supplemented with mediation has been very successful. In the event that the parties are unsuccessful in negotiating essential service agreements, the assistance of mediation would be a positive development in Saskatchewan as long as those acting as mediators are skilled in mediation and labour relations.

Again, the processes used in other jurisdictions can act as models. For example, both the New Brunswick and British Columbia models rely on negotiation with access to mediation.

The B.C. experience is also particularly detailed in terms of access to mediation. During the health sector strike in 1989 in that province there was a labour boycott of the Industrial Relations Council (IRC), as it was then known. The parties created an independent private panel to consider essential service issues and make decisions where parties couldn't reach agreement. There was little in the way of agreement as it was the first occasion on which the whole sector had taken such a detailed approach to designations. Issues arose about

the extent to which the decisions were binding and enforceable in the face of exclusive jurisdiction to regulate strikes granted to the IRC under the Industrial Relations Act. Employers, on reflection, were dissatisfied by the uncertainty over the enforceability of the outcomes of these proceedings and during the subsequent health sector dispute, in 1992, they were opposed to expedited processes. Rather they insisted on full LRB (upon the restoration of this name) hearings on many more issues. In order to cope with the volume of hearings, persons outside the LRB who were named by the parties were "deputized" to sit on LRB panels. Hotel rooms were arranged for extra hearing spaces and the LRB's resources were sorely tested. As trends in decision making emerged, they assisted parties in reaching more compromise resolutions as the process progressed.

In the aftermath of that dispute, there were legislative changes which included the insertion of mediation by the LRB mediators. This was followed by a conference of stakeholders in the essential service areas of the labour relations community that canvassed all aspects of essential service processes. A product of the conference was a standardized order and format that was for the most part, a product of mediation. The remaining issues of what has become known as the "Global Order" was concluded by the LRB and, with very few modifications, is used in essential service disputes in every sector in the 16 years since. The LRB commented upon the use of mediation:

> …one of the lessons learned from that experience was that the parties are sophisticated, capable and mature enough to settle most of the issues on their own or with the assistance of mediation, and at the end of the day comparatively little adjudication may be required. The result was that mandatory mediation was incorporated as part of the essential service regime in the code as a first step before coming before the Board for adjudication.[132]

In B.C. parties initially negotiate directly resolving many designations. This is followed by mediation to reach agreement on as many more issues as is possible. This narrows the scope of the dispute so as to leave few issues to be determined by the LRB.

CUPE suggests the adoption of mediation as an appropriate approach to essential service agreement negotiation in Saskatchewan. It would reduce the amount of time and other resources that would have to be devoted to adjudicating any remaining disputed issues.

[132] *Health Employers Association of B.C.* BCLRB No. B73/96

However, CUPE also suggests that the "assistance" processes in the current TUA would not serve this purpose. They are too cumbersome to react to the time-sensitive nature of essential service designation. They require too much direct involvement of the Minister, are unpredictable in process and in outcome. Section 22 of the TUA provides for a board of conciliation that is established by the Minister for each dispute. Its powers to "investigate" and "conciliate" are in furtherance of their responsibility to "report". Further, Section 23 provides that the chairperson and members of such boards of conciliation will be by the nomination of the parties to "the" dispute or the Minister. It takes time to construct such boards, determine their availability, conduct an "investigation" and to author a report. Essential services designation processes are often finalized in the final hours before the commencement of a strike or lockout and the process needs to ensure a far more nimble response than the current boards of conciliation can provide. The alternative existing process of a special mediator has many of the same issues. A special mediator is tasked to "investigate, mediate and report to the Minister". While this requires the appointment of only a single person as compared to a board, the investigation and report steps are unnecessary.

Rather than utilize either the boards of conciliation or the special mediator provisions, CUPE suggests a provision which would provide for a mediator whose only function in the essential services context is to assist the parties in negotiations. If the parties fail to conclude an essential services agreement even after mediation, then the LRB should adjudicate those designations which still remain in dispute. If the parties conclude an essential services agreement, that agreement should be included in an order of the LRB so as to be enforceable. Further, the TUA should provide that in respect of designation orders, the LRB has a continuing power to amend, vary or revoke and replace them with another order. This would permit the LRB to respond to any disputes that arise from changing circumstances as a lockout or strike progresses.

Bargaining in Good Faith

The expectations for the conduct of those negotiations should be parallel to those expected in collective bargaining: that they be conducted in good faith. This should be expected to include the sharing of information necessary to have a rational, reasonable and principled exchange over designation levels. This includes a fulsome exchange of information about services, positions staffing, schedules, and answers to inquiries so as to encourage a robust and

thorough discussion of the appropriateness of designation proposals. CUPE does expect that on at least the first occasion upon which this process is engaged, there may need to be more access to adjudication than will be the case once the parties have some experience and precedent to work with.

Unilateral Designation Unconstitutional

Mr. Justice Ball also observed that unilateral designation is inconsistent with negotiation in good faith.

> [190] Even so, it would be naïve to assume that both parties in all public sectors will simply deal with one another "in good faith". Good faith negotiation is not possible when one side has the capacity to simply impose an agreement on the other. Decisions based on the genuine needs of the community were not always made when the unions held the unilateral power to impose essential service protocols on public employers, and they will not always be made when the situation is reversed. It would be equally naive to think that the party with power will not eventually exercise it – in the public employers' case, if only because running a large and complex institution during a strike is a massive inconvenience to their managers and administrators.
>
> [191]The point is that the PSES Act effectively enables some public employers to eliminate the capacity of their employees to strike in any meaningful way (and, as a necessary corollary, to engage in meaningful collective bargaining) by requiring any employees they deem "essential" to work. By exercising their powers under the legislation, they are able to ensure that their operations can continue on what is at least close to a "business as usual" basis. [133]

He also observed:

> [193] As well, an unnecessary imbalance is created by giving public employers unilateral power under s. 9(2) of the PSES Act – a power that invites decisions to be made during a labour dispute based on their perception of which employees are most important to their union, or which ones are most opposed to collective action. The Government offered no response to the proposition that unions should have input into the naming of the employees and no explanation for why the public is better protected by conferring that power on the employers. [134]

For these reasons, CUPE says that PSESA Section 9 providing for unilaterally designations must be removed in its entirety.

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[133] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 43
[134] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 43

Issues for Third Party Determination

Where negotiations and mediation still leave some designations in dispute, the LRB should be tasked with adjudicating the dispute. That adjudication should not be limited. It should include a determination of whether a service is essential within that particular employer. It should include a consideration of designation levels (numbers). It should include a consideration of other sources for providing that service within the employer's operation such as classifications which have overlapping responsibilities (to avoid both classifications being found to be essential to perform the same work) and the availability of managers, and other excluded personnel.

The adjudication of designations should be determined by a panel comprised of a Vice-Chair of the LRB together with wingers familiar with the operation of the service, nominated by the parties, who would become temporary members of the LRB solely for the purpose of those essential service designations. This enables the Board to benefit from the experience and expertise those individuals have in the running of a hospital, for example.

The LRB must have the statutory authority to determine all of the issues discussed in this subsection of our response. Additionally, the LRB must have the statutory authority and be adequately resourced to conduct expedited proceedings (outside normal business hours if necessary), and to make expedited and/or interim orders.

Those providing labour as essential service workers should, while working, be employed under all of the terms of the expired collective agreement including access to the grievance procedure and the limitations of job descriptions.

The scheduling of those workers should be within the control of the union. This enables the union to rotate qualified workers through the designated classifications/positions subject to the responsibilities of the Local Executive to manage the strike. This is consistent with the union's constitutional right to strike. To permit the employer to select persons in each classification who will work the essential duties of that classification and to target Local Executive for those designations, would constitute an interference with that right. To carry out these scheduling tasks will require a scheduling/strike headquarters that includes phone lines. This permits not only the regular scheduling, but also a time-sensitive response to staffing increases the employer may need in an emergency.

Mr. Justice Ball's decision recognizes that the terms of the PSESA caused an imbalance in the bargaining power of the parties to the collective bargaining dispute:

> [163] Quite apart from the political environment of the time, it may also be that the Government did not consult with the unions because the PSES Act was intended to have not one, but two, objectives: the first, being to ensure the continuation of essential services during a labour dispute; the second, being to alter the balance of power at the collective bargaining table. The most obvious way to alter the balance of power would be to empower every public employer to prohibit any meaningful strike activity by employees while ensuring that the employees have no access to any alternative dispute resolution process.
>
> [164] The Constitution does not prohibit legislation that rebalances the strength of the parties at the negotiating table. What is unacceptable is the creation of a structure that infringes on basic freedoms protected by s. 2(d) of the charter in a manner that cannot be justified under s.1. [135]

For these reasons, in considering the replacement legislation, where designations required to preserve public life, health and safety would be too high to run a meaningful and effective strike, the option of interest arbitration should be available.

Similarly, the access to volunteers and others from outside of the employer's operation would shift the balance of power. Thus, essential services designations should prevent access to these sources that would be in the nature of strike breakers. (See *Beacon Hill Lodge* BCLRB No.2/86)

Another issue that the LRB should have statutory authority to address, is revisions to the initial order where the circumstances of the strike warrant. There is a recognition in the BC Authorities, and accepted by Mr. Justice Ball, that things which may not be essential at the beginning of a strike may become essential as a strike lengthens. It should not be necessary to engage the whole formal hearing process again to create a whole new order. CUPE contemplates the ability of the LRB to respond on short notice by expedited means, including hearings by conference call, to amend orders where it is appropriate to do so.

[135] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 38

Interest Arbitration

This subject is not canvassed in the government's paper. However, it is integrally connected to the designation levels, if that is the model the government adopts in replacement legislation. Where designation levels are too high, so as to effectively prohibit a strike, interest arbitration should be available.

This is canvassed at length by Mr. Justice Ball:

> [206] At para. 7 of this judgment I referred to the three basic approaches to essential services dispute resolution in Canada, and stated that the PSES Act ostensibly adopts a "designation" or "controlled strike" model. I used the word "ostensibly" because where as "designation" model results in such a high level of essentiality that the capacity to engage in meaningful strike action is abrogated, it in essence becomes a "no strike" model.
>
> [207] Throughout this judgment I have referred to two types of dispute resolution mechanisms. The first relates to a process whereby unilateral employer designations of employees who must work during a strike can be independently reviewed. The second relates to an overall dispute resolution process, which becomes necessary when employer designations of essential service workers serve to abrogate the ability of employees to engage in meaningful strike action.[136]

Further:

> [210] As a general rule, compulsory arbitration as a mechanism to resolve overall disputes concerning wages and other terms and conditions of employment has no place in a "designation" or "controlled strike" model. If a collective bargaining dispute is to be resolved by arbitration, a "controlled" strike by the non-essential workers serves no purpose.
>
> [211] Access to a dispute resolution process in a "designation" or "controlled strike" model is only required where the level of designated essentiality is so high that the capacity of the remaining non-essential employees to engage in strike action is substantially removed. In those cases, what is ostensibly a "controlled strike" model operates as a "no strike model".
>
> [212] The CFA principle that prohibitions of strikes in essential services should be accompanied by access to binding dispute resolution procedures is intended for situations in which meaningful strike action is prohibited. At para.128 above I referred to Professor Michael Lynk's

[136] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 46

summary of international law. As a reminder, the last paragraph in that summary stated:

> 30. (viii) where the right to strike in an essential service cannot be permitted, then the government must erect an "adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented. In such mediation and arbitration proceedings, it is essential that all the members of the bodies entrusted with such functions should be impartial and seen as such by both the employers and the workers concerned.

I refer also to the statements of Dickson, C. J. in *Alberta Reference* at para. 68 (as set out at para. 108 of this decision). Although the three statutes being considered in *Alberta Reference* all contained an arbitration process, Dickson, C.J. expressed the view that because the processes were not fair and impartial it was fatal to their validity.

[213] Canadian legislation prohibiting strikes by firefighters and police officers, where the level of essentiality is very high, invariably provides compensatory access to arbitration to resolve collective bargaining disputes. The same is true for legislation prohibiting strikes by hospital workers. Although that legislation contains a variety of approaches for determining when and how access would be provided, the point is that it is invariably provided.

[214] There is a pragmatic reason why "no strike" legislation almost always provides for access to independent effective dispute resolution processes: mechanisms of that kind can operate as a safety valve against an explosive buildup of unresolved labour relations tensions.[137]

CUPE notes that Mr. Justice Ball observed that interest arbitration was appropriate where "nearly" all of the employees would be designated essential. There may be subsectors, other than health providers, where that might be so and there may be times when that is also the case for the health provider sub-sector. This would never be known until the LRB decisions regarding disputed designations were concluded in any given round. Thus CUPE says that it is appropriate to place an access to interest arbitration into the new legislation whenever designation levels were too high to permit a meaningful right to strike, even within the designation model. This suggestion is in keeping with Mr. Justice Ball's reasoning:

[137] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 46-47

> [218] In my view, the PSES Act would be substantially less impairing of the right to strike protected by s.2(d) of the *Charter* if in every case it made provision for an effective, independent dispute resolution process to address the propriety of public employer designations of employees required to work during a work stoppage. In addition, the PSES Act would be substantially less impairing if it provided compensatory access to adequate, impartial and effective overall dispute resolution proceedings in those cases where employer designations effectively abrogate the right of employees to engage in meaningful strike action. The latter process may not be an issue for many of the public employers within the scope of the PSES Act, but it is a fundamental issue for many others, most notably police officers and health care workers. Every work place is different, and every work place must be dealt with according to its own set of circumstances.[138]

This is confirmed in Mr. Justice Ball's summary under the Proportionality section of his judgment:

> [221] A number of options are available to reduce these concerns. Some are:
>
> - In every case, provide an impartial and effective dispute resolution process by which a union may challenge public employer designations under s. 9(2) of the PSES Act;
> - In cases where public employer designations under the PSES Act remove a meaningful right to strike by the employees, provide an adequate, impartial and effective dispute resolution process;
> - Enable public service unions to have meaningful input into determining which employees will work during a strike;
> - Require public employers to consider the availability of other qualified persons to provide essential services during a strike. [139]

Interest arbitration jurisprudence describes the process as inherently "conservative", in which breakout proposals will not be achieved by either side. In part, this is because interest arbitrators use comparator employers as a backdrop for evaluating the positions of the parties. Given those moderating considerations interest arbitration is a process that fosters the public interest – it avoids any work disruption in the public services that are essential, while limiting the exposure of the public purse to modest cost increases.

Given the public benefit of this process, CUPE says the parties should be able to unilaterally trigger its use not only when designation levels are too high for an effective strike, but also when it appears that prolonged and unproductive collective bargaining expose the public to an increased likelihood of a work

[138] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 47-48
[139] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 48-49

disruption. Consequently, CUPE suggests that the right to unilaterally trigger interest arbitration in an essential service employer should also be available in any instance where collective bargaining has not resulted in at least a tentative agreement within one year of the serving of notice to bargain.

CUPE says that the format of any such interest arbitration should also be the subject of independent consultation.

Queen's Bench Decision

The decision of Mr. Justice Ball references several other important shortcomings of the PSESA. These include the lack of consideration given to the provision of essential services by managers and other personnel.

In regard to managers and other personnel, Mr. Justice Ball said:

> [192] In my view the provisions of the PSES Act go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike. For example, the provisions of s.7(2) of the PSES Act are not required to ensure the delivery of essential services to the community during a strike. As a reminder, s. 7(2) states that "…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." The apparent purpose of s. 7(2) is to enable managers and non-union administrators to avoid the inconvenience and pressure that would ordinarily be brought to bear by a work stoppage. Yet if qualified personnel are available to deliver requisite services, it should not matter if they are managers or administrators. If anything, s.7(2) works at cross purposes to ensuring the uninterrupted delivery of essential services during a work stoppage. [140]

This remark can be better understood when considered against jurisprudence in other provincial jurisdictions that utilize the designation model. In one of the very early decisions on essential services in British Columbia the LRB explained that the best interests of the public were served when an essential service strike was ended. Thus pressure must also be brought to bear upon the employer side and the union side of the collective bargaining relationship. This is accomplished in part by having managers and other personnel perform essential duties during a strike or lockout. After quoting at length from the text by Paul Weiler, one of the architects of the B.C. Labour Code, in "Reconcilable Differences", the LRB said:

> We quote this lengthy passage because it aptly describes the tensions at work in matters arising under Section 73. On the one hand, the Board must designate those services performed by the striking union members which are essential to the life, health or safety of the public. On the other hand, the Board designates the manner in which the facility, production or services is to be run or maintained with a view to preserving the maximum disruption to the employer's operation while putting out of work the maximum number of union members. By

[140] *The Saskatchewan Federation of Labour v. Saskatchewan 2012* SK QB 62 (Canlii) at p. 94

maximizing the amount of economic pressure on both sides, the Board places the greatest degree of economic pressure possible on the parties to conclude a collective agreement and thus end the collective bargaining dispute.

The price of the continued right to strike or lockout in an essential service is that the strike or lockout is controlled by the board. The normal quid pro quos of the private non-essential services do not govern in an essential service dispute regulated by Section 73. Rather, in a controlled strike or lockout, the union loses the right to try to close the operation down, and the employer loses the right to hire replacement workers...[141]

The Board's directions were aimed at both the hospital and the union, the hospital was required to canvass and report about the availability of other workforce resources. This review of workforce resources included a review of the management and supervisory staff of the hospital, members of other bargaining units who were not on strike, and "have been invited by the trade union to cross its picket lines", professional personnel at the hospital, and auxiliary and volunteer services normally available to the hospital. With this information, the Board then determined which, if any, designated members of the HEU would be required to continue to work through the lawful strike. The Board's order was structured to stretch the administrative capabilities of the hospital management, thereby placing the maximum pressure on the employer. On the other hand, the Board designated the fewest number of HEU workers necessary to maintain the essential services of the hospital during the currency of the lawful strike in order to place the maximum number of union members on strike...[142]

Rather than exercising its discretion in a neutral way with a view to maximizing the economic pressure on both sides to advance the public interest by shortening a labour dispute affecting an essential service, while at the same time ensuring that the labour dispute does not interfere with the provision of that level of services necessary or essential to prevent immediate or serious danger to life, health or safety, the employer would have the Board act in a manner which directly and powerfully advances the employer's interest. A Board order directing members of the HEU to work alongside hired paid replacements would have the certain result of removing any impact of the lawful strike on the employer. This result does not operate in the long term interest of the public, simply because without any economic pressure on the employer's side of the equation of the labour dispute, the dispute is likely to endure for a much longer time and to result in a much longer disruption to the public's access to that essential service. This is not the result contemplated by Section 73... [143]

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[141] *Beacon Hill Lodge* BCLRB No. 2/86 at 14-15
[142] *Beacon Hill Lodge* BCLRB No. 2/86 at 16
[143] *Beacon Hill Lodge* BCLRB No. 2/86 at 16-17

Should the negotiation of essential services agreements occur only after it is clear that the union and employer are unable to conclude a collective agreement? If yes, should the parties be required to negotiate an essential services agreement prior to taking strike or lock-out action?

CUPE says the parties are the ones best situated to determine the timing of the essential service designations within the broader collective bargaining and should be left to do so, though it should occur no earlier than the serving of strike notice. However, either should be able to apply to the LRB for mediation or adjudication on an expedited basis in order to ensure designations prior to a strike or lockout commencing.

In the event that the employer and union are unable to conclude an essential services agreement, should the parties be required to submit to mandatory conciliation?

Mediation rather than conciliation should be expected but not mandatory. However, there may be some instances where the timing of the giving of a strike or lockout notice leaves little time for it. In those circumstances, the LRB should be sufficiently resourced to conduct expedited hearings outside of normal business hours and be given the power to make expedited and/or interim orders.

If conciliation is unable to achieve an essential services agreement, should arbitration be provided to conclude the agreement?

CUPE says the LRB should make adjudications or designation levels but that interest arbitration should be available to conclude the collective agreement where the designation levels are so high as to preclude meaningful access to the right to strike.

What role should the LRB play in resolving any impasse around the provision of essential services during a dispute?

The LRB should have the statutory authority and be sufficiently resourced to conduct expedited proceedings to determine outstanding designations, outside normal business hours if necessary, as well as to render expedited and/or interim designation orders with sufficient speed as to not delay the union's access to strike activity at a time of their choosing.

If no essential services agreement is in place between a public employer and a trade union, what mechanism should be in place to ensure that an appropriate level of essential services continues to be provided?

The LRB should have the statutory authority and be sufficiently resourced to conduct expedited proceedings to determine outstanding designations, outside normal business hours if necessary, as well as to render expedited and/or interim designation orders with sufficient speed as to not delay the union's access to strike activity at a time of their choosing.

Appeals Penalties and Administration

Labour Relations Board

Amalgamated Tribunal

The notion of an amalgamated tribunal is not a new concept in Canada. British Columbia recently explored the concept and rejected it. The B.C. Minister of Labour engaged the B.C. Law Institute (BCLI) to study the possible implementation of a tribunal that would hear matters that existing statutes put under the jurisdiction of three separate tribunals: the Labour Relations Board, the Employment Standards Tribunal and the Human Rights Tribunal. The single tribunal model that was proposed included the investigative, adjudicative and appellate functions of the administrative machinery that was attached to all three tribunals.

In the conduct of their exploration of the proposal, the BCLI undertook comparative legal research, both international and domestic, and engaged in stakeholder consultation jointly with the Ministry, through in-person meetings and the receipt of submissions.

In the Executive Summary the BCLI said:

> The findings section of this study paper is lengthy and this executive summary is not able to outline all of our findings but rather highlights some key findings and puts forward our general conclusion. In brief, the BCLI's comparative research did not uncover any existing system for workplace dispute resolution significantly similar to the proposed model. The UK is the only jurisdiction we studied in which the employment tribunal has exclusive jurisdiction over almost all disputes arising from both unionized and unionzed [sic] workplaces, including discrimination complaints. However, differences in employment, labour and human rights law between UK and BC make comparisons unreliable…
>
> Moreover, it is questionable how successful the UK system has been in terms of addressing human rights in the workplace. Statistics of the Employment Tribunal present a very low discrimination claim success rate of 2-3%. However, although the UK does not have a specialized domestic human rights tribunal, a worker may still possess a right of appeal for breach of the *European Convention on Human Rights* to the

European Court of Human Rights, provided all domestic remedies have been exhausted.[144]

One of the premises of the Workplace Tribunal is that it would concentrate workplace dispute resolution in a manner that is not currently possible because workplace human rights are currently adjudicated in several for a. In particular, one of the concerns underlying the reference to the BCLI is the overlap in jurisdiction over workplace discrimination complaints involving unionized employees between labour arbitrators and the HRT. While the proposed model would appear to integrate decision-making to some degree, it would also fragment human rights adjudication in BC. This outcome renders the case for the Workplace Tribunal somewhat less compelling. At the consultation participants raised a number of alternative solutions to the issue of overlap in jurisdiction. These alternatives merit consideration if further reform is considered. That said, there was significant disagreement amongst participants over whether the existing overlap in jurisdiction was problematic.

The BCLI consultation revealed dissatisfaction with the current system in BC. However, dissatisfaction was not universal and was characterized by serious divisions among the stakeholder sectors. One vision of a Workplace Tribunal envisages a newly created, well-funded tribunal, with efficient costs and experienced and proficient members. However, it is not clear that creating a new entity will result in improved funding, better efficiency and greater experience and that existing problems will not be imported into the new tribunal.[145]

It is clear that the fate of the HRT will have a significant impact on British Columbians and that stakeholders hold strong and polarized opinions about reform in this area. If the Ministry intends to pursue any reform of jurisdiction over human rights complaints arising out the workplace, we recommend further consultation in a more public manner. Consultation should be informed by a detailed, publicly available discussion paper. This recommendation flows both from the consultation carried out as part of this study, which was necessarily limited by time and the terms of reference, and from our comparative analysis. In each jurisdiction that we studied, the success of significant reform in the area of employment and labour law appears connected to

[144] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p. 5-6
[145] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p. 6

> the extent to which the government provided stakeholders with an opportunity for meaningful consultation.[146]

The BCLI's comparative research included the UK, Germany, Sweden, New Zealand, Australia and The European Court of Human Rights and the Convention on Human Rights. The BCLI also considered provincial tribunal configurations. In particular, the BCLI considered the Ontario experience which had, in the late 1990s amalgamated the determination of employment standards and Occupational Health and Safety matters with the former role of the Ontario Labour Relations Board which dealt with unionized labour relations. The BCLI observed:

> Based on our review, it appears that the merger has presented a few problems. First, at the OLRB there are problems of balance where a party is unrepresented. The OLRB, being created to respond to work situations where both parties commonly had representation, experiences challenges in dealing with reviews of employment standards cases where the parties may not have counsel. There is a danger of pressure on the mediator and the tribunal member to assist parties, which can be problematic, resulting in a blurring of roles.
>
> Second, historically, the OLRB has perceived its role as being one of settling disputes, with no policy constraints on the content of a settlement, providing the parties are satisfied. The *Employment Standards Act* sets out basic minimum standards out of which a non-union employee cannot contract. The pure settlement model may not be appropriate where, as noted in the previous point, non-union workers may not have representation and may be part of social groups that experience various barriers to access to justice, such as language barriers or recent immigration. We understand that the OLRB has applied an aggressive settlement philosophy to the mediation and resolution of reviews of employment standards disputes and does not interfere where parties appeared willing to settle for less than their statutory rights.[147]

CUPE says that any settlement of an employment standards complaint that is less than the statutory minimum should be vigorously opposed.

In 2001 Ontario explored the addition of human rights adjudication, citing the proportion of the human rights case load comprised of employment related

[146] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p. 7
[147] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p 33

claims. The BCLI observed this proposal was not implemented and the Ministry of Labour withdrew the proposal without publishing its reasons. The decision of the government to not implement the proposal may be linked to a number of the following criticisms that were levied against the proposal:

1. It was not clear that the proposal would result in cost savings.
2. The proposal was not grounded in adequate research.
3. In particular, in terms of research, the move toward greater amalgamation of tribunals did not reflect any assessment of whether amalgamation to date, such as the OLRB acquiring appellate jurisdiction over employment standards matters, had been successful.
4. The proposal's stated purposes were not convincing. The very brief proposal did not explain how the intended reform would achieve its ostensible objectives, such as elimination of multiple remedies, increased effectiveness of tribunals and one-window access.
5. The inconsistency of the proposal with specialized jurisdictions, one of the special advantages of the administrative justice system, was not addressed.
6. The brevity of the proposal invited speculation as to the government's motivations for reform, including the possibility that the proposal was motivated by a desire to undermine the independence of decision makers.
7. The content of the brief proposal was very general and failed to address a number of critical issues:

    i) How the dilution and specialization of expertise inherent in the proposal would be addressed;
    ii) How the proposal's call for standardized processes could be reconciled with the administrative justice system's need for flexible processes responsive to the particular needs of each tribunal's particular mission;
    iii) How the proposal would deal with the conflicting standards of review currently applicable to decisions of the various targeted tribunals;
    iv) Whether there would be an objective selection process for identifying those existing adjudicators who would and would not be appointed to the new tribunal (the failure to address this issue raised further concerns as to how the integrity of the system would be impacted);
    v) Failure to guarantee the new tribunal's 30-50 adjudicators would be appointed from the ranks of approximately 150 incumbents;
    vi) Failure to provide transitional provisions to ensure the continued independence of incumbent adjudicators over the months;

8. The "Insubstantial and private nature of the proposal's development process, coupled with the surprising shortness of the public consultation process (less than three months) gave the impression of a government rushing to judgment."

9. Either in addition to or as a result of the above problems, the proposal did not have the support of key stakeholders.[148]

In summary, the BCLI observed that the first consolidation had experienced some difficulties. CUPE observes that some of the BCLI comments about the Ontario exploration of adding human rights adjudication are comments we make in regard to shortcomings in Saskatchewan's current process – lack of specificity in the proposal, brevity of public consultation, private nature of proposal development.

Further, several of BCLI's observations apply to all amalgamation of tribunals generally – there is no indication that such an amalgamation would result in cost savings, how it could eliminate multiple remedies (as it is the legislation, not the configuration of the tribunal) that creates that potential. Most importantly the BCLI observed the dilution of specialized jurisdictions, may in turn dilute the level of deference given the decisions by such tribunals is judicial review proceedings. We will return to this point below.

An important consideration in the debate over an amalgamated tribunal is the impact it may have upon the predictability of jurisprudence. The decisions of administrative tribunals can be reviewed by the courts in what is called a "judicial review" proceeding. Where the decision being reviewed has been made by a tribunal exercising specialized expertise, the courts treat the decision with deference and are less likely to disturb it than decisions made by other bodies. This leads to a predictability in the application of the law that parties rely upon to order their affairs so as to avoid disputes. On this subject the BCLI commented:

> Merging tribunals presents a risk of diluting expertise because decision makers must possess a broader knowledge base. An ostensible purpose of administrative tribunals is to increase subject matter expertise; combining tribunals and granting a broad mandate may be counter-productive in terms of increasing subject matter expertise.
>
> A few participants expressed concern over a potential loss of curial deference if tribunals are merged to form a tribunal with a broader jurisdiction over employment and labour issues. Curial deference is rooted in judicial appreciation of subject matter expertise possessed by specialized tribunals. Would the jurisdiction of the Workplace Tribunal

[148] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General*. October 31, 2010, p 33-34

> be too broad to attract significant deference? An unintended consequence of merging tribunals could be increased judicial review.[149]

CUPE is likewise concerned that the dilution of expertise will lead to less curial deference, more frequent overturning of tribunal decisions and ultimately confusion in the law. Such confusion has a significant impact in the labour relations sphere that is populated by relationship litigants rather than transactional one or one-time, litigation adversaries.

CUPE says that an amalgamated tribunal having responsibility for 15-17 statutes should not be pursued. Many of the statutes referenced in the government's paper are focused on individual rights, while others are focused on collective rights. This creates confusion as to the party having standing to pursue those rights in cases that may trigger multiple statutes. This also raises concerns of fairness in combining systems that encourage self-representation (such as labour standards claims) with those where experienced lay-advocates and lawyers dominate the landscape.

An amalgamated tribunal would be faced with trying to conflate adjudication models which are transactional in nature (single labour standards or wage recovery claims) and relationship based (union-management relations).

The UK experience with an amalgamated tribunal revealed a new battleground for disputes: the meaning of changes in jurisdiction addressed some issues it would generate others to take their place, netting the system no advantages.

In 2000, New Zealand announced legislative changes without consultation that set off a maelstrom of stakeholder opposition.

Similarly, in 2005 Australia proposed legislative change that met with what BCLI described as "a successful and aggressive campaign to highlight the weaknesses of the law".[150] Those amendments had to be withdrawn. After a consultation process, a newly configured set of legislative revisions was proposed

These experiences provide cautionary tales for rushed amalgamation, and rushed legislative change generally. Indeed the BCLI concluded:

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[149] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p 40

[150] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p 35

> In terms of processes informing law reform, the experience in New Zealand, Australia and Ontario confirms that labour is a delicate area for reform and that meaningful and inclusive consultation has a direct bearing on the potential success of a new regime for dispute resolution.[151]

The BCLI's research conclusions are noteworthy:

> a) It is not clear from our research and consultation that the overlap in jurisdiction between the HRT and the labour arbitration system over workplace human rights disputes is resulting in either conflicting jurisprudence or concurrent cases running in multiple fora. Only a few examples were referenced during the consultation to suggest that this is an existing problem of the current system. Rather, although the BCLI did not conduct a quantitative analysis of this question, data presented at the consultation suggested that duplication of proceedings is rare in terms of the merits of a discrimination allegation being heard before both the HRT and a labour arbitrator, either concurrently or sequentially. That said, concerns were raised about the costs and other matters associated with filing an application to dismiss – one of the primary processes set out in the *Human Rights Code* for addressing the overlap in jurisdiction…
>
> A recurring theme of the consultation sessions was feedback that the ESB does not have adequate resources to fulfill its mandate with respect to workplace minimum standards for the non-unionized sector. Most participants described the self-help forms and approach as ineffective, and as imposing additional barriers to access to justice, especially for vulnerable and marginalized workers such as immigrants and people for whom English is a second language.
>
> All three current areas of dispute resolution – human rights, labour and employment standards – would benefit from greater public funding to enhance the quality of mediation services. The consultation revealed significant lack of public confidence in publicly-funded mediation.[152]

[151] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p 49
[152] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p 50

The BCLI ultimately concluded that it was premature to reach a conclusion of the appropriateness of an amalgamated tribunal. It suggested a fulsome investigation into the problems posed by focused tribunals, if any, which would form the foundation for the development of a proposed model with all of the necessary specificity to permit analysis. This, they suggested, should be followed by extensive consultation on the specific proposal. They said:

> While theoretically the concept of a Workplace Tribunal for BC has some merit, the proposed model leaves too many key features of the system unclear to enable a full analysis of the strengths and weakness of the Workplace Tribunal. One vision of a Workplace Tribunal envisages a newly created, well-funded tribunal, with efficient costs and experienced and proficient members. However, it is not clear that creating a new entity will result in improved funding, better efficiency and greater experience and that existing problems will not be imported into the new tribunal.
>
> Employment, labour and human rights law all involve significant areas of expertise. It is not clear that dividing or combining bodies in any particular fashion will, by itself, promote better expertise or better administrative justice in any one area. At the same time, it does not necessarily mean that these areas should be administered in discrete silos. A range of solutions might address the problems identified by consultation participants. The Workplace Tribunal is only one possible solution. Other solutions mentioned in the previous section would involve a lesser degree of legislative change and may be less polarizing.
>
> Our research identified some of the legal issues raised by the proposal to merge employment labour and human rights adjudication in BC, but many questions merit further examination and debate. The further exploration of any reform should ideally succeed or be embedded within a process that involves first an investigation of the problems with the existing system. The consultation process revealed dissatisfaction with the current system in BC. However, dissatisfaction was not universal and was characterized by serious divisions among the stakeholder sectors. Any significant legislative change in the institutional structure for the resolution of workplace disputes should not be undertaken without full, open, and informed public consultation.[153]

[153] British Columbia Law Institute, *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010, p 51-52

While CUPE does not support an amalgamated tribunal, we also say that the issue is of sufficient significance that if it is to be pursued, it warrants further consultation once a specific draft model proposal has been developed.

Should the role of the LRB be expanded to include hearing all appeals related to employment standards and occupational health and safety matters?

CUPE says the LRB should not hear appeals on labour standards or occupational health and safety matters. The tribunals established by each of those statutes should hear appeals under the statute. Usually such "appeals" are limited to very narrow grounds of review with another panel of the same tribunal such as is done under the *British Columbia Labour Relations Code*.[154] Alternatively there is a second decision making body within the mechanics of the statutes.

Is the current structure of the board adequate and appropriate? Why or why not?

CUPE says the LRB should move to a larger board supported by mediators and officers. CUPE suggests a stepped transition to an all Vice-Chair model in order to maximize the Board's hearing capacity. CUPE suggests as an interim measure an increase in the number of matters that can be adjudicated by a Vice-Chair sitting alone.

Are the terms of office adequate and appropriate? Why or why not? Are the powers of the Board adequate and appropriate?

CUPE is not opposed to the current provisions dealing with terms of office. However, CUPE does say that particularly in the area of essential services, panels should include temporary wingers who have experience in operations in the sector being designated, and coming from both management and labour.

CUPE also says that particularly in essential services, expedited hearings using a variety of hearing methods short of a full evidentiary formal hearing, must be within the Board's powers.

[154] British Columbia *Labour Relations Code RSBC 1996*

Role of the Officer

CUPE sees a role for officers attached to the LRB. As part of CUPE's support for short time frames for conducting representation votes, there is a role for officers in facilitating that process. CUPE says new certification applications should be assigned to an officer for investigation and the production of a standard form of report. That investigation includes an examination of payroll records, the development of a tentative voting list, tentative voting details (date, time and location noting the employer's position on the appropriateness of the bargaining unit, accuracy of the employer's name and identity. Information identifying membership support must remain confidential. This report should be in the hands of the parties before the conduct of a vote. CUPE says the LRB should convene a short hearing to deal with issues arising from the report to be heard by a Vice-Chair sitting alone. This report can identify and refine any issues between the parties and make more efficient use of the Board's adjudicative resources in representation matters.

CUPE also supports representation votes being conducted in person at employee worksites over mail-in ballots. CUPE sees a role for officers to be available to supervise votes in rural and remote locations.

Are the existing powers of the officer appropriate and sufficient? Why or why not?

CUPE says that the tasks assigned to "officers" under the TUA should include investigations into representation applications, and the supervision of representation votes.

Penalties

The purpose of imposing financial penalties on employers is to act as a disincentive to breaching statutory requirements. Where penalties are imposed they need to be significant enough that they are not something the employer will simply take in stride as a cost of business. They need to at least fully offset the financial gain the employer obtains from the breach.

As to fines of individual workers, CUPE does not support such fines. This is a new feature in the current legislative amendments in the area of Occupational Health and Safety. Workers do not have control over the health and safety decisions made by employers and should not bear any financial consequence for matters outside of their control. They particularly should not be subjected to escalating penalties as "repeat offenders" for that reason.

However, repeat offender employers demonstrate their contempt for the law by that repetition. They should be subjected to escalating fines and other consequences such as payroll and employment audits to expose other breaches that may not have been the subject of an active complaint. These more invasive consequences provide additional protections for workers who are too vulnerable to be able to complain. This is a particularly compelling method of enforcement in the area of employment standards where workers are often in marginal employment. CUPE would advocate penalties in the circumstances of any employment standards breach.

Are the penalties in Saskatchewan's labour legislation sufficient to act as a deterrent to non-compliance? If not, what might be done to enhance compliance and address persistent offenders?

CUPE says current penalty levels imposed on employers are too low to act as a deterrent. There should continue to be penalties, but the size should be increased significantly on an escalating scale dependent upon the frequency with which the employer breaches any aspect of the statute.

Should the employment standards legislation allow for administrative penalties to be assessed by the Ministry? If so, what type of violations should administrative penalties be used for?

CUPE says that the enforcement of a statute that protects the most vulnerable workers is particularly important. Consequently, CUPE does not oppose penalties in employment standards enforcement.

Where there are repeat violations of the legislation by employers, should the Ministry have the ability to initiate payroll and employment audits of employers, at the expense of the employer?

CUPE supports investigations into the records of repeat offenders to protect the rights of those vulnerable workers who do not feel they have the economic liberty to initiate a complaint.

What types of safeguards should be in place to permit an employer to have that determination reviewed or challenged?

An appeals process within the machinery of any tribunal is the best means of reviewing any determinations made under the tribunal's empowering legislation.

Should summary offence ticketing be applied to violations of employment standards? If so, what type of violations?

CUPE has greater concern that vulnerable workers be protected from retaliation by a penalized/ticketed employer than with the form by which the penalty is imposed.

Appeals

Specialized tribunals are usually comprised of people with levels of training and expertise in a very specific area of application. This gives tribunal members a perspective on issues that are outside of the experience of a generalist. Having appeals within tribunals maximizes the contribution those tribunals can make to the development of law and policy.

Consequently CUPE does not favour an amalgamated tribunal at first instance or on appeals. CUPE says that wherever there are appeals within a tribunal, both levels should stay within the expertise of that specific tribunal. CUPE does not support a single tribunal for all types of appeals. For example, Worker's Compensation appeals should not be heard by the Labour Relations Board.

Keeping appeals within a tribunal also ensures that the unrepresented individual applicant has access to justice at an appeal level before being forced to courts where appeals are cost prohibitive for individuals.

CUPE says that the notion of "forum shopping" is exaggerated. In the report of the BCLI on the possible amalgamations of tribunals the issue of overlapping jurisdiction was explored. Some tribunals had statutory provisions permitting them to defer to another forum. Indeed one of the tribunals had every single application to defer in a year granted. Other tribunals had made it a principle of their jurisprudence that in certain matters they would defer to another forum.

> It is not clear from our research and consultation that the overlap in jurisdiction between the HRT and the labour arbitration system over workplace human rights disputes is resulting in either conflicting jurisprudence or concurrent cases running in multiple fora. Only a few examples were referenced during the consultation to suggest that this is an existing problem of the current system. Rather, although the BCLI did not conduct a quantitative analysis of this question, data presented at the consultation suggested that duplication of proceedings is rare in terms of the merits of a discrimination allegation being heard before both the HRT and a labour arbitrator, either concurrently or sequentially. That said, concerns were raised about the costs and other matters associated with filing an application to dismiss – one of the

primary processes set out in the *Human Rights Code* for addressing the overlap in jurisdiction.[155]

In CUPE's view the recent Supreme Court of Canada decision on overlapping jurisdiction sets out the law with sufficient clarity that legislative change is unnecessary.[156]

Is there a need for all these appeal mechanisms? If so, why?

CUPE says appeal mechanisms are important features of specialized tribunals and should be retained.

Should the issue of forum shopping be addressed in legislation? If so, how?

Overlapping jurisdiction issues are sufficiently addressed by recent SCC jurisprudence.

Should a single appeal body, such as the Labour Relations Board, be responsible for the various types of appeals? If so, how?

CUPE opposes a single tribunal to hear appeals, just as we oppose a single tribunal to hear matters of first instance.

How would you see such an appeal body structured?

CUPE does not support a single tribunal to hear appeals, regardless of the structure.

[155] British Columbia Law Institute. *Workplace Dispute Resolution Project: Report to the Ministry of Labour and the Ministry for the Attorney General.* October 31, 2010 at p. 50

[156] *British Columbia (Workers' Compensation Board) v. Figliola*, 2011, SCC 52 [2011] 3 SCR 422

Should qualifications for the members be established in legislation?

CUPE says that the qualifications for appointment should be responsive to the specific area of expertise and should not be established by legislation.

Should provisions limit the number of reviews of a single matter?

CUPE says that access to justice is an important issue in democratic justice. Consequently, appeals should not be artificially limited.

Administration

General Discussion

CUPE opposes the consolidation of statutes into a single omnibus statute as serves no real purpose. CUPE has noted that the only example of a consolidated statute is the federal code which operates part by part, as if each part were a separate statute. That such a result is apparently assumed even by the government, is evidenced in the posing of the questions about review, particularly the first that references the potential for a review that would be conducted for "each part of the Act" on some schedule.

While changes in policy direction can be expected when governments change, the polarized extremes of the policy shifts Saskatchewan has experienced are antithetical to the pursuit of orderly collective bargaining. The uncertainty caused by these dramatic shifts makes it difficult for parties to order their affairs. This is especially so where either statutory protections are included in collective agreements by incorporating statutory references, or where statutory protections are relied upon on issues where collective agreements are silent. For those provisions to be then changed in extreme ways undermines the foundation on which the collective agreement was negotiated.

CUPE advocates moderating the severity of shifts in policy that have been typical of the past, so as to permit parties to anticipate predictable outcomes of their collective bargaining agreements, and therefore be able to order their affairs with more certainty. The predictable outcome of doing otherwise will be to make collective bargaining following legislative changes far more volatile as unions endeavor to restore through bargaining any protection that is lost through legislative change. As there are some very major sectors in collective bargaining in the current and upcoming year, that could make for a very turbulent time, just when economic pressures are also unpredictable.

Statutory Reviews

CUPE also advocates stability being accomplished by more frequent and less unwieldy statutory review. A review of virtually all labour related legislation is so diffuse in focus as to prevent the thorough and thoughtful consideration each statute deserves. CUPE advocates that each statute be amended to provide for a periodic review of that statute on a predictable schedule and that

those reviews be staggered so as to avoid the entirety of the worker/management relationships in the Province being in a state of upheaval. CUPE has considered a model for such a review and suggests the following: that the Minister appoint a committee of special advisors to undertake their own continuing review of a particular piece of legislation, which advisors would conduct the investigation they find appropriate, make recommendations concerning for amendments if needed and report the views expressed in their consultation process. Such a review should occur on a cycle of every 4 years for the primary statutes (TUA, LSA, WCB, OHS, Pensions). Supplementary statutes could be reviewed less frequently. The reviews should be staggered so that they do not all occur in the same year.

If a single Act were created, should there be a review process built into each part of the Act? Why or why not?

CUPE says that there should not be a single consolidated statute. However, regular review mechanisms should be inserted into all the statutes with staggered review schedules.

How should the review or reviews be conducted (i.e. by a Committee similar to the council)?

CUPE supports reviews conducted by committees of special advisors appointed under the various statutes and using a consultative process.

How often should the reviews be conducted?

CUPE says reviews should be conducted on staggered rotating schedules to avoid upheaval in all facets of worker protections at the same time.

Conclusion

CUPE remains concerned about the process used to conduct this review. In the recent past single statutes have had the benefit of review processes that provide a longer period for stakeholders to express their views. This in turn provides the opportunity to give issues a more fulsome discussion. This inequality of voice is of even greater concern in regard to changes that will impact upon unrepresented workers who have no representative voice.

CUPE has made suggestions aimed at addressing the many inequalities we observe in current labour relations policy.

In doing so CUPE has suggested moderate statutory change as we believe that wild swings in labour relations policy are not in the long term interests of the stakeholders. Where a change in procedure could address any of those inequalities, we have opted to make those suggestions rather than a substantive legislative change. We have made those procedural suggestions understanding that their success will be dependent upon a commitment by government to appropriately resource the Labour Relations Board.

Two departures from that approach are in the area of human rights and essential services. We believe that human rights are so fundamental to individual dignity that we must ensure their protection with a robust complaints system that includes a sufficient investigative staff and the restoration of the Human Rights Tribunal. In the area of essential services, we believe that the current legislation having been found unconstitutional makes it necessary to engage in fully statutory reform to have a system based upon sound public policy. We have therefore made detailed suggestions as to how that legislation should be crafted.

We have also aimed to improve the relationships between the stakeholders. We believe that the TUA should have a greater focus on facilitating strong labour relations rather than on intervention, as the means by which to move Saskatchewan ahead for our mutual benefit.

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Appendix

The Intent of the Review

1. **Which Acts should be consolidated?** (pg 37)

   CUPE says that no Acts should be consolidated.

2. **Are there Acts that are not currently the responsibility of the Minister of Labour Relations and Workplace Safety that should be included in a consolidated Act?** (pg 37)

   CUPE says no Acts should be consolidated.

3. **Are there Acts that should not be included in a consolidated Act? What do you see as the benefits or risks of consolidating Acts?** (pg 37)

   CUPE says no Acts should be consolidated.

Employment Standards

4. **Does the existing employment standards legislation adequately meet its intended purpose?** (pg 43)

   CUPE says the myriad of exclusions and exceptions create unsupportable holes in the workers protection safety net.

5. **Should all provisions governing employment standards be contained in the same statute?** (pg 43)

   CUPE says that no Acts should be consolidated.

Scope of the Labour Standards Act

6. **Should the Act apply to more or fewer categories of employment or industries? Why or why not?** (pg 48)

   CUPE says that the LSA should apply in total to all employees, unless they are covered by a statute that is industry specific that provides for other minimum standards. CUPE recognizes that many sectors have unique facets to their enterprise and that it is appropriate to consider the voices of those involved in those sectors as to how the baseline protections should be

tailored to that sector. Where that is the case, CUPE encourages a consultation with the stakeholders in those industries.

7. **The Act currently applies to standard employer-employee relationships. As a result, some individuals' work arrangements may not be covered by the Act (i.e. working remotely or being a self-employed independent contractor). Given the changing nature of work relationships, should the Act be changed to cover these new work arrangements?** (pg 48)

   CUPE says the LSA already applies to variations of the employment relationship and that no revisions are necessary to accomplish that objective. However, the LSA quite properly does not apply to the "self-employed". That is not an employment relationship, given that the employer and the employee are the same person.

Employment Agencies

8. **Should labour legislation continue to prohibit the charging of a fee for finding employment for an individual? Why or why not?** (pg 51)

   CUPE says that workers should not pay fees to others for the obtaining of employment at a time when they are economically vulnerable and open to abuse. CUPE does say however that it is legitimate for a prospective employee to pay for education and training in interview skills, resume drafting and other job search techniques and skills that will enhance their opportunities for meaningful employment.

9. **Should there be fines for anyone charging fees to individuals seeking work? Why or why not?** (pg 51)

   CUPE says that there should be fines in an amount significant enough in a single fine to deter the practice. In addition, an amount should be required to be paid to the employee and in an amount equal to what the employee paid.

10. **What would be a reasonable fine?** (pg 52)

    In 2006, the Commission on Improving Work Opportunities for Saskatchewan Residents recommended more substantial fines for repeat offenders of the LSA.[157] CUPE supports that recommendation as a means of encouraging compliance. To accomplish this objective, fines will have to be significant.

    The reasonable fine should be in an amount significant enough in a single fine to deter the practice. In addition, an amount should be required to be paid by the agency to the employee to reimburse the fee paid by the employee. This avoids there being any profit motive for the agency's charging of an illegitimate fee. It avoids the fine being merely a cost of doing business. Where the beneficiary of an *ex juris* fee is a Canadian employer, that employer should pay both the fine and the amount of the fee paid by the immigrant employee in their country of origin, thus reimbursing the employee.

Hours of Work

11. **Should employees and employers be able to enter into mutually agreed upon flexible work arrangements without requiring a permit?** (pg 56)

    CUPE says the permit system should be retained, as an oversight to prevent employer abuse. CUPE suggests that the permit process be augmented to ensure a compelling need is provided to support the specific permit request and to verify employees' agreement to the adjustment.

12. **What limitations should there be on hours of work, if any?** (pg 56)

    CUPE says the current limitations on daily week and hours of work should be retained.

13. **Are the overtime provisions appropriate, adequate and clearly set out so as to ensure compliance?** (pg 56)

    CUPE says that, apart from the many unsupportable exceptions from the overtime provisions created by the Regulations, which issue has been addressed above, the overtime provisions are appropriate and should be retained.

[157] *Final Report and Recommendations of the Commission on Improving Work Opportunities for Saskatchewan Residents*. February 2006 Executive Summary at p. 14.

14. **Should permits continue to be required in certain circumstances? If yes, please describe the circumstances.** (pg 56)

    CUPE says the current permit system should be retained.

15. **Are the rest and break provisions appropriate?** (pg 56)

    CUPE says that the number of exceptions created by the Regulations should be addressed. In addition, the current rest and break provisions would be more appropriate if the scheduling of breaks was regularized.

16. **Should the hours of work provisions under the *Fire Departments Platoon Act* be amended?** (pg 57)

    CUPE's says the discussion of this statute should be limited to those parties to whom its provisions apply in a consultation process that is industry/statute specific.

17. **Should these provisions be included in the hours of work provisions for all other workers?** (pg 57)

    CUPE's position is that the discussion of the appropriateness of the *Fire Departments Platoon Act* (FDPA) to fire departments should be limited to those parties to whom its provisions apply in a consultation process that is industry/statute specific.

    If the question is intended to inquire about "consolidation" of the Fire Department Platoon Act into a single labour standards statute, CUPE says that the LSA is already a labyrinth of exceptions and that there is no benefit to be gained by consolidating this specific statute into a general one.

    However, if by this question it is meant to inquire whether the specific provisions of the Act should be made part of the hours of work provisions that apply to all other workers, CUPE says that they should not.

Leave Provisions

18. **Are the existing leave provisions clear and easy to understand? Are the current leave provisions sufficient?** (pg 59)

    CUPE says that the leave provisions should take into account the cultural diversity in our communities by contemplating leaves for the religious observances of those who are not of the Christian tradition. CUPE also supports the addition of leave for organ donation and citizenship ceremonies. As to clarity of the provisions, the provisions are clear and understandable. If there is any concern about how easily these provisions are understood by workers, the adoption of website or brochure information circulars would be of assistance. Further, given that many low-wage earning workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

19. **Should Saskatchewan consider expanding the number of leave provisions to include: organ donation, citizenship ceremonies; and others?** (pg 59)

    CUPE supports the addition of organ donation and citizenship ceremonies in the leave provisions. CUPE also advocates adding culturally based leaves to reflect the diversity of our communities.

20. **What would be the impact of changing the leave provisions?** (pg 59)

    CUPE supports the addition of organ donation and citizenship ceremonies in the leave provisions. CUPE also advocates adding culturally based leaves to reflect the diversity of our communities. CUPE believes that the limited extra cost of these expanses to the leave provisions are outweighed by the benefit of expanded social tolerance.

Annual Holiday Provisions

21. **Are the existing annual holiday provisions clear and easy to understand? Are the current annual holiday provisions appropriate and adequate?** (pg 60)

    CUPE says the current provisions are appropriate, adequate, and should be maintained. CUPE also says the provisions are sufficiently clear. However, if there are any concerns about how easily these provisions are understood

by workers, the adoption of website or brochure information circulars would be of assistance. Further, given that many low wage earning workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is their second language.

Public Holiday Provisions

22. **Are the existing public holiday provisions clear and easy to understand?** (pg 61)

    There is some confusion regarding the observance/scheduling of Canada Day, particularly if July 1 falls on a Sunday. CUPE suggests that the public holiday provision be amended to harmonize with regard to Canada Day. CUPE proposes that the LSA provide that in Saskatchewan the scheduling and observance of Canada Day be in accordance with the federal legislation that created it.

    The existing public holiday provisions are otherwise clear and understandable. However, if there is any concern about how easily these provisions are understood by workers, the adoption of website information circulars or print brochures would be of assistance. Further, given that many low wage earner workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

23. **Is the current number of public holidays appropriate?** (pg 62)

    CUPE says the current number of public holidays is appropriate.

24. **What would be the impact of changing the number of public holidays?** (pg 62)

    CUPE does not support changing the number of public holidays.

25. **Should employers and employees be able to observe a public holiday on a different day without requirement a permit?** (pg 62)

    Given the influence employers can have upon economically-dependent or otherwise vulnerable workers, CUPE says that the current permit/order system for altering the observance of statutory holidays should be maintained. As with the hours of work discussion, we reiterate the point

that these workers often do not have the financial stability risk resisting an employer request/demand to reschedule the stat. CUPE says that public holidays should always be observed on their calendar date so that a worker can share those days of rest or occasional observance with their families, unless there is a very compelling reason and the employee consents. To permit movement of dates makes unrepresented workers vulnerable to employer abuse. CUPE says that the permit/order system should be fortified to use offices to investigate employee wishes before the granting of any permit/order.

Notice Provisions

26. **Are the current notice provisions appropriate and adequate? Why or why not?** (pg 64)

    The current provisions requiring employers to provide notice to employees are appropriate.

27. **Should employees be required to provide written notice when terminating their employments? If yes, what would be a reasonable notice period?** (pg 64)

    Employees should not be required to give notice when terminating their employment. However, preventing employer retribution could encourage them to do so.

28. **What circumstances would warrant the waiving of the notice period?** (pg 64)

    Waiver of a notice period should be at the employee's option and initiative only.

Minimum Wage

29. **Should the minimum wage be indexed? If so, how should the minimum wage be indexed?** (pg 68)

    CUPE says that the minimum wage should be immediately raised to $10. The Minimum Wage Board should be immediately tasked with investigating the LICO and living wage for Saskatchewan with a view to implementing a further increase in the minimum wage to allow a full-time worker responsible for themselves alone to exceed the higher of the LICO or the living wage. From that time forward, the minimum wage should, at a

minimum, be indexed to the cost of living annually. CUPE however say the more responsible approach would be to further increase the minimum wage by whatever amount is necessary to continue to meet the higher of the LICO or living wage.

30. **If the answer to the previous question is yes, is there a need to continue the Minimum Wage Board?** (pg 69)

    CUPE says that there continues to be important work to be done by the Minimum Wage Board and it should be continued.

31. **Is the list of matters the Minimum Wage Board can review and made recommendations on appropriate and adequate?** (pg 69)

    CUPE says that in addition to its current responsibilities, it should also be tasked to study annually whether a cost of living increase in the minimum wage is sufficient to continue to meet the higher of the LICO or the living wage.

32. **Should the list be altered? If so, how?** (pg 69)

    CUPE says that in addition to its current responsibilities, it should also be tasked to study annually whether a cost of living increase in the minimum wage is sufficient to continue to meet the higher of the LICO or the living wage.

33. **Should employers be able to pay disabled workers wages lower than the minimum wage? If so, under what circumstances?** (pg 69)

    CUPE emphatically says that the discounted minimum wage for disabled workers should be removed from the statute/regulations. CUPE does draw a distinction between employment and therapeutic work skills training programs which are a form of education, rather than a form of employment.

Payment of Wages

34. **Are the requirements for payment of wages understandable? Why or why not?** (pg 72)

    CUPE says that any doubt about the employer requirement to provide a written pay statement regardless of payment method should be clarified. The current provisions are otherwise clear and understandable. However, if there is any concern about how easily these provisions are understood by workers, the adoption of website information circulars and print brochures would be of assistance. Further, given that many low wage earner workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

35. **Are the time frames for payment of wages appropriate or adequate? Why or why not?** (pg 72)

    CUPE says that the time frames for the payment of wages are appropriate.

Collection of Wages

36. **Are the current provisions adequate and appropriate to address the need to ensure the payment of wages to employees and former employees?** (pg 73)

    While the effect of the current provisions is adequate, the language of the WRA should be revised to use more contemporary words in order for it to be more easily understood. Further any concerns about how easily these provisions are understood by workers can be addressed by the adoption of website circulars and print brochures that would be of assistance. Further, given that many low wage earner workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is a second language.

Equal Pay

37. **Are the current provisions adequate and appropriate?** (pg 75)

    CUPE says the current pay provisions fall short of equal pay for work of equal value, and thus are insufficient to meet Canada's international obligation or Saskatchewan's public policy needs.

Discriminatory Actions

38. **Are the discriminatory action provisions understandable? Why or why not?** (pg 77)

    CUPE says that the current provisions are understandable. However, if there are any concerns about how easily these provisions are understood by workers, the adoption of a website or brochure information circulars would be of assistance. Further, given that many low wage earning workers are recent immigrants, having those resources translated into multiple languages would assist workers for whom English is their second language.

39. **Are the discriminatory action provisions appropriate and adequate? Why or why not?** (pg 77)

    The protections of these provisions should be modified so that the protection against termination or other adverse employment consequences for an injured worker receiving Workers' Compensation Benefits does not have a time restriction. CUPE also says that the prevention of discrimination of all kinds would be better protected by the restoration of the Human Rights Tribunal.

Labour Relations

40. **Does the existing labour relations legislation adequately meet its intended purpose?** (pg 78)

    In keeping with the discussion of labour relations at the commencement of our response, CUPE says that the existing labour legislation does not adequately meet its intended purpose.

41. **Should all provisions governing the conduct of labour relations be contained in the same statute?** (pg 78)

    CUPE says that no statutes should be consolidated.

Scope Under *The Trade Union Act*

42. **Should the TUA be amended to clarify what is meant by "managerial character" and "confidential capacity with respect to the industrial relations"?** (pg 88)

    The TUA provisions and the jurisprudence developed under them are sufficient if one added two clarifications: that the employer should be required to organize its affairs to minimize the number of people excluded from collective bargaining so as to minimally impair the freedom of association; and that those "managers" in title and in duties, should be able to access union representation in a bargaining unit separate from those they manage.

43. **Should employees with supervisory responsibilities be in the same union as the employees they supervise? Why or why not?** (pg 89)

    Front-line supervisors should be represented in the same unit by the same union as the employees that they supervise. In rare and extraordinary circumstances, it may be appropriate to have supervisors represented in a separate bargaining unit. Given that the LRB is given the authority to determine bargaining units, CUPE says that no alteration should be made to definitions that would interfere with the LRB's ability to be responsive to the unique features of some workplaces.

Accountability

44. **Are trade unions sufficiently accountable? For example, do you believe that unions should be required to provide annual audited financial statements to its members, the government and the public?** (pg 97)

    CUPE says unions are already fully accountable to their memberships. CUPE members have the opportunity to request financial statements audited in accordance with generally accepted accounting principles, whenever the membership agrees with the request. While unions already provide financial statements to their memberships, they owe no duty to do so for government or the public. Nor is there any legitimate purpose for creating such a duty.

45. **If so, what should be included in these financial statements?** (pg 97)

    CUPE says that financial statements audited in accordance with generally accepted accounting principles, as already governed by unions constitutions and bylaws, meet the same threshold as is required of corporations, societies and charities.

46. **Should union members be able to vote on how their union dues can be used in a secret ballot vote?** (pg 98)

    CUPE says union memberships already vote on union spending and can request that such a vote be conducted by secret ballot whenever the majority of the assembly agrees with that request. No separate secret ballot votes are necessary.

47. **Should union members be able to stipulate what their union dues are used for?** (pg 98)

    CUPE says union members already approve what their union dues are used for by voting on spending, approving financial statements and adopting strategic directions.

48. **Should union members be able to opt out of paying that portion of union dues that is not used for labour relations purposes?** (pg 98)

    All funds spent by unions are for labour relations purposes in the broader community in which collective bargaining occurs.

49. **Should union members have a mechanism to bring to the Labour Relations Board questions regarding whether their union has complied with the union's constitution and bylaws?** (pg 98)

    Union members already have internal mechanisms to assert breaches of the Constitution and Bylaws. Those documents have dispute resolution mechanisms with appeals. Additionally, in disputes between members and their union, there are TUA complaint processes available to members if a union fails to use the principles of natural justice in dealing with those disputes.

Certification and Decertification of Union

50. **Is there a need to clarify who can vote on a certification and decertification application (i.e. laid off employees, probationary employees)?** (pg 106)

    CUPE notes that there is no discussion of this issue in the narrative that precedes this question

    CUPE supports maintaining the current method of determining voting constituency as being within the discretion of the LRB based upon evidence they hear.

    CUPE says that experience from other jurisdictions demonstrates that the parties can often reach agreements on voting constituency when assisted by mediators and informed by officer reports. CUPE supports adding those functions to the LRB.

51. **Do the existing provisions adequately distinguish unlawful and lawful union avoidance strategies?** (pg 106)

    As the freedom to associate with a union is an individual freedom that is supported by the Supreme Court of Canada and expressed in the TUA, CUPE says that there is no legal union avoidance strategy.

52. **Should provision be made to enable an employer to voluntarily recognize an existing union without conducting a vote? For example, should this be done where there are short periods of work? If so, under what circumstances?** (pg 107)

    CUPE opposes voluntary recognition.

53. **Is it necessary to restrict applications for changing union representation or decertification of their union to the open period?** (pg 107)

    CUPE supports maintaining an open period for raid and decertification purposes only. However, to avoid these proceedings being disruptive and wasteful in collective bargaining, CUPE supports the open period being shifted earlier in each year of the collective agreement.

54. **Is an option to permit such applications but limit the number of applications in a 12 month period? What issues would this raise?** (pg 107)

    CUPE says there should only be one open period in each year of the collective agreement.

55. **Should an employer and/or union members be able to apply to the Labour Relations Board to rescind a certification order? For example, should this occur where a union is not representing its employees, either through meetings with members or collective bargaining on their behalf with the employer?** (pg 107)

    CUPE says that abandonment is not a source of concern as this question implies. CUPE also says that in the circumstances where it does arise, it is adequately dealt with by the duty of fair representation provisions of the TUA and each union's Constitution.

    Members have remedies under their Constitution/Bylaws which are generally available to them to deal with those issues. Given that the constitution is a contract between the union and its members, that is the appropriate first forum in which to deal with those issues.

    In any event, such a provision for member application should not be adopted. Even complete abandonment of representation is only the most extreme form of a failure to meet the duty of fair representation. Thus it, and the other concerns posed in the question, are already adequately dealt with in the TUA by way of the duty of fair representation provisions.

56. **Under what other circumstances should an employer and/or union members be able to apply to the Labour Relations Board to rescind a certification order? For example, should this be available where the employer no longer employs workers? And, if so should there be a minimum time period before an application can be brought forward? Are there other issues to consider?** (pg 108)

    CUPE says that as the freedom to associate is an individual freedom, there should never be an occasion when the end of the representation relationship is employer initiated.

    Decertification should only be available at the initiative of employee members and only upon the basis of the wishes of the majority. There should be no access by an employer to cancellation of a certification. Even

if an employer has had no employees for a time, they have no cause for concern if there are no employees currently entitled to the collective agreement's protection.

Unfair Labour Practice

57. **Are the unfair labour practices identified in the TUA adequate? Why or why not?** (pg 113)

    CUPE says that the current unfair labour practices are insufficient protection of the right to choose to belong to a trade union as an exercise of the freedom of association in that they are not accompanied by sufficient procedural protections to make them effective.

    Further, in pursuit of the avoidance of interference in the exercise of the right to strike and lockout, further unfair labour practice prohibitions should target the practices of the use of allies and strikebreakers.

58. **Should this section be re-written to clarify the obligations of employee, employers, employer agents and union?** (pg 113)

    The provisions should be rewritten to eliminate the reference to employer comment because any comment in the time frame of an organizing effort or collective bargaining is targeted at an audience that is economically vulnerable and has insufficient information with which to measure or balance such employer influence.

    The provisions should also be rewritten to add procedural processes to make the current provisions effective.

Province-Wide Collective Bargaining

59. **Should legislation make provision for multi-employer, multi-union collective bargaining? Why or why not?** (pg 115)

    Such bargaining should be the subject of independent consultation with the relevant sector to determine whether it is sector-appropriate.

60. **If so, are there particular sectors that should be referenced in legislation where province-wide collective bargaining relationships are permitted or encouraged? Why?** (pg 115)

    Such inclusion would be premature until independent consultation had occurred and a consensus reached.

Transferring Certification

61. **Is the successorship and common employer declaration appropriate?** (pg 118)

    CUPE says these provisions remain appropriate.

62. **Should businesses who bid on contracts to provide cafeteria, janitorial, or security services in government-owned buildings be automatically subject to existing certification orders and collective bargaining agreements?** (pg 118)

    CUPE says that governments should lead the way in preserving employment opportunities for the citizens it employs. CUPE further says that work done within the province should be done in circumstances where the benefit of the work and the economic prosperity that it generates remain in this province's economy. Consequently, CUPE says that the current provision should be maintained.

63. **Are there conditions that should apply and others that should be negotiated in the new employer-employee relationship? Please identify conditions that should transfer to a new employer?** (pg 118)

    CUPE says that all collective agreement terms should be retained until the normal expiry of the collective agreement, at which time the parties can address issues in an informed way as to whether and what adjustments may be necessary. Given the symbiotic relationship between enterprise and labour, each needing the other to survive, it is not in either's interests to have the continued prosperity of the enterprise jeopardized. If the enterprise cannot tolerate the existing collective agreement provisions, the parties to a collective agreement are in the same position as parties to any other contract, in that they may agree to alter the terms of the contract at any time when they reach a mutual agreement.

Negotiations

64. **Do the provisions of the various Acts adequately promote free and fair collective bargaining?** (pg 120)

CUPE says that when examined in a holistic way, provisions of the Act do not adequately promote free and fair collective bargaining.

65. **What does bargaining to an impasse mean to you?** (pg 121)

Impasse will be at a different point in different sets of collective bargaining and it should be left to parties to determine whether they see themselves at an impasse. CUPE has had the benefit of reviewing the submission of SEIU-West and adopts their description of "impasse" as follows:

> Bargaining in good faith means that the employer and union representing concerned employees should deal with each other with open and fair minds and make every effort to overcome obstacles existing between them with an earnest effort to create a climate of stable, positive labour relations and with a purpose of achieving a collective agreement. The parties reach an impasse if there are certain provisions that remain outstanding, even though there have been considerable efforts to bargain in good faith, as the parties simply cannot reach any compromise or resolution.[158]

If impasse, by this definition, were adopted as a pre-requisite to any access to a provision of the code, it may impede rather than encourage collective bargaining.

66. **Do you believe it is important to the employer and the union to negotiate, without interference, to a point of impasse?** (pg 121)

Collective bargaining being a constitutionally-protected process, it should be left to the parties to determine its trajectory without any statutory limitations beyond those that already exist.

67. **Are the provisions respecting re-negotiation of a collective agreement appropriate?** (pg 121)

CUPE says the current provisions should be maintained.

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[158] B. Cape *The Consultation Paper: Renewal of Labour Legislation in Saskatchewan,* SEIU-West Submission, July 11, 2012 at p. 28

68. **Should employers and unions be required to go through conciliation or mediation prior to taking strike or lock-out action?** (pg 122)

    CUPE says the parties should be left to determine the trajectory of their collective bargaining. As a constitutionally protected right the right to strike should not be subjected to any additional restrictions. However, wherever mediated negotiations could be of assistance, mediators attached to the LRB should be available.

69. **With respect to the firefighters and the cities, is there a need to change the arbitration process? If so, how? For example, should both parties have to agree to arbitration prior to a request made to the Lieutenant Governor in Council for the appointment of panel members?** (pg 122)

    CUPE's position is that the discussion of this issue should be limited to those parties to whom its provisions apply in a consultation that is industry/statute specific.

Third Party Dispute Resolution

70. **Are there processes adequate to assist the parties in resolving disputes? Why or why not?** (pg 123)

    CUPE says the current processes are cumbersome and time-consuming on steps which do not advance the parties towards reaching a collective agreement, such as reports to the Minister.

71. **Are these dispute resolution processes effective in achieving their intended purpose? Why or why not?** (pg 123)

    These processes are only effective if parties have confidence in the skills of the people who are assigned to these tasks and if they are available readily enough to meet the short term needs of the parties. This means there must be a sufficient number of them to do the work in short time frames.

Duty of Fair Representation

72. **Are these processes adequate to assist the parties in resolving disputes? Why or why not?** (pg 128)

CUPE finds that the legislative statement of the duty of fair representation is appropriate. However, for the reasons stated above, the "processes" used to handle such complaints are not sufficiently expeditious to resolve such complaints. The current method requires the expenditure of too many resources both by the LRB and the parties to the complaint. A streamlined method should be adopted which provides for an automatic review of complaints for merit prior to seeking submissions. For those complaints which demonstrate that they have met the threshold, upon the closure of submissions, a Vice-Chair should be permitted to make a decision without an oral hearing in every case. And resources to assist the parties in resolving complaints should be provided for.

73. **Are these disputes resolution processes effective in achieving their intended purpose? Why or why not?** (pg 129)

CUPE supports revisions to the dismissal process from an application to a universally applied voting process. CUPE says they would benefit from this procedural adjustment.

74. **Is this provision sufficient to ensure that union members are represented appropriately and adequately? Why or why not?** (pg 129)

CUPE says the current provision sets an appropriate threshold for union conduct toward its members and should be maintained.

75. **Should the TUA specify mechanisms that union members can apply to seek redress? For example, applications to the Labour Relations Board?** (pg 129)

CUPE says the TUA currently provides for an application to the LRB which CUPE says is appropriate to continue. However, CUPE suggests the procedural adjustment described above in the handling of those applications.

Picketing

76. **Should picketing activities be regulated in the TUA?** (pg 130)

    CUPE says the principles for the functioning of picketing enunciated by the SCC should be incorporated into the TUA.

77. **If so, what types of activities should be permitted or restricted? For example, should restrictions be placed on where picketing can take place?** (pg 130)

    CUPE says there should be no restrictions on picketing that infringe upon one's freedom of expression.

78. **Should the LRB be able to grant injunctive relief in resolving allegations of unlawful picketing?** (pg 130)

    The granting of injunctive relief relies upon the inherent jurisdiction of a superior court. The granting of injunctions cannot and should not be undertaken by administrative tribunals.

Technological Change

79. **Is the definition of technological change appropriate?** (pg 131)

    CUPE says that the definition is sufficient to address modern issues that arise in business changes.

80. **Should the definition of technological change include closure or ceasing a portion of a business?** (pg 131)

    CUPE says that the definition should be altered sufficiently to communicate to the LRB that there is a clear intention that closures of part or all of a business (that would not otherwise attract the successorship or common employer provisions) constitute technological changes that should be addressed in an adjustment plan.

First Collective Agreement

81. **Do the timelines and process permit the parties the appropriate time to bargain a first collective agreement?** (pg 133)

    CUPE says the timelines and process to permit the parties an appropriate time to bargain a first collective agreement.

82. **Are there other conditions that should have to be met before the Labour Relations Board becomes involved? For example, should there be a requirement for a report to be presented to the Board following conciliation by the parties?** (pg 133)

    CUPE says the current procedures are adequate and appropriate.

83. **If so, should the conciliator have the ability to make recommendations to the Labour Relations Board that the parties continue to negotiate?** (pg 133)

    CUPE says that a continuation of bargaining is one of the outcomes a mediator should be able to recommend.

Final Offer Votes

84. **Is the current final offer vote process appropriate for achieving the objective of enabling employees to vote on the employer's final offer?** (pg 136)

    CUPE says that the current procedure does not enhance, but rather distorts collective bargaining and should be removed. If retained, it should not be expanded.

85. **Is there value in requiring a special mediator be appointed before a final offer vote can be conducted?** (pg 136)

    CUPE says there is benefit to mediators and prefers there be mediators directly under the auspices of the LRB who do not report to the Minister.

86. **Is there a better process? If so, what would it look like?** (pg 137)

    CUPE says there is benefit to mediators and prefers there be mediators directly under the auspices of the LRB who do not report to the Minister.

87. **The TUA currently limits the number of applications for a final offer vote to one. Should there be a limit?** (pg 137)

    CUPE says that final offer votes should be removed from the TUA. However, if they are retained CUPE says there should only be a single final offer vote.

88. **Should a strike have to carry on for 30 days before a vote can be conducted? If not, what is the appropriate time period?** (pg 137)

    CUPE says the current procedures are appropriate.

89. **How should a strike be defined? Should it be continuous or total days on strike? Should all employees in the bargaining unit be allowed to vote on a final offer?** (pg 137)

    There is no final offer voting process which advances labour relations, and thus the current provision does not serve any rational objective. It should therefore be eliminated.

Strike and Lock-Out

90. **Are the notice provisions respecting strike and lock-out appropriate and adequate? Why or why not?** (pg 141)

    CUPE says the current notice provisions are sufficient and should be maintained.

91. **Are the requirements prior to commencing a strike and lock-out appropriate and adequate? Why or why not?** (pg 141)

    CUPE says the current requirement prior to resorting to economic weapons (vote and notice) are sufficient and should be maintained.

92. **Are the reinstatement provisions appropriate and adequate? Why or why not? Is the continuation of benefits provision appropriate and adequate?** (pg 141)

    CUPE says the reinstatement and benefits continuation provisions are appropriate and sufficient. They should be maintained.

Union Dues

93. **Are there situations where employees should be able to opt out of the union for reasons other than religious grounds? If so, in what situations?** (pg 148)

    CUPE opposes the ability to opt out of the union for reasons other than religious grounds.

94. **Are there any instances where union dues should not be collected in a situation where the employee has opted out?** (pg 148)

    In all instances dues should be collected even in a situation where an employee has opted out for religious grounds.

95. **Should legislation make provision for the collection of dues or should this be a matter of negotiation between the parties?** (pg 148)

    CUPE says the TUA should continue to make provision for the collection of dues.

Fines

96. **Is it necessary for the TUA to facilitate the collection of fines and assessments of a union and stipulate that a debt is owing as if a contract in a court of law? If so, what must a union do to demonstrate due process was followed in the levying of the fine or assessment?** (pg 149)

    The TUA's provisions making a fine or assessment a debt has the ultimate benefit to the employer of regularizing and minimizing the impact on an employer's payroll system. The TUA also adequately regulates due process issues in the proceedings which lead to the imposition of any fine or assessment.

97. **Is it more appropriate for unions to seek remedies available through civil court procedures and small claims?** (pg 150)

    The current system provides for the least intrusive impact upon an employer's payroll functions. The current provisions should be maintained as they are of mutual benefit to both sides of the labour relations community.

Administration

98. **Should the requirement to file copies of collective agreements with the Minister continue? If yes, should the TUA include a provision that states that a collective agreement is not in force unless filed with the Minister?** (pg 152)

    CUPE supports continued requirements for the filing of collective agreements but opposes any amendment that would make a collective agreement ineffective or unenforceable pending its filing.

99. **Should a requirement to file copies of arbitration awards with the Minister be included in the TUA? If yes, should the TUA include a provision that states that an arbitration awards is not in forces unless filed with the Minister?** (pg 153)

    CUPE supports a requirement for the filing of arbitration awards but opposes any provision that would make an arbitration award ineffective or unenforceable pending its filing.

Education and Police

100. **Should the labour relations components of *The Education Act*, 1995 and *The Police Act*, 1990 be included in legislation that governs labour relations for all segments of the economy? Why or why not?** (pg 154)

    CUPE does not support consolidation of any of the labour statutes.

101. **Are there distinct elements of the labour relations systems for the education sector and the police sector that should be maintained if included in a single labour relations *Act*?** (pg 154)

    While there are going to be some sectors in which province-wide bargaining is appropriate, CUPE says that this should be done with involvement by those sectors only. This may occur by consultation with government independent of the current process, or by applications to the LRB by the parties pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

102. **Is the current two-tiered bargaining structure in the education sector appropriate?** (pg 155)

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

103. **Are there aspects of the collective bargaining structure in the education sector that could be improved upon?** (pg 155)

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

104. **Who should be involved in the negotiation of a) provincial, b) local collective agreements? Why or why not?** (pg 155)

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

105. **Should Pre-Kindergarten to Grade 12 teachers be included within the scope of the Trade Union Act?** (pg 155)

CUPE says this discussion should be conducted solely within the sectors that could be affected, whether by way of consultation independent of the current process, or by proceedings before the LRB pursuant to the LRB's jurisdiction over defining the appropriateness of bargaining units.

Scope of the Public Service Essential Services Act, Negotiation of an Agreement and Queen's Bench Decision

106. **Should the negotiation of essential services agreements occur only after it is clear that the union and employer are unable to conclude a collective agreement? If yes, should the parties be required to negotiate an essential services agreement prior to taking strike or lock-out action?** (pg 179)

CUPE says the parties are the ones best situated to determine the timing of the essential service designations within the broader collective bargaining and should be left to do so, though it should occur no earlier than the serving of strike notice. However, either should be able to apply to the LRB for mediation or adjudication on an expedited basis in order to ensure designations prior to a strike or lockout commencing.

107. **In the event that the employer and union are unable to conclude an essential services agreement, should the parties be required to submit to mandatory conciliation?** (pg 179)

Mediation rather than conciliation should be expected but not mandatory. However, there may be some instances where the timing of the giving of a strike or lockout notice leaves little time for it. In those circumstances, the LRB should be sufficiently resourced to conduct expedited hearings outside of normal business hours and be given the power to make expedited and/or interim orders.

108. **If conciliation is unable to achieve an essential services agreement, should arbitration be provided to conclude the agreement?** (pg 179)

CUPE says the LRB should make adjudications or designation levels but that interest arbitration should be available to conclude the collective agreement where the designation levels are so high as to preclude meaningful access to the right to strike.

109. **What role should the LRB play in resolving any impasse around the provision of essential services during a dispute?** (180)

The LRB should have the statutory authority and be sufficiently resourced to conduct expedited proceedings to determine outstanding designations, outside normal business hours if necessary, as well as to render expedited and/or interim designation orders with sufficient speed

as to not delay the union's access to strike activity at a time of their choosing.

110. **If no essential services agreement is in place between a public employer and a trade union, what mechanism should be in place to ensure that an appropriate level of essential services continues to be provided?** (pg 180)

The LRB should have the statutory authority and be sufficiently resourced to conduct expedited proceedings to determine outstanding designations, outside normal business hours if necessary, as well as to render expedited and/or interim designation orders with sufficient speed as to not delay the union's access to strike activity at a time of their choosing.

Labour Relations Board

111. **Should the role of the LRB be expanded to include hearing all appeals related to employment standards and occupational health and safety matters?** (pg 189)

CUPE says the LRB should not hear appeals on labour standards or occupational health and safety matters. The tribunals established by each of those statutes should hear appeals under the statute. Usually such "appeals" are limited to very narrow grounds of review with another panel of the same tribunal such as is done under the BC Labour Relations Code.[159] Alternatively there is a second decision making body within the mechanics of the statutes.

112. **Is the current structure of the board adequate and appropriate? Why or why not?** (pg 189)

CUPE says the LRB should move to a larger board supported by mediators and officers. CUPE suggests a stepped transition to an all Vice-Chair model in order to maximize the Board's hearing capacity. CUPE suggests as an interim measure an increase in the number of matters that can be adjudicated by a Vice-Chair sitting alone.

[159] *British Columbia Labour Relations Code RSBC 1996*

113. **Are the terms of office adequate and appropriate? Why or why not? Are the powers of the Board adequate and appropriate?** (pg 189)

CUPE is not opposed to the current provisions dealing with terms of office. However, CUPE does say that particularly in the area of essential services panels should include temporary wingers who have experience in operations in the sector being designated, and coming from both management and labour.

CUPE also says that particularly in essential services, expedited hearings using a variety of hearing methods short of a full evidentiary formal hearing, must be with the Board's powers.

Role of the Officer

114. **Are the existing powers of the officer appropriate and sufficient? Why or why not?** (pg 190)

CUPE says that the tasks assigned to "officers" under the TUA should include investigations into representation applications, and the supervision of representation votes.

Penalties

115. **Are the penalties in Saskatchewan's labour legislation sufficient to act as a deterrent to non-compliance? If not, what might be done to enhance compliance and address persistent offenders?** (pg 191)

CUPE says current penalty levels imposed on employers are too low to act as a deterrent. There should continue to be penalties, but the size should be increased significantly on an escalating scale dependent upon the frequency with which the employer breaches any aspect of the statute.

116. **Should the employment standards legislation allow for administrative penalties to be assessed by the Ministry? If so, what type of violations should administrative penalties be used for?** (pg 192)

CUPE says that the enforcement of a statute that protects the most vulnerable workers is particularly important. Consequently, CUPE does not oppose penalties in employment standards enforcement.

117. **Where there are repeat violations of the legislation by employers, should the Ministry have the ability to initiate payroll and employment audits of employers, at the expense of the employer?** (pg 192)

CUPE supports investigations into the records of repeat offenders to protect the rights of those vulnerable workers who do not feel they have the economic liberty to initiate a complaint.

118. **What types of safeguards should be in place to permit an employer to have that determination reviewed or challenged?** (pg 192)

An appeals process within the machinery of any tribunal is the best means of reviewing any determinations made under the tribunal's empowering legislation.

119. **Should summary offence ticketing be applied to violations of employment standards? If so, what type of violations?** (pg 192)

CUPE has greater concern that vulnerable workers be protected from retaliation by a penalized/ticketed employer that with the form by which the penalty is imposed.

Appeals

120. **Is there a need for all these appeal mechanisms? If so, why?** (pg 194)

CUPE says appeal mechanisms are important features of specialized tribunals and should be retained.

121. **Should the issue of forum shopping be addressed in legislation? If so, how?** (pg 194)

Overlapping jurisdiction issues are sufficiently addressed by recent SCC jurisprudence.

122. **Should a single appeal body, such as the Labour Relations Board, be responsible for the various types of appeals? If so, how?** (pg 194)

CUPE opposes a single tribunal to hear appeals, just as we oppose a single tribunal to hear matters of first instance.

123. **How would you see such an appeal body structured?** (pg 194)

CUPE does not support a single tribunal to hear appeals, regardless of the structure.

124. **Should qualifications for the members be established in legislation?** (pg 195)

CUPE says that the qualifications for appointment should be responsive to the specific area of expertise and should not be established by legislation.

125. **Should provisions limit the number of reviews of a single matter?** (pg 195)

CUPE says that access to justice is an important issue in democratic justice. Consequently, appeals should not be artificially limited.

Administration

126. **If a single Act were created, should there be a review process built into each part of the Act? Why or why not?** (pg 197)

CUPE says that there should not be a single consolidated statute. However, regular review mechanisms should be inserted into all the statutes with staggered review schedules.

127. **How should the review or reviews be conducted (i.e. by a Committee similar to the council)?** (pg 197)

CUPE supports reviews conducted by committees of special advisors appointed under the various statutes using a consultative process.

128. **How often should the reviews be conducted?** (pg 197)

CUPE says reviews should be conducted on staggered rotating schedules to avoid upheaval in all facets of worker protections at the same time.

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CUPE represents over 29, 000 members in Saskatchewan
who work in a variety of public service occupations.

Response to
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