Expert Affidavit on Essential Services

Professor Michael Lynk
Faculty of Law
The University of Western Ontario

I. Broadly Accepted International Labour Standards
Principles on Freedom of Association in the Workplace

1. The primary source for the standards on the meaningful right to collectively bargain and the right to withdraw services has come from the work of the International Labour Organization (ILO). The ILO is the United Nations body devoted to international workplace and employment issues. It was founded in 1919 by the terms of the Treaty of Versailles, and it is governed through a tripartite model with governments, employers’ organizations and trade unions all enjoying an effective voice in shaping the work, direction and standards of the organization. As of May 2010, 183 countries were members of the ILO, the highest rate of state membership for any UN agency. Among its many responsibilities, the ILO sets standards for labour rights and working conditions through conventions, recommendations and declarations adopted by its tripartite governing body, and through the work of its subordinate committees and institutions. In recognition of the success of its work to improve employment conditions throughout the world, the ILO was awarded the Nobel Prize for Peace in 1969.

2. One of the ILO’s principal permanent bodies is the Committee on Freedom of Association. The Committee is a tripartite body which adjudicates complaints submitted by governments, employers and unions from its member states alleging breaches of the provisions of the two primary ILO conventions dealing with freedom of association: the Freedom of Association and Protection of the
Right to Organize Convention, 1948 (No. 87)\(^1\) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).\(^2\) These two conventions are the cornerstone documents in international law on the freedom to associate in the workplace. They establish the architecture for the protection of the associational freedom, and authorize the ILO to create structures, programs, processes and committees to bring legal and social vitality to the right.

3. Canada ratified Convention No. 87 in 1972. It has yet to ratify Convention No. 98, largely because of the tension between the federal treaty-making power and the primary constitutional assignment of authority over labour relations to the provinces. Nevertheless, Convention No. 98 has likely crystallized into an international obligation upon Canada, because Canada has supported the Declaration on Fundamental Principles and Rights at Work.\(^3\) The Declaration was adopted by the ILO in 1998 as a foundational commitment of its member states to the Organization’s fundamental conventions and four core principles: freedom of association, equality and non-discrimination at work, and an end to forced labour and child labour. The Declaration, which includes Convention No. 98 as one of the fundamental ILO conventions, states that:

All Members, even if they have not ratified the [fundamental] Conventions, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those [fundamental] Conventions.

4. Founded in 1951 and comprised of nine independent members chosen internationally and representing the tripartite parties which comprise the ILO, the Committee on Freedom of Association has issued more than 2,700 decisions on the complaints brought to it under Conventions No. 87 and 98. Its decisions are non-binding, but are considered to have considerable persuasive moral and jurisprudential weight. The Committee’s body of decisions has

---

\(^1\) (1950) 68 UNTS 17; [1973] CTS 14.
\(^2\) (1950) 96 UNTS 257.
\(^3\) (1999) 6 IHRR 285.
elaborated upon the rights and guarantees contained in the two Conventions by interpreting the foundation principles regarding the freedom of association guarantee. Periodically, the ILO issues an updated digest which authoritatively summarizes these principles and interpretations; the most recent edition was issued in 2006.4

5. The Committee on Freedom of Association is the most influential adjudicative body in the world today with respect to shaping the meaning of freedom of association as it pertains to rights at work. Its interpretations of Convention No. 87 have been described as the “cornerstone of the international law on trade union freedom and collective bargaining”, a definition favourably cited by the Supreme Court of Canada.5 The principles and interpretations of the Committee have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including the Supreme Court of Canada. The Supreme Court has stated in British Columbia Health Services that:

“Convention No. 87 has been the subject of numerous interpretations by the ILO’s Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry….While not binding, they shed light on the scope of s. 2(d) of the Charter as it was intended to apply to collective bargaining: Dunmore, at paras. 16 and 27, per Bastarache J., applying the jurisprudence of the ILO’s Committee of Experts and Committee on Freedom of Association.”6

6. A second influential body of the ILO that has played a significant standard-setting role on freedom of association principles has been the Committee of Experts on the Application of Conventions and Recommendations. Formed in 1959, the Committee of Experts consists of 20 labour law and industrial relations specialists from around the world who regularly meet in order to monitor compliance by member states with ratified ILO conventions. The

6 Health Services and Support, ibid. Also see: Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, at paras. 66-71 (per Dickson C.J.).
experts, who come from a variety of legal systems and industrial relations cultures, work at arms’ length from the ILO’s tripartite constituents. The Committee of Experts issues regular reports and observations on the meaning of various ILO standards, including those fundamental standards on the right to organize, the right to collectively bargain and the right to strike. While the reports and observations of the Committee of Experts are not binding, they are widely accepted as a leading and influential source for the purposive interpretation of ILO standards.

7. In 1994, the Committee of Experts on the Application of Conventions and Recommendations released a report on the freedom of association that has since become an influential and widely-cited document. In General Survey: Freedom of Association and Collective Bargaining, the Committee stated that the flourishing of the associational freedom is a pre-requisite for the success of democracy and other important liberal values:

   Freedom of Association is a fundamental human right and, together with collective bargaining rights, a core ILO value. The rights to organize and to bargain collectively are enabling rights that make it possible to promote democracy, sound labour market governance and decent conditions at work.  

8. The Supreme Court of Canada has held that, in the Charter era, international law, and specifically international labour law, is an important interpretative source for determining the meaning and content of the Section 2(d) guarantee of freedom of association. In British Columbia Health Services, the Court stated that: “Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter”.  

---

7 (Geneva: ILO, 1994).
9. In the *British Columbia Health Services* judgement, the Supreme Court of Canada laid out its rationale for adhering to international human rights standards when engaged in Charter interpretation on workplace rights:

70. Canada’s adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the Charter. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

71. The sources most important to the understanding of s. 2(d) of the Charter are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (“ICESCR”), the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (“ICCPR”), and the International Labour Organization’s (ILO’s) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 (“Convention No. 87”). Canada has endorsed all three of these documents, acceding to both the ICESCR and the ICCPR, and ratifying Convention No. 87 in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

72. The ICESCR, the ICCPR and Convention No. 87 extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d).

79. In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the Charter should be interpreted as recognizing at least the same level of protection: *Alberta Reference*.

A. **Collective Bargaining**

10. The right of trade unions and workers’ associations to bargain freely with employers respecting the conditions of work is deemed by the Committee on Freedom of Association to be a fundamental element of the freedom to
associate. Collective bargaining is an integral part of the broader human right to form trade unions and participate in their lawful activities, as guaranteed by the Universal Declaration of Human Rights (1948), the International Covenant of Civil and Political Rights (1966) and the International Covenant of Economic, Social and Cultural Rights (1966), which together make up the International Bill of Rights. There is a direct and intimate link between respect for human rights in general and respect for freedom of association in the workplace, in particular respect for free collective bargaining.

11. All member states of the International Labour Organization have a primary obligation to take positive steps to promote collective bargaining. As part of this positive duty, governments and public authorities are required to refrain from any interference which would restrict the right to collective bargaining, except in compelling and justifiable circumstances. Governments do not have a policy choice as between the promotion of free collective bargaining and the selection of other more restrictive and intrusive means for the determination of the terms and conditions of work for employees who are unionized, who may wish to be unionized or who are eligible to be unionized. Rather, governments have the duty to create viable mechanisms to enable and ensure free collective bargaining, and can only adopt other means to determine working conditions where the circumstances strictly justify a lesser alternative.

*Right to Collective Bargaining in the Public Sector*

---

9 *Digest, Supra*, note 8, at paras. 925-6
10 UNGA Res. 217 A (III) UN Doc. A/810.
15 *Digest, Supra*, note 8, at paras. 881 and 994.
12. Convention No. 98 and subsequent conventions and recommendations by the ILO recognize the general right of all public sector employees to enjoy collective bargaining rights. The four recognized exceptions to this right (which are not binding upon, but rather permissive for, member states to act upon) are those public sector employees directly engaged in the administration of the state; those working in high-level or confidential positions; police services; and the armed forces. According to the ILO, collective bargaining is the primary and recognized means by which the terms and conditions of employment are to be determined between public sector employers and employees. Among other groups of public employees, this right is available to those public sector employees working in public undertakings and in autonomous public institutions.

13. Under the standards established by the International Labour Organization through its conventions and recommendations, and its Committee on Freedom of Association through its decisions, the leading principles of collective bargaining as they pertain to the public sector include the following:

(i) As part of the positive duty upon a state to respect, protect and promote the freedom to associate, collective bargaining is to be made available for all employees of public undertakings and autonomous public institutions. Notwithstanding this, a state would have the capacity to exclude designated groups of public sector employees – those public sector employees directly engaged in the administration of the state; those working in high-level or confidential positions; police services; and the armed forces – if it decided that that would be appropriate.

(ii) Public sector employees of public undertakings and autonomous public institutions are to enjoy those same civil and political rights as other employees that are fundamental to the normal exercise of

---

16 See Convention No. 151 (1978)
17 The various jurisdictions in Canada, with only a few exceptions, allow government ministry employees and police officers to unionize and to engage in collective bargaining.
18 Digest, supra, note 8, at para. 886.
19 Digest, ibid, at para. 893.
20 Ibid, at paras. 885-911.
freedom of association, subject only to those justifiable restrictions pertinent to their public sector status and the nature of their work.\(^{22}\)

(iii) Compulsory arbitration is an exception to the broad right of public sector employees to engage in free and voluntary collective bargaining. It is “one of the most radical forms of intervention by the authorities in collective bargaining.”\(^{23}\)

(iv) The removal, in whole or in part, of the right to collective bargaining by public sector employees and its substitution by compulsory arbitration or some other method short of collective bargaining can be justified only in the following two indefinite circumstances:

(i) in the case of those four designated groups listed above; or
(ii) in essential services within the strict meaning of the term;

and the following three temporary circumstances:

(iii) an acute national crisis;
(iv) where the parties have freely agreed; or
(v) where, after protracted and fruitless negotiations, it is clear that the deadlock will only be broken through an initiative of the government/authorities, provided that the principles of free and voluntary collective bargaining have been fully satisfied up to that point.\(^{24}\)

(v) To be compatible with the fundamental right to collective bargaining by employees, essential services are to be given a strict and purposive meaning. Essential services are those services whose interruption would endanger the life, personal safety or health of part or whole of the population.\(^{25}\) A broader or more elastic definition of essential services would be incompatible with the general right to collective bargaining by public sector employees.

(vi) In order to gain and maintain the confidence of the industrial relations parties, any compulsory arbitration system is to be truly

\(^{22}\) Ibid., art. 9.

\(^{23}\) B. Germigon, A Odero & H. Guido, “ILO principles concerning collective bargaining” (2000), 139:1 International Labour Review 33, at p. 44.

\(^{24}\) Ibid, at p. 52; and Digest, supra, note 8, at para. 1004.

\(^{25}\) Digest, supra, note 8, at para. 994.
independent and the outcomes of arbitration should not be predetermined.\footnote{26}  

(vii) Where a Parliament or a legislature have set targets or ceilings for wage settlements, they must nevertheless “leave a \textit{significant} role to collective bargaining.” Moreover, it is essential that “workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework.”\footnote{27}

\section*{B. Strikes and the Withdrawal of Services}

14. The right of unionized employees to strike through the peaceful withdrawal of services in order to defend their economic and social interests has been widely accepted as one of the pillars of the freedom to associate, along with the right to organize and the right to collectively bargain. Although the right to strike is not explicitly stated in either Conventions Nos. 87 or 98, the caselaw developed by the Committee on Freedom of Association and the cumulative reports of the Committee of Experts on the Application of Conventions and Recommendations have read the right to strike into the meaning of the freedom of association. A leading ILO study that reviewed the jurisprudence of the two Committees has stated that: “the right to strike is a fundamental right of workers and their organizations;”\footnote{28} “strike action is a right and not simply a social act;”\footnote{29} and “the right to strike is essential to a democratic society.”\footnote{30} The Committee on Freedom of Association has ruled that:

\begin{quotation}
the right to strike [is] one of the essential means through which workers and their organizations may promote and defend their economic and social interests.\footnote{31}
\end{quotation}

\begin{footnotes}
\item[26] \textit{Ibid}, at para. 995.
\item[29] Gernigon at al, \textit{ibid}, at p. 11.
\item[30] \textit{Ibid}, at p. 60.
\item[31] Digest, supra, note 8, at para. 522.
\end{footnotes}
15. The purpose for placing the right to strike at the heart of the freedom to associate has been explained by the International Labour Organization as “the logical corollary of the effective realization of the right to collective bargaining” because, where it does not exist, “bargaining risks being inconsequential – a dead letter.” According to a recent and leading legal text on the right to strike in international labour law, the Committee on Freedom of Association has recognized that:

...combination in a trade union may be a function of individual liberty, but this liberty has little meaning if workers are unable to pursue their own interests with such organizations. Worker solidarity allows workers to overcome the limitations inherent in individual contracts of employment, to achieve fair conditions of employment, and to participate in making decisions which affect their own lives and society at large. In the absence of a right to strike, it remains difficult (if not impossible) for workers to achieve these goals.

16. Other leading international human rights instruments have expressly included the right to strike as part of their umbrella of fundamental rights. Article 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights* provides that state parties to the *Covenant* must protect, among other things, “the right to strike, provided that it is exercised in conformity with the laws of the particular country.” At the regional level, article 6(1) of the 1961 *European Social Charter* expressly recognizes the right to strike in the event of a conflict of interests, subject to any outlined obligations resulting from the collective agreement currently in force. Similarly, article 27 of the 1948 *Inter-American Charter of Social Guarantees* stipulates that “[w]orkers have the right to strike,” and that the law “shall regulate the conditions and exercise of that right.” Finally, the right to strike is recognized in article 8(1)(b) of the

---

34 *Supra*, note 15.
35 (1965) 529 UNTS 89; ETS 25.

17. In his 1987 opinion in the Alberta Reference decision, Chief Justice Dickson approvingly cited the commentary of the two ILO Committees on the right to strike and its relationship to the associational freedom. Although his reasons were given in dissent, this opinion has become one of the most influential dissents in the Charter era, as it has been approvingly cited by majority panels of the Supreme Court of Canada in subsequent decisions. At paras. 68 and 70-72, Dickson C.J. stated:

68. The general principle to emerge from interpretations of Convention No. 87 by these decision-making bodies is that freedom 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. A Commission of Inquiry, appointed to investigate a complaint against Greece, held that strike activity is implicitly protected by Convention No. 87: I.L.O. Official Bulletin: Special Supplement, vol. LIV, No. 2, 1971. The Committee of Experts has reached the same conclusion in its deliberations, pointing out that prohibitions on the right to strike may, unless certain conditions are met, violate Convention No. 87:

214. In the opinion of the Committee, the principle whereby the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned in previous general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Moreover, if strikes are restricted or prohibited in the public service or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.

* * * * * * *

70. These principles were recently applied in relation to a number of complaints originating in Canada, in particular, in Alberta, Ontario and Newfoundland. A number of the provisions impugned as being in violation of Convention No. 87 are

37 Additional protocol of 1988, known as the “Protocol of San Salvador.”
38 Supra, note 10.
the subject of this Reference. It is helpful, in the present context, to look at the Freedom of Association Committee's conclusions and recommendations on the provisions relating to prohibitions on strike activity. These conclusions and recommendations were approved unanimously by the I.L.O.'s Governing Body.

71. The complaint (Case No. 1247) was launched by the Canadian Labour Congress on behalf of the Alberta Union of Provincial Employees against the Government of Canada (Alberta). In discussing s. 93 of the Public Service Act, which bans strike activity of provincial government employees, the Committee summarized the principles applicable to complaints about infringements of Convention No. 87 as follows:

131. The Committee recalls that it has been called to examine the strike ban in a previous case submitted against the Government of Canada/Alberta (Case No. 893, most recently examined in the 204th Report, paras. 121 to 134, approved by the Governing Body at its 214th Session (November 1980)). In that case the Committee recalled that the right to strike, recognised as deriving from Article 3 of the Convention, is an essential means by which workers may defend their occupational interests. It also recalled that, if limitations on strike action are to be applied by legislation, a distinction should be made between publicly-owned undertakings which are genuinely essential, i.e. those which supply services whose interruption would endanger the life, personal safety or health of the whole or part of the population, and those which are not essential in the strict sense of the term. The Governing Body, on the Committee's recommendation, drew the attention of the Government to this principle and suggested to the Government that it consider the possibility of introducing an amendment to the Public Service Employee Relations Act in order to confine the prohibition of strikes to services which are essential in the strict sense of the term. In the present case, the Committee would again draw attention to its previous conclusions on section 93 of the Act.


The Committee reached similar conclusions in respect of s. 117.1 of the [Alberta] Labour Relations Act:

132. Linked to this question of restrictions on the right to strike is one of the specific written allegations, namely that an amendment contained in Bill 44 to section 117.1 of the Labour Relations Act prohibits the right to strike of all hospital employees. The Committee notes that this broad exclusion covers kitchen help, janitors, gardeners, etc. but that the Government told the representative of the Director-General that only small groups were affected by section 117.1 and that this question was, in any event, being challenged in the Alberta Court of Appeal and the Canadian Supreme Court. Given that this provision is not sufficiently specific as regards the important qualification of "essential employee", the Committee refers to the principle set out in the above paragraph concerning circumstances in which recourse to strike action may be prohibited. It requests the Government to re-examine section 117.1 so as to confine the prohibition of strikes to services which are essential in the strict sense of the term.

(I.L.O. Official Bulletin, supra, p. 35.)

(c) Summary of International Law
72. The most salient feature of the human rights documents discussed above in the context of this case is the close relationship in each of them between the concept of freedom of association and the organization and activities of labour unions. As a party to these human rights documents, Canada is cognizant of the importance of freedom of association to trade unionism, and has undertaken as a binding international obligation to protect to some extent the associational freedoms of workers within Canada. Both of the U.N. human rights Covenants contain explicit protection of the formation and activities of trade unions subject to reasonable limits. Moreover, there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities -- that is of collective bargaining and the freedom to strike.

18. In their various decisions and reports, the two ILO Committees have established a considerable body of principles on how the right to strike may be exercised. As a fundamental feature of the freedom to associate, the right to strike is to be made available to all private and public sector employees, save only those working in specifically designated occupations or those in specified circumstances. The right to strike is not an absolute right, but the exceptions to it must be narrowly and precisely defined so that the protection of the right’s purpose is not frustrated. The exceptions to the right to strike would be limited to the following three indefinite situations:

(i) Public servants who work in core administrative services in the name of the state; those working in high-level or confidential positions; police officers; and members of the armed forces;

(ii) Employees working in essential services, within the strict meaning of that term; and

(iii) Political strikes which are focused on purely political aims such as a change in government (as opposed to strikes on collective bargaining or on broader economic and social policy issues);

and the following four temporary situations:

(iv) Employees working in an industry where the withdrawal of services has exceeded a certain duration and what was once an inconvenience has now become a very serious risk to the life, personal safety or health of part or the whole of the community;

(v) An acute national emergency;
(vi) When a collective agreement is in force; and

(vii) When a withdrawal of labour is, or has become, violent.\textsuperscript{39}

19. The Committee on Freedom of Association has accepted that governments are entitled to legislate reasonable pre-requisites for a lawful strike, such as requirements for conciliation and mediation, prior notice of the withdrawal of service, secret ballots and a majority vote.\textsuperscript{40}

**Right to Strike in the Public Sector**

20. From the jurisprudence of the Committee on Freedom of Association, it can be established that public sector employees who have the right to organize into unions and to collectively bargain and who have been granted these rights also have the right to strike, subject to three specific exceptions:

(i) Those public sector employees who exercise authority in the name of the state;

(ii) Those public sector workers working in high-level or confidential positions; and

(iii) Those public sector employees performing essential services within the strict meaning of the term, including police and the armed forces;

A government is not compelled to prohibit the right to strike for these categories of public sector employees, but it would not be in breach of the freedom of association principles and standards if it did so.

21. The Committee of Experts has cautioned that the determination of which public sector employees would have the right to strike denied or restricted must be exercised as a limited and confined exception to the general right. The exercise in restricting access to the right must be minimal and proportional:

\textsuperscript{39} Gernigon at al, supra, note 32.

\textsuperscript{40} Digest, supra, note 8, at paras. 547-563.
The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.\(^{41}\)

22. Drawing from the jurisprudence and standards established by the two Committees, the application of the right to strike in the public sector can be characterized as falling into three distinct categories:

(i) The broad and general right to strike, which would be the governing rule;
(ii) A partial and restricted right to strike; and
(iii) A prohibition on the right to strike.

23. A government does not have a policy choice as to which one of the three categories it might wish to apply, even in the public sector. Given that the withdrawal of labour is a fundamental component of the freedom of association, a decision by a government to restrict or prohibit the right to strike must be conducted in a manner that is faithful to the protection and guarantee of any significant right. The restriction or prohibition on the right to strike must be plainly justifiable by the government, and it must be strictly proportional to the degree of reasonable and probable danger to the life, personal safety or health of the whole or part of the population.

*The Right to Strike and Public Sector Essential Services*

24. 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.\(^{42}\) As indicated above, the Committee of Freedom of Association has

---


\(^{42}\) Digest, supra, note 8, at para. 581.
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.43

25. A government would be entitled to legislate restrictions or even prohibitions on the right to strike for public sector employees working in essential services. However, to be compliant with the ILO standards, a government would have to ensure the following:

(i) the public services that are targeted for the withdrawal of services genuinely meet the definition of essential services in its strict and proper sense;

(ii) the guiding test for the restriction or prohibition of the right to strike would be based on the minimal and proportional analysis;

(iii) the first permissible exception to the broad and general right to strike that is to be explored would be a partial and restricted right to strike;

(iv) the scope for a partial and restricted right to strike is to be drawn as purposively as possible in order to establish the minimum amount of services that can be offered during a strike that are sufficient to avoid endangering the life, personal safety or health of the whole or part of the population, while allowing for as comprehensive an exercise of the right as possible in the circumstances;

(v) a partial and restricted right to strike that compels an unnecessarily broad number of employees to continue to work and leaves only a relatively small number of employees with the ability to strike would make the exercise of the right futile, and the right to collectively bargain a hollow guarantee;

(vi) In determining the appropriate level of minimum services for a partial and restricted strike, provision is to be made for the meaningful involvement of the trade union(s) to establish the appropriate levels;

(vii) that, if it 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 proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.”44 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.45

26. The Committee on Freedom of Association has accepted that the following services can be classified as essential services “in the strict sense of the term”, such that the right to strike could be restricted or prohibited, based on a minimal and proportional analysis:46

- the hospital sector
- electricity services
- water supply services
- telephone services
- police and armed forces
- fire-fighting services
- prison services
- the provision of food to school age students and the cleaning of schools
- air traffic control

27. The Committee on Freedom of Association has ruled, on other occasions, that the following services are not considered to be essential services “in the strict sense of the term”, and prohibitions placed by governments on the right to strike by employees in these sectors have not been justified:47

- petroleum sector
- radio and television
- ports
- banking
- computer services for the collection of excise duties and taxes
- department stores and pleasure parks
- the metal and mining sectors

44 Ibid, at para. 596.
• transport generally
• airline pilots
• fuel production, transport and distribution
• railway services
• metropolitan transport
• postal services
• garbage collection services
• refrigeration enterprises
• hotel services
• construction
• automobile manufacturing
• agricultural activities and the supply and distribution of foodstuffs
• the Mint
• the government printing service and the state alcohol and tobacco monopolies
• the education sector
• mineral water bottling company

In some of these services, the Committee has held that restrictions on the right to strike may be imposed, such that a minimal service is maintained while the remainder of the employees would be entitled to withdraw their services. Examples include ferry service to coastal islands; postal services; the Mint; the education sector (but only in cases of long durations and in full consultation with the social partners); and animal health services in the context of a highly contagious disease.

C. Conclusion to Part I

28. The International Labour Organization, primarily through the work of the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, is the primary standard-setting institution in the world on the issue of freedom of association in the workplace. The work of the ILO on the associational freedom has been accepted and applied by the Supreme Court of Canada in its Charter analysis of s. 2(d). The ILO has recognized that the right to free collective bargaining and the right to strike are core features of the freedom of association. Its two Committees
have held that the two rights are to be applied broadly and purposively, and the exceptions to the rights must be construed narrowly.

29. In the public sector, the right to free collective bargaining and the right to strike are to be given their full effect, except where the circumstances strictly justify a lesser alternative. Compulsory arbitration as a substitute for collective bargaining, and a partial and restricted strike or a prohibition on strikes, would have to be justified on a minimal and proportional analysis. Collective bargaining and the withdrawal of services can be curbed in the case of essential services, but only if the services truly meet the strict definition of essential: “services whose interruption would endanger the life, personal safety or health of the whole or part of the population.” In these cases, a substitution process must provide an adequate, impartial and speedy conciliation and arbitration proceeding.

II. The Saskatchewan Public Service Essential Services Act

A. Application of the Broadly Accepted Standards for Freedom of Association in the Workplace

30. This section will conduct as analysis as to how the Public Service Essential Services Act (the “PSESA”) compares to these internationally accepted standards with respect to essential services in the public sector in the context of a strike.

---

48 Ibid., at para. 581.
49 S.S. 2008, c. P-42.2.
31. Section 2(c) of the PSESA provides the following definition of “essential services”:

“essential services” means:

(i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:
   (A) danger to life, health or safety;
   (B) the destruction or serious deterioration of machinery, equipment or premises;
   (C) serious environmental damage; or
   (D) disruption of any of the courts of Saskatchewan; and
(ii) with respect to services provided by the Government of Saskatchewan,
   services that:
   (A) meet the criteria set out in sub-clause (i); and
   (B) are prescribed;

32. When this definition of “essential services” is compared with the standards established by the ILO, one can observe that the PSESA definition is potentially broader. Rather than confining the definition of “essential services” to those services whose interruption would endanger the “life, personal safety or health of part or whole of the population”, the PSESA definition also captures the injury posed by a strike to machinery et al, the environment and the operation of the courts. It may be that the application of the PSESA definition would comply with the strict meaning of the ILO definition, in that the net cast by its application goes no further than “life, personal safety or health” in its interpretation of the harm posed by the strike to machinery et al and to the environment. However, the PSESA definition could also be reasonably read to go beyond the ILO standard of essential services, in that the harm or injury to matters quite separate from any danger to “life, personal safety or health of part or whole of the population” would be sufficient under the legislation to establish an “essential service”. This concern is also extended to the services provided by the Government of Saskatchewan, since the PSESA, in s. 2(c) and (h), vests in the Government the authority to prescribe the services that the Government provides as essential services, provided it also meets the criteria set out in s. 2(c)(i).
33. Section 2(i) of the PSESA provides the following definition of “public employee”:

“public employer” means:
(i) the Government of Saskatchewan;
(ii) a Crown corporation as defined in The Crown Corporations Act, 1993;
(iii) a regional health authority as defined in The Regional Health Services Act;
(iv) an affiliate as defined in The Regional Health Services Act;
(v) the Saskatchewan Cancer Agency continued pursuant to The Cancer Agency Act;
(vi) the University of Regina;
(vii) the University of Saskatchewan;
(viii) the Saskatchewan Institute of Applied Science and Technology;
(ix) a municipality;
(x) a board as defined in The Police Act, 1990;
(xi) any other person, agency or body, or class of persons, agencies or bodies, that:
   (A) provides an essential service to the public; and
   (B) is prescribed;

34. The definition of “public employer” in the PSESA is broadly consistent with the industrial relations understanding in international law of what constitutes a public employer – a ministry, authority, institution or agency that is a direct arm of government, or is owned, controlled and directed by the government for the benefit of the public, or is substantially funded by the government for a recognized public purpose and objective.

35. However, the PSESA definition of “public employer” is contained in legislation devoted to essential services, and the definition in the legislation appears to designate all of the listed public employers as essential services public employers for the purposes of determining the scope of a lawful strike in conjunction with collective bargaining. Some of the institutions and authorities included in the definition would likely be legitimate essential services under the ILO definition, such as police and health services. For employees working for these services, the right to strike may be appropriately restricted or even prohibited, depending on the results of a minimal and proportional analysis. But for other institutions and agencies, the PSESA definition would appear to be
overly-broad. Included in the PSESA definition are public authorities and institutions – such as post-secondary institutions, crown corporations, municipalities, ministries and other unnamed boards and agencies – that would not appear to fall within the ILO definition of essential services. Unless the government or the institution et al in question can justifiably demonstrated that a withdrawal of services by the employees of these institutions et al would meet the ILO’s essential services threshold using the appropriate analysis, the inclusion of these bodies within the PSESA essential services list would appear not to be in compliance with the requirements of international law.

36. The definition of “public employer” is not confined to the specific list in s. 2(i) of the PSESA. One would note that s. 2(i)(xi) empowers the Government to classify “any other person, agency or body, or class of persons, agencies or bodies” that provide essential services and has been prescribed as per the PSESA to be deemed to be a “public employer” for the purposes of the Act. While each entity that is subsequently prescribed under s. 2(i)(xi) would have to be assessed on a case-by-case basis, the provision appears to permit a range of employers in Saskatchewan to come under the PSESA even though they might not meet the ILO standard of “essential services”.

37. Section 6 of the PSESA requires the parties to bargain for an essential services agreement when a collective agreement is within sight of its expiry. It states that:

6(1) If a public employer and a trade union do not have an essential services agreement that is in effect, the public employer and the trade union shall begin negotiations with a view to concluding an essential services agreement:
   (a) at least 90 days before the expiry of the collective bargaining agreement; or
   (b) as soon as is reasonably possible if:
      (i) on the day this Act comes into force, there are fewer than 90 days before the expiry of the collective bargaining agreement; or
      (ii) there is no collective bargaining agreement in effect.

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

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

(4) For the purpose of facilitating the negotiation of an essential services agreement, the public employer may give a notice to the trade union setting out the information the public employer is required to provide pursuant to subsection 9(2) if:
   (a) either:
      (i) at any point during the 30-day period before the expiry of the collective bargaining agreement, the public employer and trade union have not concluded an essential services agreement; or
      (ii) there is no collective bargaining agreement in effect and the public employer and trade union have not concluded an essential services agreement; and
   (b) the public employer considers it appropriate to give the notice.

(5) For the purpose of facilitating the negotiation of an essential services agreement, the public employer shall give, as soon as is reasonably possible, a notice to the trade union setting out the information the public employer is required to provide pursuant to subsection 9(2) if:
   (a) either:
      (i) at any point during the 30-day period before the expiry of the collective bargaining agreement, the public employer and trade union have not concluded an essential services agreement; or
      (ii) there is no collective bargaining agreement in effect and the public employer and trade union have not concluded an essential services agreement; and
   (b) the trade union has requested that notice.

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

38. Section 7 of the PSESA stipulates the provisions that must form part of the content of an essential services agreement. It provides the following:

7(1) An essential services agreement must include the following provisions:
   (a) in the case of an employer other than the Government of Saskatchewan, provisions that identify the essential services that are to be maintained;
   (b) provisions that set out the classifications of employees who must continue to work during the work stoppage to maintain essential services;
   (c) provisions that set out the number of employees in each classification who must work during the work stoppage to maintain essential services;
(d) provisions that set out the names of employees within the classifications mentioned in clause (b) who must work during the work stoppage to maintain essential services;

(e) any other prescribed provisions.

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

39. The international law standards for the continued performance of essential services during a partial or limited strike require that: (i) the services performed are the minimal necessary so as to ensure that the “endanger” threshold is not reached, and so as to allow the greatest possible exercise of the right to strike; and (ii) the trade union involved should have an effective and meaningful role in determining the level of minimal essential services to be maintained during a partial strike.

40. The provisions in Section 6 of the PSESA appear to provide a significant degree of power to the public employer vis-à-vis the trade union in the determination of which employees would be deemed to be the providers of essential services. The process laid out in s. 6 grants the power to the public employer, other than the Government, to make the initial determination as to which services it considers to be essential for the purposes of an essential services agreement. This would appear to be reasonable. However, if the public employer and the trade union cannot subsequently agree on an essential services agreement, then the public employer’s list would appear to become the established list, leaving the trade union the right to apply under s. 10 of the PSESA to the Saskatchewan Labour Relations Board (SLRB) for an order to vary the number of essential services whom the public employer has designated to work during the withdrawal of services. There is no requirement on either party to bargain in good faith during this process, which would fall below the ILO standards, unless s. 19(1) of the PSESA is read to confer such an obligation. This would
likely disadvantage the trade union, which is limited under the PSESA as to the legal or industrial relations power that it can exert on the public employer to bargain seriously. Moreover, section 10(1) of the PSESA appears to give the trade union the ability to challenge only the number of employees designated as essential services employees who must work during a withdrawal of services. It does not appear to give the trade union the ability to challenge the other mandatory features in section 7 that are required to be in an essential services agreement, such as:

(i) the services that are deemed to essential and must be maintained;
(ii) the classifications of employees who must continue to work; and
(iii) what else may be prescribed by the Cabinet through regulations.

41. Sections 6 and 7 of the PSESA would appear to contravene the standards of international law, because the legislation permits a public employer to over-define the scope of essential services, it does not appear to require the public employer to bargain its essential services list in good faith with the trade union, and it significantly restricts what the SLRB may review upon an application by a trade union challenging the public employer’s essential services list.

42. Section 21 of the PSESA provides that:

The Lieutenant Governor in Council may make regulations:
(a) defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act;
(b) prescribing, for the purposes of this Act, services provided by the Government of Saskatchewan for the purposes of sub-clause 2(c)(ii);
(c) prescribing any person, agency or body, or class of persons, agencies or bodies, for the purposes of sub-clause 2(i)(xi);
(d) for the purposes of clause 7(1)(c) prescribing other provisions that must be included in an essential services agreement, including prescribing the contents of those provisions;
(e) prescribing any other matter or thing that is authorized or required by this Act to be prescribed in the regulations;
(f) respecting any other matter or thing that the Lieutenant Governor in
Council considers necessary to carry out the intent of this Act.

43. Section 21 raises concerns with respect to its consistency with the requirements of international law. The section grants broad powers to the Saskatchewan Cabinet to make regulations to:

(i) prescribe what is meant by essential services in the PSESA with respect to services provided by the Government of Saskatchewan;

(ii) prescribe which persons, bodies or agencies are essential service public employers;

(iii) prescribe any other mandatory provisions of an essential services agreement;

(iv) and prescribe “any other matter or thing” that may be necessary to carry out the intent of the Act.

The concern that can be raised by the broad grant of powers in section 21 to the Cabinet to make regulations respecting the PSESA is that provisions on the right to collectively bargain, the right to strike and essential services may be prescribed that fall below the threshold established by international law through the International Labour Organization. This is not a comment on the ability of the Legislature to grant regulation-making powers to the Cabinet; rather, it is a comment on the criteria that might be employed by the Cabinet to regulate essential services.

B. Essential Services Legislation in Canada

44. This section will focus on the legislative provisions relating to essential services with respect to both the right to collective bargaining and the right to strike in the eleven jurisdictions across Canada. Specifically, this section will look at: (i) an individual description and analysis of essential services legislation in each
jurisdiction in Canada; and (ii) a comparison of the Saskatchewan essential services legislation with essential services legislation in the rest of Canada.

45. Before delving into an analysis of essential services legislation in Canada, it is useful to outline some fundamental trends concerning Canadian essential services legislation. There tends to be two contrasting approaches to essential services legislation in Canada. The first approach involves an attempt by legislators to specifically enumerate the services that should be deemed essential.\(^{50}\) This list often encompasses roles such as hospital medical staff, police forces, and firefighters.\(^ {51}\) The second approach, often called a consequences-based approach,\(^ {52}\) maintains that essential services are those services in which a work stoppage would create danger to life, health or safety of the public. If it is deemed that these consequences would be the result of a work stoppage, that profession may be considered an essential service. Canadian legislation on essential services falls into one of these two categories.

46. It is equally important to consider specific limitations on striking itself in essential services legislation. There are three strike models found in Canadian essential services legislation. First, the No-Strike Model prohibits all strikes by certain classes of employees; it simultaneously provides, however, for some kind of dispute resolution mechanism to reach agreement on the collective agreement between the parties. Accordingly, if the parties are unable to reach an agreement on their own, all outstanding issues in dispute are submitted to a disinterested third party, who then assumes the responsibility to make a legally binding decision on their outcome. Since strikes are not anticipated in the No-Strike Model, there are no provisions in such legislation for emergency services. There are, however, penalties for violation of the no-strike clauses, including

---

51 *Ibid.* It is important to note, however, one potential problem with this approach. Although the list of professions that constitute essential services is relatively certain, this list may be under- or over-inclusive in certain cases.
forfeit of strikers’ legal protection against dismissal and the opportunity for employers to ask the Labour Relations Board to declare the strike illegal.

47. In contrast, the Unfettered Strike Model permits striking with no legal fetters beyond those found in the private sector labour relations statutes.

48. Finally, the third strike model, the Designation Model, is a hybrid of the No-Strike Model and the Unfettered Strike Model. Like the Unfettered Strike Model, the Designation Model permits strikes; however, like the No-Strike Model, the Designation Model also uses an independent adjudicator to determine what services and levels of service are deemed essential while the bargaining dispute is in the process of being resolved.\textsuperscript{53} The idea behind the Designation Model is to “treat the provision of essential services as an enclave to be sheltered from the interplay of economic power [between the union and the employer],” and for this reason “a third party […] is made responsible for deciding on the nature and extent of essential services should the union and employer be unable to agree.”\textsuperscript{54}

49. When comparing and contrasting essential services legislation in the public sector in other Canadian jurisdictions with the PSESA in Saskatchewan, the key points for comparison are both the definition of essential services itself and the safeguards established to ensure the right to strike and to collective bargaining are not unduly compromised when designating certain essential services. This next section will individually outline essential services legislation in each jurisdiction across Canada.\textsuperscript{55}

\textit{Individual descriptions of essential services statutes in Canada}

\textbf{Federal Jurisdiction}

\textsuperscript{53} Ibid, at p. 14.
\textsuperscript{54} Ibid.
\textsuperscript{55} Please also refer to the chart of essential services legislation in Canada at Appendix A.
50. In the federal jurisdiction, essential services in the public sector are governed by the *Public Service Labour Relations Act*. \(^{56}\) Section 2(1) of this statute provides that the act applies to all persons employed in the public service, with public service defined as the departments, other portions of the federal public administration, and separate agencies specifically named in relevant schedules of the act. Essential services are defined in s. 4(1) as:

> a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public.

This definition is clearly a consequence-based approach, and the definition itself also closely mirrors the definition of essential services in the PSESA with regard to the words “safety or security of the public.” However, the PSESA adds the criteria of destruction of machinery, serious environmental damage or court disruption.

51. It is important to note that the provisions concerning essential services in this federal statute applies only to bargaining agents and employers who have selected conciliation, as opposed to arbitration, to resolve bargaining disputes. \(^{57}\) Therefore, if the parties do not choose to resolve their dispute through arbitration, there is an essential services requirement for the service, facility, or activity of the Government of Canada that is, or will be, necessary for the safety and security of the public or a segment of the public.

52. Under the *Public Service Labour Relations Act*, the employer has the exclusive right to establish the level at which an essential service is to be provided to the public, or a segment of the public, including the extent to which and the frequency with which the service is to be provided. \(^{58}\) An essential services agreement is thereby negotiated between the union and the employer to

\(^{56}\) S.C. 2003, c. 22 [*Public Service Labour Relations Act*].

\(^{57}\) Ibid, ss. 103 and 119.

\(^{58}\) Ibid., s. 120.
designate services that are essential. If the two parties are unable to reach an agreement over essential services, s. 123(1) provides that either party may apply to the Public Service Labour Relations Board to determine any unresolved matter that may be included in an essential services agreement. Unlike the PSESA, however, either party may dispute any matter with regard to the essential services agreement, including classification, not just the number of employees.

53. Therefore, unlike the PSESA, under federal legislation, the employer does not have the unilateral right to impose an essential services agreement. If agreement cannot be reached, a neutral third party attempts to find a fair balance between the two parties. In this way, the collective bargaining process is protected since the party who decides on the designations is not a party to the bargaining process. Moreover, either party may dispute any part of the essential services agreement, not just the number of employees included in each classification like under the PSESA.

54. Section 194(1) of the Public Service Labour Relations Act prohibits the right to strike until thirty days after the agreement is concluded. Moreover, as will be illustrated throughout this section, there are often penalties in place for violation of the essential services provisions. These penalties most often take the form of a fine. In this act, pursuant to s. 202(2), an employee organization that contravenes s. 194 is guilty of an offence and liable on summary conviction to a fine not more than $1,000 for each day that any strike declared or authorized by it in contravention of that subsection is in effect.

55. Additionally, it is important to note another statute in the federal jurisdiction that relate to essential services in the public sector. Under s. 87.4(1) of the Canada Labour Code, those who supply services, the operation of facilities, or the production of goods to the extent necessary to prevent an immediate and

---

serious danger to the safety or health of the public are deemed essential services. Therefore, this definition of essential services also takes a consequence-based approach, similar to the PSESA, but without the added criteria. In this same provision, both the employer and the union may negotiate such an essential services agreement. However, unlike the PSESA, if the union and the employer do not come to an agreement on essential services, either party may apply to the Canada Industrial Relations Board to determine any question with respect to essential services. Therefore, the Canada Labour Code provides for a third party dispute resolution process regarding disagreement over the provision of essential services. Moreover, again unlike the PSESA, either party may dispute any matter concerning essential services, and are not limited to the number of employees in classification.

New Brunswick

56. In New Brunswick, the governing essential services legislation is the Public Service Labour Relations Act.60 In the same way as the PSESA and the federal legislation, the New Brunswick legislation makes reference to the health, safety, or security of the public when defining those services that constitute essential services. In s. 43.1(1), essential services are defined as those services that “in whole or in part” are “essential in the interest of the health, safety or security of the public.” This definition includes all public hospitals, nursing homes, and ambulance operators.61 Again, however, the definition of essential services does not refer to added criteria as the PSESA does.

57. Under the Public Service Labour Relations Act, the employer may advise what it considers essential services. The employer and the union must then attempt to reach an agreement regarding the employer’s proposal.62 If the two parties

---

61 Note that s. 91(4) of the Industrial Relations Act, R.S.N.B. 1973, c. I-4, prohibits a full-time fire department employee from striking, and s. 91(5) prohibits a police officer from striking.
62 S. 43.1(3).
cannot reach an agreement, the Labour and Employment Board must make the decision for them.\textsuperscript{63} Again, similar to the federal legislation and unlike the PSESA, a third party makes the decision as between the employer and union as to the designation of essential services after allowing both parties to make submissions. There is also an attempt between both the union and the employer to reach an essential services agreement, rather than unilateral employer designation as under the PSESA. This preserves the integrity of the collective bargaining process.

58. Also similar to the federal legislation, there is a fine in place in the case of violation of the act with regard to the essential services provisions. Pursuant to s. 105(1), if an employee designated as an essential service employee participates in a strike, that employee is guilty of an offence and liable on conviction to a fine of $100 for each day that the employee is in violation of that provision.

\textbf{Quebec}

59. The same consequences-based language used to designate essential services above is also used in Quebec’s \textit{Labour Code}. Section 111.0.17 provides:

\begin{quote}
On the recommendation of the Minister, the Government, if of the opinion that a strike in a public service might endanger the public health or public safety, may, by order, require an employer and a certified association in that public service to maintain essential service in the event of a strike.\textsuperscript{64}
\end{quote}

60. Also along the same lines of both the federal jurisdiction and New Brunswick, s. 111.0.18 of the \textit{Code} states that the certified association and the employer must negotiate what essential services must be maintained in the event of a strike. If no agreement is reached, either party may apply to the Conseil des services essentials to designate a third party to help the parties reach an agreement. The Council may also designate a third party on its own initiative to aid the parties

\begin{footnotesize}
\textsuperscript{63} S. 43.1(5).
\textsuperscript{64} s. 111.0.17.
\end{footnotesize}
in reach an agreement regarding essential services. If still no agreement is made, it is interesting to note that in Quebec, the certified association, not the employer, must forward to the employer and the council a list determining the essential services that must be maintained the event of a strike. Upon receiving an agreement or a list, s. 111.0.19 provides that the council assess whether or not the essential services provided in that agreement or list are sufficient. Therefore, again, unlike the PSESA, there is no unilateral employer designation for designating essential services employees, but instead negotiation between the union and the employer. Further, a third party may be appointed or applied for in order to reach such an agreement between the parties.

61. Interesting, s. 111.10 of the Labour Code provides for the percentage of employees to be maintained per work shift from among the employees who would usually be on duty during that period in the event of a strike in an institution. During a strike, there must be 90% of the employees in public health institutions; 80% of the employees in an institution operating a hospital centre other than those contemplated in above; 60% of the employees in the case of an institution operating a local community service centre; and 55% of the employees in the case of an institution operating a child and youth protection centre or in the case of a social services centre.

62. Further, Quebec’s Labour Code institutes a fine for those parties who violate the essential services provisions of the act. Pursuant to s. 142, any person declaring or instigating a strike or lock-out contrary to the provisions of the Code, or participating in such a strike, is liable, for each day or part of a day during which the strike or lock-out continues, to a fine of $25 to $100 in the case of an employee, and $1,000 to $10,000 in the case of a senior officer or employee of an association of employees or of an administrator, agent or adviser of an association of employees or of an employer. In the case of an employer, an association of employees or a union, federation or confederation to which an association of employees is affiliated or belongs, a fine is instituted
from $5,000 to $50,000. Further, according to s. 146.2, any association of employees and any employer that contravenes an agreement or a list contemplated in s. 111.0.18, and any association of employees that fails to take the appropriate means to induce the employees it represents to comply with the agreement or the list or with the agreement or the decision, is guilty of an offence and liable to a fine of $1,000 to $10,000 for each day or part of a day during which the offence continues.

63. Québec’s essential services legislation also includes An Act to ensure that essential services are maintained in the health and social services sector.\(^{65}\) This statute applies to a detailed list of services, including health and social institutions and ambulance operators.\(^{66}\) Pursuant to s. 2 of this statute, such employees are deemed essential services and prohibited from striking. This statute therefore follows an enumeration approach to defining essential services, with a no-strike model with regard to the right to strike. As a result, this act does not provide much value when comparing its essential services and strike model with the PSESA.

64. Similar to all jurisdictions analyzed so far, there are strict fines in place for those employees that violate the essential services provisions of this act. Section 10 provides that any person who contravenes or incites or encourages a person to contravene s. 2 is guilty of an offence and liable to a fine: of $50 to $125 in the case of an employee; of $6,075 to $30,350 in the case of a person who fills certain enumerated services; and of $24,300 to $121,400 in the case of an association of employees or a group of associations of employees.

**British Columbia**

\(^{65}\) R.S.Q. c. M-1.1.

\(^{66}\) *Ibid*, s. 1.
65. In British Columbia, there is no explicit reference made to essential services in its labour legislation. However, the British Columbia Labour Relations Code\textsuperscript{67} contains a lengthy section that contemplates the concept. Section 72(1) provides:

If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute, (a) investigate whether or not the dispute poses a threat to (i) the health, safety or welfare of the residents of British Columbia, or (ii) the provision of educational programs to students and eligible children under the School Act, and (b) report the results of the investigation to the minister.

66. Again, British Columbia's essential services legislation includes a similar consequences-based definition of essential services that requires a threat to the health, safety or welfare of the residents of British Columbia. In British Columbia, however, there is the added criterion of threat to educational programs in the province.

67. Under this Act, if the Minister finds that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the Minister may direct the Labour Relations Board to designate those facilities, productions and services that the Board considers necessary or essential for such reasons as essential services.\textsuperscript{68} Section 72(3) allows the associate chair of the Mediation Division to appoint one or more mediators to assist the parties to reach an agreement on essential services designations. Therefore, again, unlike the PSESA, a disinterested third party may assist the parties in its decision on essential services. Also unlike the PSESA, yet similar to the rest of the legislation analyzed so far, there is no unilateral employer designation, but instead the relevant parties negotiate together to decide on the provision of essential services.

\textsuperscript{67} R.S.B.C. 1996, c. 244.

\textsuperscript{68} Ibid, s. 72(2).
68. Section 73(1) states that every employer, union or employee affected by the designation of essential services made in s. 72 must comply with that designation. Again, failure to comply with these designations results in a potential conviction of a fine not exceeding $1,000 for an individual, and a fine not exceeding $10,000 for a corporation, union, or employers’ organization, as pursuant to s. 158.

Newfoundland

69. Newfoundland’s definition of essential services is found in the Public Service Collective Bargaining Act. Section 10(13) of this act states that:

"essential employee" means one of a number of employees whose duties consist in whole or in part of duties the performance of which at a particular time or during a specified period of time is or may be necessary for the health, safety or security of the public.

70. Once again, this statute defines essential services in a consequence-based manner as those services necessary for the health, safety, or security of the public. In this way, its definition of essential services is similar to the PSESA; however, the Newfoundland definition does not add any additional criteria.

71. Under this statute, upon certification of a bargaining agent or afterward, the employer may, or where ordered by the Labour Relations Board must, provide the Board and the union with the number of employees in each classification the employer deems to be essential employees. Therefore, similar to the PSESA, there is unilateral employer designation of essential services under the act. Pursuant to s. 10(3), however, the union may object to this designation of essential services by the employer. The Board then gives the employer and the union the opportunity to make representations, and then may determine the

---

70 It is important to note that s. 10(13) of the Interns and Residents Collective Bargaining Act, R.S.N.L. 1990, c. I-18, features an identical definition of essential services. In this statute, interns and residents are a specific group of essential services.
71 Supra, note 73, s. 10(1).
number of employees to be deemed essential services. The Board therefore makes the final determination in the event that the union and the employer cannot come to an agreement. However, the Board is limited in its designation; section 10(3) provides that the number of employees determined to be essential by the Board must not exceed the number contained in the employer’s initial designation statement. Therefore, again, a neutral third party may consider the parties’ proposals for essential service designation under the Public Service Collective Bargaining Act.

72. There are similarly grave consequences under this legislation for not complying with the essential services provisions. Under s. 10(11), where an employee named by the employer as an essential service does not report for work, the employer must immediately terminate that employee, unless the employer is satisfied that there are reasonable grounds for the employee not reporting to work. Moreover, s. 49 states that an employer, union, employee organization or individual that does anything, or refuses to do anything, prohibited by the act is guilty of an offence and liable upon summary confliction of a fine not exceeding $200 for a natural person, and a fine not exceeding $1,000 in the other case.

73. Newfoundland’s essential services legislation also features the Health and Community Services Resumption and Continuation Act,72 which ordered striking nurses to return to work in light of “in light of a serious and deteriorating situation in the provision of health care to patients and the public.”73 Pursuant to s. 6 of that act, the terms and conditions of employment approved by the Lieutenant-Governor in Council constituted the collective agreement. Section 7 also provides for severe fines for non-compliance with this act. Additionally, s. 45 of the Royal Newfoundland Constabulary Act74 prohibits police officers from belonging to a union or going on strike. Therefore, this act is characterized by a

---

73 Ibid, s. 3.
enumeration, no-strike model, and therefore is of little value when comparing the PSESA with essential services legislation across Canada.

Ontario

74. Under Ontario’s *Crown Employees Collective Bargaining Act, 1993*, essential services is defined as:

services that are necessary to enable the 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 the administration of the courts or of legislative drafting; ("services essentiels")

Again, the definition of essential services follows a consequences-based approach, using the phrase “danger to life, health or safety.” There is also added criteria to this definition as under the PSESA.

75. Under this statute, both the employer and the union must negotiate an essential services agreement, together determining which services should be deemed essential. During these negotiations, either party also has the option to request the Minister to appoint a conciliation officer to confer with the parties and endeavour to conclude an essential services agreement, as pursuant to s. 35(1). If the parties fail to come to an agreement, under s. 36(1), either the employer or the union may apply to the Ontario Labour Relations Board to determine any matters the parties have not resolved. Thus, Ontario’s essential services legislation is characterized also by an option for a neutral third party to help negotiate an essential services agreement. Moreover, the negotiation of essential services is not done unilaterally by the employer, but instead conducted by both the employer and the union. Finally, either party may apply to the Board to dispute any part of the essential services agreement, not just the number of employees under a classification as under the PSESA.

---

75 S.O. 1993, c. 38.
76 *Ibid*, s. 30.
77 Ibid, s. 33.
76. Ontario’s essential services legislation further includes the *Ambulance Services Collective Bargaining Act, 2001*,\(^7\) which states that ambulance workers cannot strike unless an essential services is negotiated beforehand. Moreover, the *Hospital Labour Disputes Arbitration Act*\(^7\) specifies certain hospital employees as essential services, with a very broad definition of hospital that includes its laundry services. Under this act, these specified employees are denied the right to strike, and instead provided with binding arbitration. This statute, therefore, follows the enumeration and no-strike models with regard to essential services employees in the hospital sector, and are again of little value to our analysis.

**Manitoba**

77. In Manitoba, the *Essential Services Act*,\(^8\) defines essential services again in a consequence-based approach. In the *Act*, s. 1 states that:

> “essential services” means services that are necessary to enable the 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 the administration of the courts or of legislative drafting; (« services essentiels »)

78. Attached to the statute is Schedule A, which includes a list of government services and departments declared to be essential services. These departments include the Department of Health, the Department of Highways and Transportation, Adult and Youth Correctional Facilities, and Workplace Safety and Health.

79. As is obvious, Manitoba’s definition of essential services is identical to Ontario’s definition in the *Crown Employees Collective Bargaining Act, 1993*.

---

\(^7\) S.O. 2001, c. 10.
Moreover, these two jurisdictions feature essential services very similar to the definition of essential services in the PSESA, where all three definitions use a consequences-based approach with added criteria. Unfortunately there have been no judicial considerations of either of these statutes, so it is difficult to draw conclusions on whether the definition is overly broad. However, the fact that this type of definition is in the overwhelming minority may lend support to the idea that this definition is too broad.

80. There is a key distinction, however, between the Ontario legislation and the Manitoba legislation. Under s. 7(1) of the Essential Services Act, in the event of or in anticipation of a strike, and if no essential services agreement is in effect, the employer must serve a notice on the union setting out the classifications of employees and number of employees in each classification who are deemed essential services. Therefore, Manitoba’s essential services legislation imposes unilateral employer designation of essential services, similar to the PSESA. The union may then apply to the Manitoba Labour Board for a variation of the number of employees in each classification who are deemed essential under s. 8(1). This provision is also very similar to the PSESA provision, as the union may only dispute the number of employees in each classification, rather than any matter as in most of the other essential services legislation analyzed so far. Therefore, the Manitoba legislation sets out similar provisions for employer primacy in determining essential services designations as in the PSESA, whereas the Crown Employees Collective Bargaining Act makes clear provision for a third party, the Ontario Labour Relations Board, to step in and resolve any outstanding issues.

87. Like many of the other jurisdictions, there are high repercussions for violations of the essential services provision in this statute. Section 19 holds that every person, union, or employer that contravenes the act is guilty of an offence and liable on summary conviction. In the case of an offence committed by an employer or a union, or by a person acting on behalf of an employer or a union,
a fine is prescribed of not more than $50,000. In the case of an offence committed by any other person, a fine is also prescribed of not more than $1,000.

88. The Manitoba *Essential Services Act* is not the only important legal document in that province on the topic of essential services. The health care unions and the health care employers in Manitoba negotiated a written agreement in 2001 – The Negotiation of ‘Essential Services Agreements’ (Neg ESA) – which establishes a detailed process to reach an essential services agreement in the Manitoba health care sector for those occasions when either the unions or the employers are contemplating a legal work stoppage or lockout.\(^8\)

89. The Neg ESA has four significant components. First, in Clause #5, the industrial relations stakeholders have agreed upon a quite narrow and precise definition of the services that will be provided during a lawful work stoppage. This definition is very similar to the standards required by the ILO’s Committee on Freedom of Association. The relevant part of Clause #5 states:

> …the Parties agree, that during a work stoppage, the full range of services and care normally provided (in non-work stoppage circumstances) will not continue, and only those services and care, which if not provided would endanger the life or limb, will continue.

To that end, and to the extent reasonably possible, the Employer will take all necessary steps to ensure that activities requiring the provision of essential services be curtailed to as great a degree as possible.

90. The second significant component of the Neg ESA is that the stakeholders agreed, in Clause #7, that the essential services which are to be carried out during a work stoppage will be determined by the parties on the basis of ‘Essential Work Functions’, which corresponds to the actual work requirements that are necessary to safely perform the essential services of a health care provider during a strike or lockout. The stakeholders specifically agreed that the determination of the essential services to be performed would *not* be done

\(^8\) ‘The Negotiation of ‘Essential Services Agreements’’ (7 November 2001)
through the designation of individual employees or through the designation of job classifications. The significance of this provision is that it more narrowly and precisely designates the job functions to be performed during a work stoppage, and allows unionized more employees to participate in a lawful strike or lockout. This approach approximates the requirements of the ILO’s Committee on Freedom of Association.

91. The third significant component of the Neg ESA is found in Clauses # 9 and 11. If the stakeholders cannot agree on either the standardized work functions to be performed during a work stoppage or agree on the essential services staffing levels during a work stoppage, the dispute will be referred to a three person panel with an employer and union representative and chaired by an industrial relations neutral. The panel will adjudicate the dispute(s) and render its decision in a speedy manner before the expiry of the current collective agreement. These provisions ensure that the resolution of these disputes are decided: (i) expeditiously; (ii) prior to the expiry of the governing collective agreement; and, most importantly (iii) by a decision-making body that both parties would have confidence in.

92. The fourth significant component of the Neg ESA is that it mandates active employer-union collaboration in the determination of the provision of essential services during a work stoppage. In Clauses # 14-21, it designates the union as the initial party that is to assign employees to provide the necessary essential service functions. These provisions also granting certain powers to the employer to assign employees where it is not practical or possible for the union to perform this responsibility. As well, in Clause # 16, the health care employers have agreed not be:

- hire additional persons to perform work normally performed by employees involved in a work stoppage;
- allow bargaining unit employees to work unless designated essential; or
- utilize non-employees to perform work of employees who are otherwise legitimately withholding their labour as a result of the work stoppage.
93. The detailed arrangements negotiated by the stakeholders in the Neg ESA for the provision of essential services during a work stoppage appear to be quite congruent with the requirements of international labour law and demonstrate a mature approach towards mutual problem-solving in health care industrial relations.

Alberta

94. Unlike the above jurisdictions, Alberta uses the enumeration approach to essential services. Under this approach, Alberta essential services legislation prohibits firefighters and hospital employees from striking. Sections 96 to 98 of the Alberta Labour Relations Code\(^{82}\) prohibits against strike and lockout for firefighters, hospital employees and health authorities employees. Instead, this act provides for interest arbitration for these services in place of the right to strike.

95. Additionally, it is important to note that s. 112 of the Labour Relations Code states that, in emergencies, the Lieutenant Governor may declare a strike a public emergency when the health and safety of the public is at risk for services affecting utilities, such as sewage systems, plans, or equipment, or water, heating, electrical or gas systems, plant, or equipment, and health services.

96. Since Alberta uses the enumeration approach and the no-strike model, and not the consequences-based approach of the PSESA, Alberta’s essential services legislation is less useful for comparison to Saskatchewan’s essential services legislation.

Prince Edward Island

\(^{82}\) R.S.A. 2000, c. L-1.
97. Like Alberta, the enumeration approach is also used in Prince Edward Island’s essential services legislation, barring police, firefighters, and hospital staff from striking. Pursuant to s. 41(5) of the Labour Act, a member of the police force, hospital employee, full-time employee of any fire department, security police officers employed by the University of Prince Edward Island, nursing home or community care facility employees, and non-instructional personnel are prohibited from striking.

98. Similar to Alberta, Prince Edward Island’s essential services legislation provides for binding arbitration for these services that are denied the right to strike. Section 41(6) states that the Minister shall appoint an arbitration board to resolve the matters which the parties in these services have failed to agree upon. The decision of this arbitration board is final and binding upon the parties, as pursuant to s. 41(9). Therefore, Prince Edward Island’s essential services legislation is not as useful for comparison in Saskatchewan.

Nova Scotia

99. Currently, there is no essential services legislation in Nova Scotia. However, in some instances, the parties in their collective agreement may voluntarily require that some form of “emergency services” be negotiated prior to a strike in order to ensure that a minimum level of service is provided. While such a system may be helpful with an impeding strike and the resulting disruption, these types of arrangements are vulnerable in that they do not modify the rights that currently exist under the Nova Scotia Trade Union Act, and may not even be enforceable.

100. It is also important to note that, according to ss. 52A(1) and 52AA(1) of the Trade Union Act, police constables or officers and firefighters do not have

---

84 R.S.N.S. 1989, c. 475.
the right to strike; that right is instead replaced with interest arbitration. Therefore, like the above two provinces, the enumeration approach is used in Nova Scotia, barring police officers and firefighters from striking. As such, these provinces are less useful for comparison to the PSESA.

Comparison to the Saskatchewan PSESA

101. In light of the above, it is clear that the PSESA utilizes a consequences-based model when defining essential services. Moreover, with regard to strikes, the PSESA uses a designation model. As stated above, the PSESA offers a broad definition of essential services in s.2(c), as stated in para. 35 above.

102. This definition of essential services in the PSESA applies to every public employer, which is defined to include: the Government of Saskatchewan, Crown corporations, regional health authorities, Saskatchewan Cancer Agency, universities, SIAST, municipalities, police boards, and any other person, agency, or body prescribed by the Government of Saskatchewan. This definition of essential services follows the consequence-based approach as many essential services across Canada follow. However, the PSESA definition attaches additional criteria, namely the destruction of machinery, serious environmental damage or court disruption. The only other essential services legislation in Canada to define essential services in such a manner with additional criteria is the definition in Ontario’s and Manitoba’s legislation.

103. In comparing this definition with the definition of essential services across Canada, it is unclear whether the additional criteria in the PSESA substantially adds to the requirement that there be a threat to public safety or security. Instead, the additional criteria may create the risk of characterizing certain services as essential that may not in fact be so. If the additional criteria in the PSESA were more specific examples of public danger, it could be argued

---

85 Ibid, s. 2(i).
that they reflect essentiality. However, the additional criteria are by no means synonymous with threat to public health, life, or safety. It may be that the additional criteria broaden the definition of what it means to be “essential” too widely. Therefore, the definition itself may not be a definition of essentiality but may contain elements that go beyond what is absolutely necessary to maintain public health and safety. Also, the fact that very few other essential services legislation across Canada define essential services in such a manner lends credence that this definition is considered too broad.

104. Under this PSESA, an essential services agreement should be agreed upon between the employer and the union at least ninety days before the expiry of a collective agreement.\textsuperscript{86} This is an absolute requirement. If agreement is not reached, and the union is in a legal strike position or is striking, the employer has the power to serve notice on a trade union of the classifications of employees who must continue to work, the number of employees within each classification, the names of the employees, and what services are to be maintained.\textsuperscript{87} If the union disputes the notice served by the employer, believing that essential services can be maintained with fewer employees than that set out by the employer, then may make an application to the Labour Relations Board to have the notice varied.\textsuperscript{88}

105. Therefore, unlike most other essential services legislation in Canada with a few exceptions, the PSESA features unilateral employer designation. Where the union disputes this designation, the union can apply to the Labour Relations Board to vary numbers of employees in the classifications designated by the employer, but not the classifications themselves. The PSESA therefore does not provide any mechanism for a union to challenge the employer’s characterization of a classification as essential. The union may challenge the number of employees designated by the employer, but not the designation itself.

\textsuperscript{86} PSESA s.6(1).
\textsuperscript{87} PSESA s. 9(1) and (2).
\textsuperscript{88} PSESA s. 10(1).
106. Most other jurisdictions in Canada, even the ones that impose unilateral employer designation of essential services, allow the union to dispute any matter in the essential services agreement. Many other jurisdictions also allow both the employer and the union to negotiate an essential services agreement. Some jurisdictions also allow for neutral third party conciliation to be applied for and appointed. Moreover, once that essential services agreement is reached, most jurisdictions allow for either the union or both the union and the employer to dispute the classification and number of essential services. The lack of these features in the PSESA makes the PSESA appear to be unfair and unbalanced between the union and the employer with respect to essential services. In legislation such as the PSESA, where the employer ultimately holds the power of designation, the designation of essential services is inherently subject to the economic interplay of collective bargaining, but with the power concentrated in the hands of the employer. If the employer knows that the union is or will be in a lawful strike position, there is no incentive to bargain in good faith when the employer knows that even if agreement is not met on mutually agreeable terms, they can force unionized employees back to work with the only reviewable aspect of their decision being the number of employees being designated, not the designation itself.

107. There are also severe fines for violations of the essential services provisions of the PSESA, as is found in most of the Canadian essential services legislation analyzed in this section. Pursuant to s. 20(2) of the PSESA, any person who or union that contravenes any provision of the PSESA is guilty of an offence and liable on summary conviction. In the case of an offence committed by an employer, a union, or a person acting on behalf of an employer or the union, a fine is imposed of not more than $50,000 and, in the case of a continuing offence, to a further fine of $10,000 for each day or part of a day during which the offence continues. Further, in the case of an offence committed by any other person, a fine is imposed of not more than $2,000 and,
in the case of a continuing offence, to a further fine of $400 for each day or part of a day during which the offence continues. This fine imposed by the PSESA is the upper limit of fines imposed by any other essential services act in Canada. This fine therefore has the potential to be considered too severe of a penalty for violation of the Act.


102. In March 2010, the ILO’s Committee on Freedom on Association released its decision in Case No. 2654, a complaint against the Government of Canada by the National Union of Public and General Employees (NUPGE), the Canadian Labour Congress (CLC) and the Saskatchewan Federation of Labour (SFL), and supported by the Public Services International (PSI). The three complainants, all of which are trade unions or trade union federations in Canada, alleged in their complaint that the Saskatchewan Public Services Essential Services Act (PSESA) and the Saskatchewan Trade Union Act (TUA), as amended in 2008, impeded workers in Saskatchewan from exercising their fundamental right to freedom of association by making it more difficult for them to join unions, engage in collective bargaining and exercise their right to strike. Specifically, the complainants alleged that the
Government of Saskatchewan, through the *PSESA*, effectively denied the right to strike to the majority of public employees in Saskatchewan, failed to provide access to an independent arbitration mechanism for those public employees, and had not engage in a fully open and extensive consultative process with the affected public sector trade unions.

103. In assessing the complaint, the Committee based its decision on the foundational jurisprudence of international labour standards and freedom of association contained in its 2006 edition of the *Digest of Decisions and Principles*.\(^8^9\)

104. In its decision, the Committee partly upheld the complaint, making three findings in particular.

---

*Lack of Full and Complete Consultation*

105. First, it found that the Government of Saskatchewan did not engage in the requisite degree of consultations with the concerned trade unions before enacting the 2008 amendments to the PSESA and the TUA. It accepted the complainants’ allegations that the Government of Saskatchewan did not consult with any workers’ organizations on the need for, the contents of, or the potential effects of the two reform bills prior to drafting them. The Committee also accepted that the consultations held by the Government after the legislation was introduced fell short of the requirement in international labour standards that they be meaningful and conducted in good faith. Referring to ILO Recommendation No. 113\(^9^0\) and the jurisprudential principles contained in the 2006 edition of the *Digest*, the Committee stated at para. 362 that:

---

\(^{8^9}\) *Supra*, note 10.

\(^{9^0}\) Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113).
…in accordance with Paragraph 5 of [Recommendation No.113], such consultation should aim at ensuring that the public authorities seek the views, advice and assistance of these organizations, particularly in the preparation and implementation of laws and regulations affecting their interests. It is important that consultations take place in good faith, confidence and mutual respect, and that the parties have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise.

106. The Committee, in its recommendations, stated at para. 384 that it expected the Government of Canada to make its best efforts to ensure that the Government of Saskatchewan will, in the future, provide full and specific consultations with the relevant industrial relations parties when considering labour legislation reform:

The Committee expects that the Government [of Canada] will ensure that the provincial authorities hold full and specific consultations with the relevant workers’ and employers’ organizations in the future at an early stage of considering the process of adoption of any legislation in the field of labour law so as to restore the confidence of the parties and truly permit the attainment of mutually acceptable solutions where possible.

Inadequate Powers Assigned to the Labour Relations Board to Determine All Aspects of Essential Service Designations

107. The Committee’s second finding went to the restrictions in the PSESA on the right to strike. It first pointed out that the right to strike may be restricted in essential services only “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)”. [Para. 370]

108. In para.371, the Committee then turned to the exceptions to the right to strike in essential services:

…a minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users’ basic needs are met or that facilities operate safely or without interruptions [See Digest, op. cit., para. 607]
109. The Committee acknowledged that section 2 of the PSESA, which provided a definition of “essential services” where a minimum service is to be maintained, could satisfy the criteria in the Freedom of Association jurisprudence of the ILO. However, it went on to note that some parts of the list of public service positions that would be required to work during a lawful strike had been unilaterally declared as “essential” by the Government of Saskatchewan without consultation with the trade unions involved and in the face of a narrower and more concise list of positions that had just been reached through a Memorandum of Understanding between the Government and a public service trade union. Moreover, the Committee noted that the Saskatchewan Labour Relations Board had only limited powers to review essential services designations made by the Government of Saskatchewan or by public sector employers.

110. As a consequence, the Committee recommended in para. 372 that (i) the Saskatchewan Labour Relations Board be given the powers by legislation to make the necessary determinations of what is an essential service, which workers can strike and which workers must work to maintain minimum services; and (ii) the PSESA Regulations be amended with respect to the list of prescribed essential services and the Government of Saskatchewan would be required to consult with the social partners when developing these amendments:

The Committee requests the Government [of Canada] to ensure that the provincial authorities take the necessary measures, in consultation with the social partners, to amend the Public Service Essential Services Act so as to ensure that the LRB may examine all aspects relating to the determination of an essential service, in particular, the determination of the sectors in question, classification, number and names of workers who must provide services and act rapidly in the event of a challenge arising in the midst of a broader labour dispute.

The Committee further requests that the Public Service Essential Services Regulations, which sets out a list of prescribed essential services, be amended in consultation with the social partners. It requests the Government [of Canada] to provide information on the measures taken or envisaged in this respect.
111. In making this second recommendation, the Committee was expressing its concerns through the restrained language common in its decisions on three matters: (i) the overly-broad definition of what constitutes an essential service under the PSESA; (ii) the narrowly-drawn assignment of legislative powers to the Labour Relations Board to review the determination of essential services; and (iii) the necessity for consultation by the Government of Saskatchewan with its social partners in designing a reformed essential services legislation regime. On all three matters, the Committee was strongly implying that the PSESA fell short of the minimum standards required by the jurisprudence of international labour law.

_Lack of Sufficient Compensatory Guarantees for Essential Service Workers whose Right to Strike has been Restricted or Prohibited_

112. The third area of concern addressed by the Committee in its decision was the lack of sufficient compensatory guarantees in the PSESA for those workers employed in essential services who would see their right to strike either restricted or prohibited. It accepted that the complainants’ submissions on this point were well-founded.

113. The Committee noted in para. 376 that, where the right to strike is restricted or prohibited for workers in essential services, the legislative authorities should provide adequate substitute protection in order to compensate them for their inability to exercise their bargaining power through the withdrawal of services. In these circumstances, the principles of freedom of association required that:

…restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned have confidence and can take part at every stage and in which the awards, once made, are fully and promptly implemented.

114. As a consequence of its finding that the Government of Saskatchewan had not meet the standards of international labour law in its design of the compensation mechanism for those essential service workers who could not strike
or whose right to strike had been circumscribed, the Committee in para. 384 recommended that:

…the Government [of Canada] … ensure that the provincial authorities take the necessary measures so that compensatory guarantees are made available to workers whose right to strike may be restricted or prohibited and it keep it informed in this respect.

Conclusion

115. Decision No. 2654 of the Committee of Freedom on Association found that the Government of Saskatchewan’s process in 2008 to enact the PSESA was *procedurally* deficient through its lack of consultation with the industrial relations social partners, particularly trade unions. The Committee also found that the PSESA itself was *substantively* deficient through the narrow authority given to the Labour Relations Board to assess only limited aspects of the essential services determinations, through the broad definition of essential services provided for in the legislation, and through the inadequate compensatory guarantees made for essential services workers whose right to strike was restricted or prohibited.

116. Two concluding observations can be made about the Committee’s ruling in Decision No. 2654. First, the decision applied the Committee’s prevailing Freedom of Association jurisprudence to the accepted evidence in a predictive and consistent fashion. In its typically circumspect language, the Committee was clear in its disapproval of the process to create the PSESA and its disapproval of the content of parts of the legislation. And second, Decision No. 2654 is the latest in the growing volume of rulings by the Committee since the mid-1980s where it has expressed its concerns with regards to specific Canadian pieces of federal and provincial legislation that have interfered with the fundamental principles of associational freedom in the workplace. Since 1982, the Committee has received 79 complaints filed against Canada alleging that one or more of the federal or provincial
governments has breached the ILO freedom of association principles. It has released decisions on 77 of these complaints. It has decided that Canada has been in violation of the ILO principles in 71 of these cases. This record is one of the very worst among western industrialized nations.\textsuperscript{91}

IV. Review of Recent Academic Literature on Essential Services in the Public Sector

117. This four and final section focuses on a review of the recent Canadian academic literature in law and social science with respect to meaningful collective bargaining and a meaningful withdrawal of services in the public sector, with particular regards to essential services.

118. Most academics agree that there is an inherent tension in essential services in the public sector with regard to the necessity to protect the right to strike and collective bargaining, and the necessity to protect the public from danger to life, health, and safety. Adell, Grant and Ponack state:

> Our industrial relations system relies heavily on collective bargaining and on the right to strike and lock out for reaching a balance between employer and

employee interests in the workplace. But how can the right to strike and lock out be reconciled with the public’s need for certain services? Do the various regulatory approaches to the protection of essential services across the country allow enough room for collective bargaining? Do they adequately protect the public interest [...]?

119. As a result of this tension, Swimmer and Bartkiw hold, “[w]hen most federal and provincial jurisdictions extended collective bargaining to public employees, there was a recognition that the special circumstances of the public sector required a different legislative framework.” Accordingly, when dealing with essential services employees in the public sector, the government has proceeded cautiously. As Peykov states, “In recent years governments across Canada have tried to deal with the issue of the provision of essential services through new or amended legislation [...] the attention has been focused on whether strikes should be permitted and if so, whether certain employees should be designated as essential.” Therefore, most academics agree that there has been a longstanding tension between, on the one hand, achieving a balance between employer and employee interests through the right to collective bargaining and the right to strike, and on the other hand, the need to protect the public from immediate danger to their health and safety.

Models of strikes in Canada:

120. Swimmer and Bartkiw hold that the two major areas where the public sector legislative framework has diverged from the private sector model are the scope of bargaining and dispute resolution. In regard to the scope of collective bargaining, Swimmer and Bartkiw hold that, based on the philosophy that public policy should be determined in the legislature, not at the bargaining table, the scope of issues subject to negotiation is often narrower than in the private (and

---

92 Adell et al, supra, note 54, at p. 1.
95 Swimmer & Bartliw, supra, note 93, at p. 579.
municipal) sector. For example, many provincial and federal public sector unions were prohibited from negotiating aspects of hiring, classification, and promotion. As a practical matter, however, the line between public policy and legitimate labour relations issues often became blurred. Nurses and teachers, for example, invariably attempted to bargain about issues of the quality of health care and education, and it often turned out that there was a correlation between service quality and the numbers of professional employees and their workloads.

121. Moreover, legislation governing essential services in the public sector among the provinces is unique when compared to the private sector model. Swimmer and Bartkiw state that the most controversial aspect of public sector collective bargaining has been dispute resolution. From the outset, Canadian legislatures accepted that there must be some form of finality for the bargaining regime to be credible. They state, “[i]n virtually all cases, the final step was either the union's right to strike (and management's right to take a strike -- public sector lockouts were not really contemplated) or interest arbitration.”

122. Adell et al. propose that all acts and regulations governing essential services in the public sector vary among the provinces, but fall into one of three distinct legislative systems: the unfettered strike model, the designation model, and the no-strike model. An unfettered right to strike exists where, if negotiations for a new collective agreement reach an impasse, unions can direct their members to walk out subject to strike approval, which most often takes the form of a voting process, along with a provision of notice to the employer and the provincial labour relations board. Peykov holds that “[a]s a general rule, the unlimited right to strike prevails in the municipal sector where only a small number of services are perceived to be ‘truly’ essential.” However, Peykov also states that municipal governments are more likely to tolerate work stoppages that would create only some inconvenience than those that pose a high risk to the health and

96 Ibid, at p. 581.
98 Peykov, supra, note 94, at p. 4.
safety of residents, since many municipal services could be temporarily provided by management.”

123. The no-strike model, on the other hand, is an outright ban on strikes. Jurisdictions in which this form is instituted often have legislative provisions in place for arbitration in order to resolve any bargaining issue or issues. Therefore, Peykov states that “the right to strike is substituted with compulsory arbitration” in this model.\(^{100}\) The author also states that nurses, police officers, and firefighters are perceived to be the most essential public-sector workers in Canada. Municipal blue collar and public transit employees are also perceived to be essential, but to a lesser extent than the aforementioned services.

124. Peykov states that the designation model had been a fairly recent phenomenon, arguing “[m]ore recently [...] a general departure from the widespread use of either the unlimited-strike or the no-strike model has been observed.”\(^ {101}\) An increasing number of jurisdictions in Canada have rather adopted a different approach to dispute resolution in cases where certain services are designated as essential. Under the designation model, the bargaining parties are required to negotiate a level of essential services to be maintained before any work stoppage may begin. If no agreement is reached, an administrative tribunal often settles the issue, or issues. Peykov holds that the limited-strike model is extensively used on the provincial level.\(^ {102}\)

**Definition of an essential service:**

125. Peykov states that there is “room for debate on what constitutes an essential service,” but the most common view is that an essential service is a service the

---

\(^{99}\) Ibid.  
\(^{100}\) Ibid.  
\(^{101}\) Ibid, at p. 5.  
\(^{102}\) Ibid.
withdrawal of which would create an imminent danger to the life, health, or safety for the whole or party of the population. Hadwen et al. hold that “the burden of proof that services are essential or that circumstances constitute an emergency lies upon the party so alleging;” further, the author state that “burden of proof that services are essential is not met by speculation.”

Nursing:

126. Nursing is characterized by a labour force with highly specialized skills that are not easily transferable. Peykov states that, in Saskatchewan, there has been a recent shortage of qualified professionals as more nurses have retired or otherwise left the workforce than joined it. Moreover, there has been a recent shift towards employment in ‘non-traditional’ nursing areas, such as community and home care, and research and education, at the expense of employment in surgical wards, maternity, and psychiatric units.

127. Peykov also contends that another important feature of the nursing market in Saskatchewan and, throughout Canada, is the existence of so-called ‘legal monopolies’ on both the demand and supply side of labour, specifically the nursing union, as the exclusive bargaining agent and supplier of labour, and the government, as the exclusive employer of that labour. Peykov states that, “The fact that nurses possess highly specialized skills and that the government is the major employer in the market, coupled with the latter’s ability to seemingly always find ways to fund the health-care system, have created monopoly conditions.” Peykov argues that this factor, along with the centralized nature of collective bargaining, has led to the distinct possibility, and sometimes reality, of confrontations and decisions being made in furtherance of private rather than public interests. In this environment, legislative provisions that completely

---

104 Hadwen et al, ibid.
105 Peykov supra, note 94, at p. 7.
prohibit or completely allow nurses the right to strike may only exacerbate the problem.\textsuperscript{107}

128. Peykov further holds that, regardless of which of the three legal regimes identified earlier applies, there have been a number of nurses’ strikes, some illegal, throughout the Canada in recent years. All of these strikes were ended by either reaching an agreement between the government and the nurses’ union or through arbitration. Due to the direct impact of a withdrawal of nursing services on public health and safety, policy-makers have been particularly sensitive about allowing nurses to strike; where strikes by nurses are permitted, governments have often resorted or threatened to resort to ad hoc legislation to terminate them.\textsuperscript{108} However, Peykov also states that there has been a recent movement towards at least a partial designation of services provided by hospital nurses.\textsuperscript{109}

Efficacy of the three systems of dispute resolution in Canadian essential services in the public sector:

129. The prevailing systems of dispute resolution in the Canadian public sector permit the right to strike to a different extent across the country. Peykov argues that no model can be said to prevent or decrease the amount of strike activity. The author states, “[t]here has been a relative decline in strike activity in recent years that cannot be attributed to a particular legislative system or state of labour-management relations.”\textsuperscript{110} Rather, Peykov states that improved economic conditions in the second half of the 1990s allowed both governments and unions to pursue their goals in a more cooperative environment. However, Peykov also argues that the general public’s tolerance for strikes in essential services has

\begin{footnotesize}
\begin{enumerate}
\item[Ibid.] at p. 8.
\item[Ibid.] at p. 11.
\item[Ibid.] at p. 25.
\item[Ibid.]
\end{enumerate}
\end{footnotesize}
more recently decreased, which has put some pressure on the bargaining parties to reach an agreement without resorting to work stoppage.\textsuperscript{111}

\textit{The designation system}

130. Generally, there have been mixed assessments of the designation system by union representatives and managers from British Columbia and Quebec.\textsuperscript{112} Adell \textit{et al.} state that there have been more frustration and negative perceptions in British Columbia. However, it has to be noted that there are some important differences in the process of designation between the two provinces, which are the main source of dissatisfaction. British Columbia has adopted a more decentralized approach and the designation of essential services is determined before a negotiations impasse occurs. In Quebec, the determination of essential services levels and oversight are left to the Essential Services Council, which is largely respected for its independence and expertise. Further, the system in Quebec has been in place longer than in British Columbia, and the parties involved have had sufficient time to adapt to it.\textsuperscript{113}

131. Peykov argues that, from a theoretical perspective, “the designation model increases the bargaining position of unions relative to the no-strike model and has the opposite effect relative to the unlimited-strike model. As a result, the general public is more adequately protected against the complete withdrawal of some essential services.”\textsuperscript{114} The author further holds that there will be a gradual shift toward designation of essential services, which ensures more certainty for the bargaining parties in terms of what is expected from them, along with better public protection against any reduction or withdrawal of essential services.\textsuperscript{115}

\textsuperscript{111} \textit{Ibid.}
\textsuperscript{112} Adell \textit{et al.}, \textit{supra}, note 54.
\textsuperscript{113} \textit{Supra}, note 94, at p. 25.
\textsuperscript{114} \textit{Ibid.}, at pp. 25-26.
\textsuperscript{115} \textit{Ibid.}, at p. 26.
132. Gunderson et al. further support the designation model, holding that, in requiring the bargaining parties to designate services prior to any strike or lockout, both the union and the employer have an incentive to bargain efficiently and in good faith while retaining the right to take job action; otherwise they would face the prospect of arbitration.  

116 In many cases, arbitration has been perceived as not conducive to collective bargaining, because the parties may rely on the arbitrator to arrive at an agreement without having to make prior concessions. Peykov calls this the “chilling effect”, which provides a disincentive for constructive negotiations and creates an environment of labour-management mistrust. The “chilling effect” also increases the cost of reaching an agreement.

(2) the no-strike model

133. Swimmer and Thompson hold that interest arbitration was not limited to employees who were essential to public health and safety, such as fire, police, and hospital services, but was a common dispute resolution process for blue- and white-collar employees in provincial and federal administration. They hold that, until the middle 1980s, many governments viewed arbitration as a shield against public accountability from either public sector strikes, which would be illegal, or expensive settlements, which could be blamed on the arbitrator. Some jurisdictions, such as Ontario, fortified this accountability shield by developing a decentralized bargaining structure for their indirect employees. Rather than negotiate with education and health unions, these provinces set up local school or hospital boards, who became the formal employer, even though the boards depended largely or entirely on provincial government grants for funds. They hold that interest arbitration and decentralization are not without their own political costs. The more effective the accountability shield, the more likely that a senior government potentially loses control of its salary budget, as decentralized

117 Ibid.
management boards or arbitrators impose commitments on the overall provincial or federal government budget.\textsuperscript{119}

134. With regard to existing statutes governing police officers and firefighters that prohibit any strike action, Peykov states that there have not been recent work stoppages in any province largely due to favourable financial settlements between unions and local authorities, which, however, has been often costly to the taxpayer since any increase in wages for municipal employees is accompanied by a corresponding increase in revenues or the exploitation of new revenue sources. Otherwise, local authorities would be running deficits, a situation that could not be sustained in the long run without increasing taxes or implementing cuts in other services.

135. Peykov argues, however, that police officers and firefighters are regarded as likely the most essential of all public employees. Accordingly, there is little tolerance on the part of the general population to any job action by either of these groups. At the same time, there is willingness by unions and employers to reach an agreement without resorting to strikes or lockouts.\textsuperscript{120}

(3) the unfettered strike model

136. Peykov holds that it is largely agreed that the existing models of dispute resolution for municipal blue-collar workers across Canada, mostly the unlimited-strike model, are adequate given the prevailing local economic and social conditions. Despite some social and economic costs incurred, job action may last for months without any real breakthrough in the negotiations. Peykov notes that the highest costs of strikes are usually suffered by the least-advantaged members of society.


\textsuperscript{120} Supra, note 94, at pp. 26-27.
137. Peykov argues that this model has worked fairly well, and it seems feasible to keep it in place. Similarly, the legislative systems of governance for public-transit services have worked reasonably well and should not be changed. With the exceptions of Toronto and Montreal, where a high proportion of the population relies on public transportation, no other city or town in the country necessitates any special consideration of its transit services.\textsuperscript{121}

**Caution Against Unilateral Government Action:**

138. Swimmer argues that, during the 1991-1996 period, there were 15 different governments in power across the 11 federal and provincial jurisdictions. Eleven of those governments relied on the legislative option to cancel collective bargaining by extending contracts, to impose wage cuts through days off without pay, to override job security provisions to simplify downsizing, or to intimidate their unions into ‘negotiated’ concessions.\textsuperscript{122} Adams argues that, despite Canada's commitment to the International Labor Organization's declaration regarding the freedom of association and the effective recognition of the right to bargain collectively, the federal and provincial governments have repeatedly used unilateral action to override these rights for their own employees.\textsuperscript{123} Swimmer and Bartkiw argue that it is “hypocritical for Canada to portray itself as a champion of human rights internationally, when various levels of government routinely suspend collective bargaining rights of their own employees.”\textsuperscript{124} They further state that governments are only concerned about the outcomes of public sector labour relations and largely ignore the process. Although it was possible to negotiate compensation restraint at the bargaining table and, if necessary, take a strike, governments have increasingly opted for the easy way out, through

\textsuperscript{121} *Ibid*, at p. 27.
\textsuperscript{124} *Supra*, note 93, at p. 589.
legislation. They hold that, “[u]nfortunately, every time the government ‘changes the rules’ the future legitimacy of collective bargaining declines.”\textsuperscript{125}

\textbf{Predicted Future of Essential Services in the Public Sector}

139. Swimmer and Bartkiw expect a trend of moving away from interest arbitration for all except the most essential services, which includes fire, police, and some health services. In many public sector jurisdictions with arbitration, the unions involved are on record as being in favour of the strike right. They believe that these unions will not protest government legislation to substitute a strike-based system for arbitration, even though arbitration may in fact be a more effective means for unions to catch up in this environment. Furthermore, they argue that it is most likely that governments will only extend a limited strike right in return for arbitration; those services designated as essential must continue to work during the strike. These increasingly broad designations will solidify the governments’ ability to wait out a lengthy public sector strike.\textsuperscript{126}

140. Swimmer and Bartkiw also expect a trend toward more centralized bargaining. They state that even in good economic times, they do not foresee an absence of ad hoc legislation, but a change in the legislation's focus toward ending specific strikes and imposing mechanisms for resolving the labor dispute from interest arbitration, the typical remedy pre-1990, to imposition of the government's offer, the recent remedy.\textsuperscript{127}

141. Swimmer and Bartkiw expressed confidence that public sector collective bargaining will survive in the long term, although in a modified form. Despite the tampering by governments with the process, they hold that public sector labour relations outcomes have been and should continue to be at least on par with the

\textsuperscript{125} \textit{Ibid.}, at p. 586.  
\textsuperscript{126} \textit{Ibid.}  
\textsuperscript{127} \textit{Ibid.}
unionized private sector. Accordingly, public sector unions could demonstrate a fair degree of success to their constituencies on both the salary and job security fronts.\textsuperscript{128} Adell et al. argue that unions will have to develop new pressure tactics, as in Quebec, where municipal unions used rotating strikes to confuse employers and the public about which nonessential services would be available.\textsuperscript{129}

\textbf{Conclusion}

142. International labour law and international human rights law holds that the right to collectively bargain and the right to strike are core features of the freedom to associate and, accordingly, sets a high standard for their protection. These rights are to be broadly and purposively construed, and exceptions to these rights must be narrowly drawn.

143. The Supreme Court of Canada has held that the work of the ILO and its committees on the various aspects of the associational freedom are a persuasive source for the interpretation of s. 2(d) of the \textit{Charter}.

144. In international law, the right to collectively bargain and the right to strike apply in full to the public sector, with precisely drawn exceptions based on a minimal and proportional analysis. Generally, the right to collectively bargain can be modified, and the right to strike can be limited or even prohibited, in the realm of essential services only if the services are truly essential based on the “endanger” threshold.

145. The PSESA provides a very broad definition of essential services and, as well, a wide inclusion of a number of public sector services within its coverage. Neither of these definitions would appear to fit easily within the established jurisprudence of international law as developed by the ILO.

\textsuperscript{128} \textit{Ibid.} \\
\textsuperscript{129} \textit{Supra}, note 54, at p. 182.
146. The ILO Committee on Freedom of Association has recently criticized several features of the PSESA, and called for broad social partner consultation followed by legislative reforms to the legislation.

147. Different jurisdictions in Canada have employed a variety of approaches to the regulation of collective bargaining and strikes. Not all of these approaches might survive a careful scrutiny by the ILO standards on associational freedoms. A comparative analysis would suggest that the PSESA provides for one of the most circumscribed and narrow range of associational rights among the Canadian jurisdictions.

148. Among Canadian academic scholars of industrial relations in the public sector, there is a general criticism that some governments have been too inflexible in their statutory regimes for essential services.