

**IN THE MATTER OF A COMPLAINT TO THE INTERNATIONAL
LABOUR ORGANIZATION
COMMITTEE ON FREEDOM OF ASSOCIATION
CASE NO. 2654**

BY:

**THE NATIONAL UNION OF PUBLIC AND GENERAL EMPLOYEES
(NUPGE) AND SASKATCHEWAN GOVERNMENT AND GENERAL
EMPLOYEES UNION (SGEU)**

AGAINST:

THE GOVERNMENT OF CANADA (SASKATCHEWAN)

**STATEMENT OF EVIDENCE ON BEHALF OF THE
GOVERNMENT OF CANADA (SASKATCHEWAN)**

INTRODUCTION

Saskatchewan has one of the highest rates of unionization in Canada,¹ and long history of developing and implementing legislation for the protection of the rights of workers. *The Trade Union Act* (“TUA”) was first introduced in the province in 1944, and was the first jurisdiction in North America to guarantee civil servants the right to form unions and bargain collectively, including the right to strike.

Protections for workers, both in unionized and non-unionized workplaces are also found in several other pieces of legislation. *The Labour Standards Act* and associated regulations deal with minimum standards of employment; including hours of work, annual holiday entitlement, payment of overtime and minimum wages, equal pay and leave provisions. *The Occupational Health and Safety Act, 1993* and associated regulations set out workplace safety standards and ensure the protection from retaliation of workers who make occupational health and safety complaints. *The Worker’s Compensation Act, 1979* ensures workers who are injured on the job are insured and compensated on a no-fault basis.

Saskatchewan is currently experiencing a time of economic growth and increased prosperity, with the province expected to lead the country in economic growth in 2009. The population of the province is increasing, as is the participation rate in the labour market. Average wages are also rising, as the province experiences a shortage of skilled labour.²

The two pieces of legislation which form the basis of this complaint are *An Act Respecting Essential Public Services* (“Bill 5”) and *An Act to Amend The Trade Union Act* (“Bill 6”). These pieces of legislation continue to facilitate and protect the rights of workers to engage in the process of collective bargaining, balanced with the Government’s obligation to protect the health and safety of the public during a workplace dispute and ensure the continued economic growth and prosperity of the province.

Prior to the enactment of Bill 5, Saskatchewan was one of the only jurisdictions in

1 In 2007 Saskatchewan ranked fourth of provincial jurisdictions with a union coverage rate for Saskatchewan was 34.8%. The Canadian average is 31.5%.

2 Statistics Canada, Labour Force Survey, December 2008. Saskatchewan's population grew by 15,007 from October 2007 to October 2008. The number of people working in Saskatchewan increased by 16,900 from December 2007 to December 2008, an increase of 3.4 per cent, about seven times above the national average of 0.5 per cent. The average earnings of a payroll employee were \$765.75 per week in October 2008. This is an increase of 4.0 per cent compared to October 2007, and above the national average of 3.0 per cent.

Canada to lack essential services legislation. Public employers and trade unions are now required to negotiate and put in place essential service agreements prior to the expiry of collective bargaining agreements. Bill 6 introduces a number of changes to *The Trade Union Act* (TUA), including mandatory secret ballot votes for certification and de-certification, allowing for responsible employer communications and directing the board to render decisions within six months of the conclusion of a hearing. These changes provide greater stability and security for workers exercising rights protected under *The Trade Union Act* and ensures that decisions of the Labour Relations Board are rendered in a timely manner.

The Legal Regime for Collective Bargaining in Saskatchewan

The International Labour Organization's (ILO) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 ("*Convention No. 87*"), ratified by Canada in 1972, protects the right of workers to freely associate and bargain collectively.

The Supreme Court of Canada considered Canada's ratification of Convention No. 87 as a factor in its landmark decision that the freedom to engage in the process of collective bargaining is protected as part of the right to freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms* ("the Charter"):³

Convention No. 87 has also been understood to protect collective bargaining as part of freedom of association. Part I of the Convention, entitled "Freedom of Association", sets out the rights of workers to freely form organizations which operate under constitutions and rules set by the workers and which have the ability to affiliate internationally. Dickson C.J., dissenting in the *Alberta Reference*, at p. 355, relied on *Convention No. 87* for the principle that the ability "to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits".

...

³ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (hereinafter "B.C. Health Services"), at paragraphs 75 and 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* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.

This protection extends to the process of collective bargaining, including the right to strike and good faith bargaining, but does not extend to a guarantee of any particular outcome. The right is also subject to the section 1 of the *Charter*, which guarantees that rights are constitutionally protected, subject only to reasonable limits that are demonstrably justified in a free and democratic society.

The Government acknowledges and supports the right to free collective bargaining, and in Saskatchewan the rights and principles related to the process of free collective bargaining are enshrined in TUA.⁴ The TUA provides the legal framework for collective bargaining, along with a procedure for adjudicating disputes and enforcing rights and obligations. The following principles are enshrined in the legislation:

- the majority of employees determine for all employees in a group whether they will bargain collectively and, if so, through which union;
- an employer is required to recognize the union chosen by the majority of its employees as their exclusive representative for the purpose of bargaining collectively;
- the employer and the union are required to bargain in good faith with a view to concluding a collective bargaining agreement;
- a number of unfair labour practices are created to protect employees and unions from any attempt by the employer to interfere with their rights;
- strike and lock-out activity is regulated, but not prohibited; and
- remedial and enforcement procedures are included in the statute.

⁴ In addition, *The Construction Industry Labour Relations Act*, 1992, S.S. 1992, c. C-29.11, provides for a system of collective bargaining in the building trades. *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03, deals with the organization of labour relations between health sector employers and employees in the Province.

The TUA also creates the Labour Relations Board (LRB), an independent, quasi-judicial tribunal with exclusive and binding jurisdiction over the matters assigned to it by the TUA. The LRB monitors the procedural aspects of the collective bargaining process and hears disputes related to unfair labour practices and grievances arising out of collective bargaining agreements.

The LRB is composed of a chairperson, up to two vice-chairpersons and an unspecified number of members who are representatives of employees or employers. The chairperson, vice-chairpersons and members are appointed by the Lieutenant Governor in Council, or Cabinet. The LRB operates independently from the government, its ministries and agencies. The chairperson, vice-chairpersons and all members are required by the *Act* to take an oath of impartiality in the performance of their office.

Consultation Process

On November 7, 2007 the Saskatchewan Party was elected to form a majority government for the province. The first sitting of the Legislature under the new government commenced on December 10, 2007. At this sitting, the Government introduced seven bills, including Bills 5 and 6, considered priorities to fulfill commitments made by the Saskatchewan Party in its election platform. Campaign materials publicly available during the election articulated the party's platform to address issues related to essential services, certification votes and management communications:⁵

A Saskatchewan Party government will establish a fair and balanced labour environment in Saskatchewan that respects the rights of workers and employers by:

- Ensuring a balanced labour environment in Saskatchewan that is fair to workers and employers and competitive with other Canadian jurisdictions;
- Protecting public safety by working together with the province's public sector unions to ensure essential services are in place in the event of a strike or labour action; and

⁵ "Securing the Future: New Ideas for Saskatchewan"; released in September 2007, page 19

- Ensuring democratic workplaces by:
 - Requiring secret ballots on any vote to certify a union in a workplace and a 50% plus one result for successful certification; and
 - Ensuring freedom of information in the workplace during any unionization drive, by allowing unions and management the opportunity to fairly communicate with employees.

According to procedural rules adopted by the Saskatchewan Legislature in 2003, non-budget bills are typically introduced in the fall sitting of the Legislature.⁶ Bills may then be referred to a standing committee of the Legislature, with opportunity for public and stakeholder consultations, prior to passage in the following spring sitting of the Legislature. Apart from the fact that the fall 2007 sitting was abbreviated due to the election, this process was followed with respect to Bills 5 and 6. After being introduced in December 2007, Bills 5 and 6 were referred to the committee process, receiving consideration by the Legislature's Standing Committee on Human Services on April 23, 2008. The Bills received Royal Assent on May 14, 2008, following an extensive consultation process in early 2008.

The principles of the ILO Committee on Freedom of Association stress the importance of consultation on legislation affecting trade union rights:

The Committee has emphasized the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights.
(241st Report, Case Nos. 1172, 1234, 1247 and 1260, para. 144)

The Committee has drawn the attention of governments to the importance of prior consultation of employers' and workers' organizations before adoption of any legislation in the field of labour law.
(277th Report, Case No. 1492, para. 99)

⁶ Rules and Procedures of the Legislative Assembly of Saskatchewan, s. 33 page 13.

Under Canadian law, legislators are generally not required to consult with affected parties before introducing legislation.⁷ While a formal consultation process with labour and employers organizations was not conducted prior to the introduction of the Bills in the Legislature, the Government did undertake a significant consultation process after the Bills were introduced.

In January and February 2008, the Ministry of Advanced Education, Employment and Labour sent out eighty letters of invitation for meetings and placed public notices in nearly 100 newspapers across the province. The Minister and officials met with nearly 100 individuals, including representatives from organized labour, over a series of twenty meetings. The Ministry received approximately 82 submissions on Bill 5 and 55 submissions on Bill 6. Approximately 2,480 letters received from individuals in the province expressing view on the Bills 5 and 6.

As a result of the consultation process, five house amendments to Bill 5 were introduced when the legislature resumed sitting in March 2008. Three of the house amendments were informed by feedback received from consultation with organized labour. Specifically, in clause 2 of Bill 5 the definition of ‘essential services’ was clarified with respect to the application of the bill to public employees only, and to ensure that the same criteria applied to executive government as for other public employees. Also, the wording of clause 6 was clarified to require an employer to prepare a list of the services that it considers essential as opposed to services that are essential.

ANALYSIS OF BILL 5

The Public Sector Essential Services Act

The ILO Committee on Freedom of Association has determined that maintaining services necessary to protect the health and safety of the public is an acceptable limit on the right to strike:

The right to strike may be restricted or prohibited:
(1) in the public service only for public servants

⁷ *B.C. Health Services* case, at paragraph 157. The presence or absence of consultations prior to introducing legislation may be indicative of whether or not a government considered any alternatives to legislative action which has been determined by the court to infringe upon a protected right. This is considered as a factor in an analysis under section 1 of the Charter. Pursuant to section 1 of the Charter, rights are constitutionally protected, subject only to reasonable limits that are demonstrably justified in a free and democratic society

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 would endanger the life, personal safety or health of the whole or part of the population).
(See the 1996 Digest, paras. 526 and 536; and, for example, 306th Report, Case No. 1882)

Prior to the passage of Bill 5, Saskatchewan was one of the only jurisdictions in Canada to lack essential services legislation. Currently, every provincial jurisdiction and the federal government have legislative provisions related to essential services, except Nova Scotia which introduced a bill in 2007 that was not passed.

Bill 5 balances the rights of workers to strike and the need for essential services and protection of the public. The legislation does not outlaw the right of any worker or union to strike. Rather, it creates a process for the negotiation of essential services agreements. The legislation also provides for recourse to the LRB in the event the parties are unable to conclude an essential services agreement.

Recent public sector strikes in Saskatchewan highlight the need for a process to resolve essential services issues prior to work stoppages. In 1998 a strike by employees of SaskPower, the public electrical utility, the government determined it necessary and in the public interest to legislate an end to the strike of electrical workers during the winter. This action, which was criticized by the Committee on Freedom of Association, may not have been necessary had there been an essential services agreement in place.

A 2007 general strike by the Saskatchewan Government and General Employees Union (SGEU) impacted correctional facilities and the operation of the courts. Snow plow operations were initially impacted, although the SGEU voluntarily resumed these services following a severe winter storm. As part of a resolution to this strike, which lasted for eight weeks, the mediator recommended that the SGEU and the Government prepare an essential services plan prior to the expiry of the next collective bargaining agreement.

A 2007 strike by Canadian Union of Public Employee (CUPE) at the University of Saskatchewan, which includes employees of the Royal University Hospital,

resulted in as many as four hundred patients per day being left with inadequate medical care.

The negotiation of essential services agreements prior to the expiry of the collective bargaining agreement and well outside of any potential labour disruption will ensure greater predictability, stability, public security and safety. This process also allows the parties to focus on the issues of negotiating a collective bargaining agreement, rather than spending time and resources to determine the provision of essential services.

Procedure for negotiation of an Essential Services Agreement

Within 90 days of the expiry of a collective bargaining agreement, public service employers and trade unions must undertake negotiations to conclude an essential services agreement. The negotiation process begins with the employer providing a list to the trade union of what it considers as essential services.

Within 30 days of expiry, or if the collective bargaining agreement has expired, an employer may serve notice on the trade union setting out the classifications, numbers of employees within each classification and names of employees within each classification who must continue to work during a work stoppage. The purpose of this notice is to assist with the negotiations, and this list does not automatically become the essential services agreement.

In the event there is a work stoppage or potential work stoppage and no essential service agreement is in place, section 9 requires an employer to serve the trade union with notice setting out the classification, number and names of employees who must continue to work to maintain essential services. An additional notice may be served to increase or decrease the number of employees required to maintain essential services during a work stoppage.

A trade union may apply to the LRB if it believes that essential services can be maintained with fewer employees than the number set out in the employer's notice. The legislation directs the LRB to determine the issue within 14 days of the receipt of such an application.

The public employer's ability to serve a notice is not unfettered, and it may only be exercised within the restraints of the legislation. The list of classes, numbers and names of employees necessary to maintain essential services may only include those services that are essential services as defined in the legislation.

It is not open to an employer to refuse to negotiate an essential services agreement and wait to serve a notice pursuant to section 9. As with any collective bargaining negotiation, there is a duty on the parties to bargain in good faith on essential services agreements, and recourse may be had to the LRB in the event that a party refuses to bargain in good faith.

An employer cannot discriminate or interfere with the administration of any labour organization through an essential services agreement. Public service employers must comply with *The Trade Union Act*, which prohibits unfair labour practices, including interfering, restraining, intimidating, threatening, or coercing an employee in the exercise of any right conferred by *The Trade Union Act*.

Definition of Essential Services

The ILO Committee on Freedom of Association has considered that the right to strike is limited to certain circumstances:

To determine situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population.

(See the 1996 Digest, para. 540; 320th Report, Case No. 1989, para. 324)

What is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense 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.

(See the 1996 Digest, para. 541)

Bill 5 is consistent with the intent and purpose of these principles, and essential services are defined as:

- (i) with respect to services provided by a public employer other than the Government of

Saskatchewan, services that are necessary to enable a public employer to prevent:

- (A) danger to life, health or safety;
- (B) the destruction or serious deterioration of machinery, equipment or premises;
- (C) serious environmental damage; or
- (D) disruption of any of the courts of Saskatchewan; and

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

- (A) meet the criteria set out in subclause (i); and
- (B) are prescribed;

This definition provides categories or criteria for determining what must be considered an essential service. This is the basis for public employers and trade unions to negotiate essential services agreements, including the specific job classifications and number of employees needed to maintain essential services that are required in the event of a work stoppage.

The concept of essential services is not absolute, and a service may become essential depending on the circumstances of an individual case if there is a serious danger to health and safety. Specifically referencing services necessary to prevent serious damage to the environment and destruction of property in the definition is consistent with this concept. Such events may cause irreparable harm, damage and hardship with direct and indirect impacts on human health and well-being.

The definition also includes reference to maintaining the administration of the courts, which is consistent with previous decisions of cases, the ILO Committee on Freedom of Association. (*See the 1996 Digest, paras. 537 and 538; and 336th Report, Case No. 2383, para. 763.*)

Definition of Public Service Employer

The ILO Committee on Freedom of Association principles state that:

The right to strike may be restricted or prohibited only for public servants exercising authority in the name of the State.

(See the 1996 Digest, para. 534; 304th Report, Case No. 1719, para. 413; 338th Report, Case No. 2363, para. 731, and Case No. 2364, para. 975.)

Too broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers. The prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State.

(See the 1996 Digest, para. 535.)

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 would endanger the life, personal safety or health of the whole or part of the population).

(See the 1996 Digest, paras. 526 and 536)

The definition of “public employer” in Bill 5 is consistent with these principles. It includes the Government of Saskatchewan; Crown corporations; regional health authorities and affiliates; the Saskatchewan Cancer Agency; universities and technically colleges; municipalities; and police boards. These are public entities providing services that are potentially necessary for protection of health and safety and the prevention of serious environmental damage or destruction of property.

There is also authority to prescribe as a public employer any other person, agency or body, or class of persons, agencies or bodies, that provides a service that is essential to the public. In a complex and modern government structure such as that of Saskatchewan, public services are provided by a myriad of entities that are supported by public funding and subject to public accountability through

legislative and regulatory control. It is not practical or possible to list all such entities directly in legislation. Prescribing such entities in regulation will ensure the list is reflective and current. Cabinet does not have open-ended discretion and only those employers that provide essential services to the public may be prescribed.

Offences and Penalties

Bill 5 provides that upon summary conviction a public employer or trade union may be fined up to \$50,000 and a further \$10,000 a day for a continuing offence, and any other person may be fined up to \$2,000 and a further \$400 a day for a continuing offence. Such penalties may only be imposed after a person has been convicted by a court, thereby ensuring full procedural protections before such a penalty could be imposed. The maximum fine amounts are in keeping with fine amounts provided for in the TUA and *The Labour Standards Act*. It is a basic principle of sentencing that the most serious fines are imposed only for the most serious offences.

ANALYSIS OF BILL 6

The Trade Union Amendment Act, 2007

The amendments introduced in Bill 6 are designed to foster a fair and balanced labour environment in Saskatchewan. The amendments aim to promote co-operative, productive and healthy work environments for employers and employees, while also ensuring that Saskatchewan is competitive with other provincial jurisdictions in Canada.

Certification and Decertification

Amendments to section 6 of the TUA require that an application to the LRB for certification of a bargaining unit must be supported by at least 45 percent of eligible employees, provided within 90 days of the filing of the application. The requirement that a union show 45 per cent support for a proposed bargaining unit is in keeping with the thresholds of other jurisdictions. Alberta, Manitoba and Ontario have a 40 per cent threshold, and British Columbia has a 45 per cent threshold. The 45 percent threshold applies to both certification and decertification drives, which also ensures greater stability for unionized workplaces.

Amendments to section 6 of the TUA make secret ballot voting of all eligible employees mandatory for union certification and de-certification. The quorum of votes required for certification remains unchanged at 50 per cent plus one of votes cast. Secret ballot votes are already required for every union certification in

Alberta, Ontario and British Columbia. As an integral part of the democratic system, secret ballot voting protects the right of workers to freely exercise their choices.

The ILO Committee on Freedom of Association has noted the importance of workers being able to freely organize in a climate of security:

Workers should have the right to establish the organizations that they consider necessary in a climate of complete security irrespective of whether or not they support the social and economic model of the Government, including the political model of the country.

(See 332nd Report, Case No. 2258, para. 515.)

Employer Communications

The ILO principles on freedom of association state:

Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents in their establishment, functioning or administration.

(272nd Report, Case No. 1479, para. 387)

The existence of legislative provisions prohibiting acts of interference on the part of the authorities, or by organizations of workers and employers in each other's affairs, is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice.

(289th Report, Case no. 1594, para. 23; 297th Report, Case No. 1618, para 22.)

Pursuant to section 11(1)(a) it is an unfair labour practice for an employer to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act. The LRB has jurisdiction to hear and determine complaints that an employer has contravened this requirement. This provision and jurisdiction remain as an integral part of the TUA.

The amendments to section 11(1)(a) clarify that an employer is not precluded from communicating facts and its opinions to its employees. It allows for fair and responsible communications by an employer to employees. This amendment makes Saskatchewan consistent with all other jurisdictions in Canada, except Newfoundland and Quebec, which specifically allow an employer to communicate its view or statements of fact or opinion.

Prior to the amendment, the legislation had been interpreted by the LRB to mean that an employer could not communicate in any manner to employees during a certification drive. The amendment clarifies that an employer can communicate facts and opinions to its employees. The employer remains prohibited from interfering with exercise of any rights that may be exercised by employees under the TUA and from any acts of restraint, intimidation, threats or coercion.

Bill 6 also introduces several other amendments to the TUA. To promote greater transparency and accountability, the LRB is now required to submit an annual report to the Legislature and directed to render its decision within six months of the close of a hearing.

The amendments also remove a three year limit on collective bargaining agreements. In 2005, there were approximately 50 collective bargaining agreements that ran longer than 36 months. No other jurisdiction in Canada limits the length of collective bargaining agreements, apart from a three year limit on first time agreements in Quebec. This change reflects the notion that it is more appropriate for employers and trade unions to negotiate an appropriate length for a collective bargaining agreement rather than impose an arbitrary statutory limit.

CONCLUSION

The Public Services Essential Services Act ensures that the right of workers to strike is balanced with the need to protect the health and safety of the public. Changes to the TUA will provide greater stability and fairness and democracy in the workplace, ensuring that employees are able to make fully informed choices in the exercise of their rights under the TUA. These pieces of legislation were introduced in the legislature following a democratic election of the Saskatchewan Party to form a majority government for the province. Both Bills were introduced and passed in accordance with the rules of the Legislative Assembly of Saskatchewan. The Government undertook an extensive consultation process, incorporating feedback from stakeholders as house amendments prior to final passage of the Bills.

The Government respectfully submits that Bills 5 and 6 are in accordance with the spirit and intent of the *Convention No. 87* and the principles articulated by the ILO Committee on Freedom of Association. The Bills reflect the constitutionally guaranteed right to engage in the process of collective bargaining, subject to restriction demonstrably justified in a free and democratic society.