



Canadian Foundation
for **Labour Rights**

Labour rights are human rights

Background

Summary of current *Charter*
challenges and their impact
on union security in Canada

updated
June 2014

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CASES HEARD BY THE SUPREME COURT OF CANADA: DECISION PENDING

Case # 1 **Saskatchewan *Public Service Essential Services Act*, Bill 5 (June 2008) and the *Trade Union Amendment Act*, Bill 6 (June 2008)**

Summary of the Legislation – Bill 5 allows for the employer to unilateral designate essential employees based if the employer and the union are unable to reach a negotiated essential services agreement. It also allows employers to increase essential service designations during a strike, thereby having the unfettered ability to determine how effective a strike will be at any stage of the job action.

Bill 6 eliminated card-based certification and expanded the employer's ability to communicate its opinions to its employees regarding union activities and functions.

Nature of Court Challenge – Violation of section 2(d) of the *Charter*. The real substance of this revolves around Bill 5, which basically denies the right to strike.

Initiators of the Challenge – The Saskatchewan Federation of Labour (SFL) and several SFL affiliates.

Current level of Court – The Supreme Court of Canada held a hearing on this case on May 16, 2014. A decision is pending.

Previous Judgements on this Case – On February 7, 2012, the Saskatchewan Court of Queen's Bench (CQB) Justice Dennis Ball released his decision that found the provincial government's *Public Service Essential Services Act* (Bill 5) violated the constitutional right to strike and bargain collectively as upheld in the *Charter*. He found that Bill 6 did not violate the *Charter*. In his decision, Justice Ball concluded:

"No other essential services legislation in Canada comes close to prohibiting the right to strike as broadly, and as significantly, as the PSES Act. No other essential services legislation is as devoid of access to independent, effective dispute resolution processes ... None have such significantly deleterious effects on protected rights. I am satisfied that the right to strike is a fundamental freedom protected by s.2(d) of the Charter along with the interdependent rights to organize and to bargain collectively. That conclusion is grounded in Canada's labour history, recent Supreme Court of Canada jurisprudence and labour relations realities. It is also supported by international instruments which Canada has undertaken to uphold . . . "The ultimate truth of free collective bargaining is that it can only operate effectively, in market terms, if it is backed up by the threat of economic sanction." (2012SKQB 62)

In April 2013, the Saskatchewan Court of Appeal (COA) overturned the February 2012 decision of the CQB. The COA decision addressed a number of issues, however, the key issue was whether or not the right to strike is covered by the freedom of association protected by section 2(d) of the *Charter*. The pivotal question was whether the 2007 *B.C. Health Services* decision and the 2011 *Fraser* decision, of the Supreme Court of Canada had overturned the *Labour Trilogy* from the 1980s, i.e. in relation to whether or

not the right to strike, in addition to, or as part of, the right to bargain collectively) was protected by section 2(d).

The COA determined this was not the case and by application of the principle of *stare decisis* (to stand by settled matters). The COA held that it and the Queen's Bench were bound to follow the Supreme Court's precedent and hold that the *Trilogy* still stood and the section 2.(d) claim must fail. The Court concluded that if the line of reasoning regarding the right to strike is to be overturned, only the Supreme Court of Canada can do so.

Union Legal Counsel – The lead counsel for SFL et al. is Craig Bavis with Victory Square Law Office.

Interveners – Employer-side:

- Attorney General of Canada
- Attorney General of Ontario
- Attorney General of Quebec
- Attorney General of British Columbia
- Attorney General of Alberta
- Attorney General of Newfoundland and Labrador
- Regina Qu'Appelle Regional Health Authority
- Saskatchewan Chamber of Commerce
- University of Regina
- Canadian Constitution Foundation
- Conseil du patronat du Quebec
- Canadian Post Corporation

Union-side:

- Canadian Labour Congress
- National Union of Public and General Employees
- Saskatchewan Union of Nurses
- Service Employees International Union (West)
- Saskatchewan Government and General Employees' Union
- Canadian Union of Postal Workers and International Association of Machinists and Aerospace Workers (IAMAW)
- United Nurses of Alberta and Alberta Federation of Labour
- Service Employees International Union (SEIU West)
- Confederation des syndicats nationaux
- Professional Institute of the Public Service of Canada
- Public Service Alliance of Canada
- Alberta Union of Provincial Employees
- British Columbia Teachers' Federation
- Air Canada Pilots' Association
- British Columbia Civil Liberties Association

ILO Complaint – The ILO ruled in October 2011 on complaints (Case No. 2654) submitted by the National Union of Public and General Employees (NUPGE) and the SFL in June 2008. Both laws were found not to comply with ILO freedom of association principles. The ILO Committee on Freedom of Association will be reviewing this case at one its upcoming sessions in order to examine the progress made by the Saskatchewan government in implementing its October 2011 recommendations.

Case # 2 The Federal *Public Service Labour Relations Act*, PSLRA (Section 2 (1) (d)) and the *Royal Canadian Mounted Police Act Regulations* (Sections 41 and 96)

Summary of the Legislation – Section 2(1) (d) of the PSLRA excludes members of the RCMP from engaging in collective bargaining. Section 41 prohibits members of the RCMP from publicly criticizing the police force. Section 96 of the Regulations of the *RCMP Act* establishes a separate scheme (different than collective bargaining) to deal with labour relations between RCMP officers and management.

Nature of Court Challenge – Violation of section 2(b) (freedom of expression), section 2(d) (freedom of association) and section 15 (equality rights) of the *Charter*.

Initiators of the Challenge – The Mounted Police Association of Ontario and the B.C. Mounted Police Professional Association.

Current level of Court – The Supreme Court of Canada held a hearing on this case on February 18, 2014. A decision is pending.

Previous Judgements on this Case – In 2009, the Ontario Superior Court (OSC) found section 96 of the *RCMP Act* Regulations infringed on section 2(d) of the *Charter*, and that the infringement could not be justified under s.1. The judge dismissed the Associations' other claims against section 2..(1)(d) of the PSLRA, and section 41 of the *RCMP Act* Regulations, which prohibits members of the RCMP from publicly criticizing the police force.

The Attorney General of Canada applied to the Ontario Court of Appeal (OCA) to appeal the OSC decision regarding section 96. The two police associations cross-appealed their other two claims that had been denied by the OSC.

On June 1, 2012, the OCA overturned the OSC's decision. The OCA decision relied heavily on the April 2011 Supreme Court of Canada (SCC) *Fraser* decision. The decision noted the SCC's restrictive conclusion that "collective bargaining under section 2(d) protects only the right to make collective representations and to have those collective representations considered in good faith."

Using the SCC ruling that collective bargaining is a "derivative right," the OCA concluded that "it is not effectively impossible for RCMP members to meaningfully exercise their fundamental freedom under section 2(d) and act collectively to achieve workplace goals through the existence of the Staff Relations Representative (SRR) Program.

Union Legal Counsel – Both Associations are represented by Laura Young.

Interveners – Employer-side: Attorney General of Ontario
 Attorney General of Alberta
 Attorney General of Saskatchewan
 Attorney General of British Columbia

Union-side: Canadian Labour Congress
 Saskatchewan Federation of Labour
 Public Service Alliance of Canada
 Alberta Union of Provincial Employees and SAIT
 Academic Faculty Association
 Association des membres de la police montée du Québec
 Mounted Police Members' Legal Fund
 Confédération des syndicats nationaux
 Canadian Police Association
 Canadian Civil Liberties Association
 British Columbia Civil Liberties Association

ILO Complaint – No complaint has been filed.

Case # 3 The Federal *Expenditure Restraint Act*, Bill C-10 (March 2009)

Summary of the Legislation – The *Expenditure Restraint Act* (ERA), as part of the federal government's 2009 Budget Implementation Act, Bill C-10, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrides previously negotiated collective agreements containing wage increases above the imposed salary caps.

Note – This case is one of six current cases against Bill C-10 before the Courts. The other five cases are listed below under the **Current Cases Before the Courts** section. There was a seventh challenge against Bill C-10 (see below, Case # 21 referred to under **Closed Cases: 2013 – 2014** section).

Nature of Court Challenge – Violation of section 2(d) of the *Charter* (denies collective bargaining and right to strike).

Initiator of the Challenge – Royal Canadian Mounted Police (Meredith and Roach).

Current Level of Court – The Supreme Court of Canada held a hearing on this case on February 19, 2014. A decision is pending.

Previous Judgements on this Case – Members of the RCMP are represented by the Staff Relations Representative (SRR) Program, and the two plaintiffs were elected representatives on the SRR Program's National Executive. The SRR, in turn, has representation on a Pay Council, which is an advisory board that also includes management and a neutral chairperson. The Pay Council, through a process of collaboration and consensus, makes recommendations on pay and benefits to the employer.

In June 2008, the Treasury Board announced a pay package that resulted from the Pay Council's efforts. However, in December 2008, the Treasury Board reduced the pay increases without consulting the Pay Council. The Treasury Board considered itself bound by the ERA, which set aside "any collective agreement, arbitral award or terms and conditions of employment" . . . and established a schedule of reduced pay increases.

The RCMP challenged the federal government at the Federal Court. In its June 2011 decision, the Federal Court found certain provisions of the ERA interfered with the RCMP members' rights to make collective representations to their employer, the Treasury Board. The Court found that the Treasury Board's decision to cut the RCMP wage package was a unilateral decision: "Treasury Board withdrew the issue from consideration and refused to negotiate on a good faith basis." The Court also recognized that the impact of the ERA was not temporary – and that it "set the benchmark for future wage increase negotiations."

Finding that the Pay Council process was "completely disregard[ed]," the Court concluded that this "unilateral cancellation of a previous agreement also constitutes interference with section 2(d) rights." The Court struck down the provisions of the ERA that rolled back wages and imposed wage increase limits for the RCMP.

The federal government appealed this decision to the Federal Court of Appeal (FCA). On April 26, 2013, the FCA overturned the June 2011 Federal Court decision.

The FCA held that the federal government's *Expenditure Restraint Act* did not violate the guarantee of freedom of association in section 2.(d) of the *Charter*. In the FCA's view, the government's action did not substantially interfere with the process of collective bargaining, primarily because the RCMP's salary determination scheme (a

Pay Council) was subject to unilateral control by the government, and did not amount to collective bargaining.

Union Legal Counsel – The RCMP are represented by Chris Rootham, a partner with Nelligan O'Brien Payne.

Interveners – Employer-side: Attorney General of Ontario
Attorney General of Alberta
Attorney General of Saskatchewan
Attorney General of British Columbia

Union-side: Canadian Labour Congress
Professional Institute of the Public Service of Canada
Public Service Alliance of Canada
Canadian Union of Public Employees, Local 675
Confédération des syndicats nationaux and
Union of Canadian Correctional Officers

CURRENT CASES BEFORE THE COURTS

Case # 4 The Nova Scotia *Essential Home-support Services Act, Bill 30* (March 2014)

Summary of Legislation – The legislation ended a two-day strike of some 500 home care workers and forced the workers' unions and their employers to negotiate an essential services agreement prior to a strike or lock out. If the union and the employer are unable to agree to an essential services agreement, the dispute will be referred to the Labour Relations Board to settle the provisions of such an agreement.

Nature of the Court Challenge – Violation of section 2(d) of the *Charter* (home support workers' right to bargain collectively), revoking their *Charter* right to “engage in the expressive activities associated with collective bargaining and the right to strike. Bill 30 also violates section 15, as it has a discriminatory, adverse impact on employees on the basis of sex, as it disproportionately affects women (approximately 90 per cent of workers affected by this legislation are women).

Initiators of the Challenge – the Nova Scotia Government and General Employees Union (NSGEU/NUPGE).

Current level of Court – A statement of claim was filed on May 20, 2014 with the Supreme Court of Nova Scotia.

Union Legal Counsel – NSGEU/NUPGE is represented by Ray Larkin with Pink Larkin in Halifax.

Interveners – No interveners at this stage.

ILO Complaint – No complaint has been filed.

Case # 5 The Federal *Economic Action Plan 2013 Act, No. 2, Bill C-4* (December 2013)

Summary of Legislation – Bill C-4 amends the federal *Public Service Labour Relations Act (PSLRA)*, making it illegal for any bargaining unit to strike if 80 percent or more of the positions in that unit are declared necessary for providing an essential service. It also gives the federal government the "exclusive right" to determine which services are essential and the number of positions required to provide those services.

Under the former essential services regime, unions and government negotiated the number of employees who were considered essential. If the two sides couldn't agree,

the matter was turned over to the Public Service Labour Relations Board to decide which jobs would be considered essential in the event of a strike.

Further changes under the bill include limiting the use of arbitration for resolving disputes. Whereas before unions were free to choose between walking off the job or going through binding interest arbitration, the *PSLRA* now requires the union to proceed by way of conciliation or strike in all cases where the employer designates less than 80 percent of the employees in a unit as essential, unless the employer agrees otherwise.

As well, in the circumstances where the union is entitled to proceed to interest arbitration, the arbitration board must now take into account the government's "fiscal circumstances relative to its stated budgetary policies," as a primary consideration in making its decision.

Nature of the Court Challenge – Violation of the *Charter's* section 2(b) – rights to freedom of expression and section 2(d) freedom of association (denies the right to strike).

Initiators of the Challenge – the Public Service Alliance of Canada (PSAC)

Current level of Court – A statement of claim was filed in the Ontario Superior Court on March 24, 2014.

Union Legal Counsel – PSAC are represented by Andrew Raven, a partner with Raven, Cameron, Ballantyne & Yazbeck.

Interveners – No interveners at this stage.

ILO Complaint – No complaint has been filed.

Case # 6 The Ontario *Putting Students First Act*, Bill 115 (September 2012)

Summary of Legislation – The Act amends the *Education Act*, requiring collective agreements between school boards and employees to not include compensation increases for a two-year period beginning September 1, 2012. The legislation eliminates the accumulation of sick leave credits after August 31, 2012. It also outlaws strikes and lockouts without providing for independent binding arbitration. Bill 115 gives the Minister of Education unprecedented powers, including the right to deny strikes and lockouts and impose terms in collective agreements at any time.

Nature of Court Challenge – Violation of section 2(d) of the *Charter* (denies collective bargaining and right to strike).

Initiators of the Challenge – the Ontario Secondary School Teachers' Federation (OSSTF), the Elementary Teachers' Federation of Ontario (ETFO), the Canadian Union of Public Employees (CUPE) and the Ontario Public Service Employees Union (OPSEU/NUPGE) have each filed a court challenge.

Current level of Court – In early March 2014, Justice Himmel of the Ontario Superior Court of Justice, at the request of the Ontario Attorney General's legal counsel, granted a postponement of the hearing date initially scheduled for June 2014. The decision to postpone the hearing date was based on the fact that three cases similar in nature to Bill 115 case were heard in February and May, 2014 before the Supreme Court of Canada which could end up changing the meaning of the protections for collective bargaining and strike action under s. 2(d) of the Charter (*see above, Cases #1, # 2 and # 3*). The hearing is now expected to take place in April 2015.

Union Legal Counsel – OSSTF is represented by Susan Ursel, a partner with Ursel, Phillips Fellows & Hopkinson; ETFO is represented by Steve Barrett, a partner with Sack, Goldblatt & Mitchell; CUPE is represented by Andrew Lokan, a partner with Paliare, Roland, Rosenberg & Rothstein; and OPSEU is represented by David Wright, a partner with Ryder, Wright, Blair & Holmes.

Interveners – Employer-side: Ontario Public School Boards Association

Union-side: Canadian Civil Liberties Association
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ILO Complaint – A complaint (Case No. 3003) was filed by the Elementary Teachers' Federation of Ontario in January 2013. The ILO Committee on Freedom of Association has not yet dealt with the complaint.

Case # 7 *The Federal Act to Provide for the Continuation and Resumption of Air Service Operation, Bill C-33 (March 2012)*

Summary of the Legislation – The Act substantially interfered in the collective bargaining process between Air Canada and its 8,200 technical, maintenance, and operational support employees represented by the International Association of Machinists and Aerospace Workers (IAMAW), and the airline's 3,000 pilots represented by the Air Canada Pilots Association (ACPA). The legislation prevented both unions from taking strike action and sent both disputes to a biased arbitration process.

Nature of the Court Challenge – Violation of section 2(d) of the *Charter* (denies collective bargaining and right to strike).

Initiators of the Challenge – The IAMAW and the ACPA have each filed a court challenge.

Current level of Court – Challenge filed in March 2012 at the Ontario Superior Court of Justice. A hearing will be scheduled after the Supreme Court of Canada releases decisions on three cases similar in nature to Bill C-33's case. These three cases were heard in February and May 2014. The outcome of these cases could end up changing the meaning of the protections for collective bargaining and strike action under section 2(d) of the Charter (see above, Cases # 1, # 2 and # 3).

Union Legal Counsel – IAMAW is represented by CFLR Board member Paul Cavalluzzo and Adrienne Telford, both with Cavalluzzo, Shilton, McIntyre & Cornish, and ACPA is represented by Steve Waller of Nelligan, O'Brien & Payne.

Interveners – Employer-side: Air Canada

ILO Complaint – A complaint (Case No. 2983) was filed by IAMAW in September 2012. The ILO Committee on Freedom of Association ruled in October 2013 that Bill C-33 violated the ILO's freedom of association principles.

Case # 8 Federal – Restoring Mail Delivery for Canadians Act, Bill C-6 (June 2011)

Summary of Legislation – This legislation forced locked-out postal workers back to work. It imposed wage increases that were less than the employer's last offer, and referred all other outstanding issues to final offer arbitration. The legislation also restricted the impartiality of the arbitrator in deciding on a settlement.

Nature of Court Challenge – Violation of Section 2.(d) of the *Charter* (denies collective bargaining and right to strike).

Initiator of the Challenge – The Canadian Union of Postal Workers (CUPW).

Current level of Court – The challenge was filed in the Ontario Superior Court of Justice in October 2011. A hearing will be scheduled after the Supreme Court of Canada releases decisions on three other cases heard in February and May 2014. similar in nature to Bill C-6 case. The outcome of these cases could end up changing the meaning of the protections for collective bargaining and strike action under section 2(d) of the *Charter* (see above, Cases # 1, # 2 and # 3).

Union Legal Counsel – CUPW is represented by CFLR Board member Paul Cavalluzzo and Adrienne Telford, both with Cavalluzzo, Shilton, McIntyre & Cornish.

Interveners – Employer-side: Canada Post Corporation
 FETCO (Federally Regulated Employers -
 Transportation and Communications)
 – hearing has taken place to grant intervener status,
 judgment is under reserve.

ILO Complaint – A complaint (Case No. 2894) was filed by CUPW in August 2011. The ILO Committee on Freedom of Association ruled in June 2013 that Bill C-6 violated the ILO's freedom of association principles.

Case # 9 British Columbia – *Education Service Collective Agreement Act, Bill 27 (January 2002) and Education Improvement Act, Bill 22 (March 2012)*

Summary of the Legislation – Bill 27 imposed a three-year collective agreement on approximately 45,000 teachers employed by school boards. The legislation also eliminated 10 local agreements and nine school board districts.

Bill 22, passed in March 2012, took away the right to strike from B.C.'s 41,000 public school teachers, imposed a wage freeze, and sent remaining unresolved issues to a government-appointed "mediator" who given a narrow mandate just to focus those areas where the employer was demanding concession. The legislation also reintroduced parts of Bills 27, passed by the Liberal government in 2002, which prohibited bargaining on class size, class composition, and the ratios of teachers to students. In April 2011, the B.C. Supreme Court ruled that those sections of Bills 27 and 28 were unconstitutional and in breach of the Canadian *Charter of Rights and Freedoms*.

Nature of Court Challenge – Provisions in Bill 27 and Bill 22 that prohibited bargaining on class size, class composition, and the ratios of teachers to students are a violation of teachers' section 2(d) *Charter* rights.

Initiator of the challenge – The B.C. Teachers' Federation (BCTF).

Current Level of Court – The government of British Columbia is appealing the January 2014 decision of the BC Supreme Court that found Bill 22's provision which prevents the union to negotiate class size and composition breached 2(d) of the Charter. In that decision, the Court ordered retroactive reinstatement of the union's right to negotiate class size and composition and ordered the government to pay \$2 million in damages under section 24 of the *Charter*.

The case is set for appeal in October 2014 (with a 5 judge panel) and will likely make its way to the Supreme Court of Canada as it deals with the next wave of the *Charter's*

Section 2(d) litigation issues: what is the remedy for a breach and what is the extent of consultation required when interfering with rights.

Previous Judgements on this Case – On April 13, 2011, Madam Justice Griffin of the B.C. Supreme Court determined that in enacting Bill 27 in 2002, which eliminated hundreds of existing collective agreement provisions, and by prohibiting future collective bargaining on these important workplace issues, the B.C. government infringed teachers' freedom of association guaranteed by s. 2.(d) of the *Charter*.

It further ruled that this infringement could not be justified in a free and democratic society under Section 1 of the *Charter*. The restrictive sections of the legislation were declared to be unconstitutional and invalid. The declaration of invalidity was suspended for 12 months "to allow the government time to address the repercussions of this decision."

The BCTF took the position that the ruling had reinstated the union's right to bargain class size, class composition, and the provision of services by specialist teachers. The government did not appeal but refused to recognize the decision. The government's position was that the finding of constitutional invalidity was based solely on the government passing the legislation without prior consultation with the BCTF. Thus, the government's position was that the only remedy required was to consult with the BCTF after the fact.

Union Legal Counsel – The BCTF is represented by John Rogers, a partner with Victory Square Law Office.

Interveners – There are no interveners.

ILO Complaint – The ILO ruled on two complaints against Bill 27 in March 2004 – one complaint submitted by the National Union of Public and General Employees (NUPGE) (Case No. 2166) and one submitted by the B.C. Teachers' *Federation* (Case No. 2173). The ILO Committee on Freedom of Association found Bill 27 not to comply with ILO freedom of association principles.

Case # 10 The Federal *Expenditure Restraint Act*, Bill C-10 (March 2009)

Summary of the Legislation – This Act, as part of the federal government's 2009 *Budget Implementation Act*, Bill C-10, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases, such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrides previously negotiated collective agreements containing wage increases above the imposed salary caps.

Nature of the Court Challenge – Violation of Section 2.(d) of the *Charter* (denies collective bargaining and right to strike).

Note – There are currently six section 2.(d) challenges against the *Expenditure Restraint Act* (ERA) (see above, Case # 3 above which was heard at the Supreme Court of Canada in February 2014 as well as below, Cases # 11, # 12, # 13 and # 14) There was a seventh challenge against Bill C-10 by the Association of Justice Counsel (see below, Case # 21 referred to under **Closed Cases: 2013 – 2014** section)

Initiators of the Challenge – Association des réalisateurs de Radio-Canada (independent union) and Canadian Union of Public Employees (CUPE) Local 675.

Current level of Court – The federal government is appealing to the Québec Court of Appeal, a July 2012 ruling of the Québec Superior Court that found the ERA in violation of section 2(d) of the *Charter*. The appeal was heard in March 2014. A decision on this case will likely not be released until the Supreme Court of Canada releases its decision on another case concerning Bill C-10 (see above, Case # 3).

In the meantime, CUPE returned to the Québec Superior Court (QSC) in March 2013 to challenge the Harper government's refusal to implement the QSC's decision to allow the agreement negotiated in good faith between CUPE and Société Radio-Canada (SRC) to come into force.

Previous Judgements on this Case – On July 12, 2012, the Québec Superior Court ruled that because the ERA retroactively changed the collective agreement of members of the Association des réalisateurs de Radio Canada and CUPE Local 67, it deprived them of their right to engage in meaningful collective negotiations with their employer over the terms of their employment, in violation of section 2(d) of the *Charter*.

The Court also decided that the ERA was a justified infringement under section 1 of the *Charter*. However, with respect to this case, the Court found that the application of the ERA to Radio-Canada's agreement with its employees is not rationally connected to section 1. The reason the Court gave for this finding was that the federal government's financing of the Radio-Canada is not linked to the contracts Radio-Canada negotiates with its employees.

Union Legal Counsel – The Association des réalisateurs de Radio-Canada is represented by Jean-Pierre Belhumeur, a partner with Stikeman, Elliot, SENCRL and CUPE Local 67 is represented by internal counsel Annick Desjardins.

Interveners – There are no interveners.

ILO Complaint – There has not been an ILO complaint filed against the *Expenditure Restraint Act*.

Case # 11 The Federal *Expenditure Restraint Act*, Bill C-10 (March 2009)

Summary of the Legislation – This Act, as part of the federal government’s 2009 *Budget Implementation Act*, Bill C-10, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases, such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrides previously negotiated collective agreements containing wage increases above the imposed salary caps.

Nature of Court Challenge – Violation of section 2(d) of the *Charter* (denies collective bargaining and right to strike).

Note – There are currently six Section 2.(d) challenges against the *Expenditure Restraint Act* (ERA) (see above, Case # 3, which was heard at the Supreme Court of Canada in February 2014 and Cases # 10, as well as below Cases # 12, # 13 and # 14). There was a seventh challenge against Bill C-10 by the Association of Justice Counsel (see below, Case # 21 referred to under **Closed Cases: 2013 – 2014** section)

Initiators of the Challenge – Federal Government Dockyard Trades and Labour Council.

Current Level of Court – The Supreme Court of Canada has decided to wait to rule on the Dockworkers' application for leave to appeal until the Court has rendered its decision in *Meredith v. Attorney General of Canada* (see above, Case # 3).

Previous Judgements on this Case – The Dockyard argued that the ERA affected them in a different manner than it had other federal public servants by eliminating a pay increase awarded to them by arbitration in January 2009, but which had been retroactive to October 1, 2006, more than two years prior to the introduction of the ERA. They suggested that every other group who had their pay increases for the period of 2006 to 2008 determined before the introduction of the ERA in January 2009 were allowed to keep those increases, whether or not they were consistent with the salary caps set out in the ERA.

On September 8, 2011, the B.C. Supreme Court dismissed the Dockyard workers' challenge on primarily three points. First, it held that because the award was achieved through the arbitration process, it did not receive the same constitutional protection that is afforded to collective agreements reached outside that process. Second, the Court held that there was no interference with the dockyard workers' constitutional rights because the government was operating in a climate of intense economic uncertainty and gave some warning that they would be proceeding with the ERA. Finally, the Court held that the significant economic crisis that affected Canada in 2008 meant that the legislation was required under section 1 of the *Charter*.

The Dockworkers appealed to the B.C. Supreme Court of Appeal, and on August 19, 2013, the Appeal Court upheld the B.C. Supreme Court decision.

This decision goes in an opposite direction than the Federal Court took in June 2011 with the RCMP challenge to Bill C-10 (see above, Case # 3)

Union Legal Counsel – The Dockyard Trades and Labour Council are represented by Joseph Arvay, a partner with Arvay & Finlay.

Interveners – Employer-side: B.C. Attorney General

ILO Complaint – There has not been an ILO complaint filed against the *Expenditure Restraint Act*.

Case # 12 The Federal *Expenditure Restraint Act*, Bill C-10 (March 2009) and the *Public Sector Equitable Compensation Act*, also a part of Bill C-10 (March 2009)

Summary of the Legislation – The *Expenditure Restraint Act* (ERA), as part of the federal government's 2009 *Budget Implementation Act*, Bill C-10, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases, such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrides previously negotiated collective agreements containing wage increases above the imposed salary caps.

The *Public Sector Equitable Compensation Act* (PSECA), also a part of Bill C-10, removed the right of public sector workers to collectively file complaints for pay equity with the Canadian Human Rights Commission, thereby forcing women to file complaints as individuals. It imposes a \$50,000 fine on any union that encourages or assists their own members in filing a pay equity complaint.

Nature of Court Challenge – Both Acts are in violation of section 2(d) of the *Charter* (they deny collective bargaining and the right to strike), and the PSECA is also in violation of section 15 (equality rights).

Note – There are currently six section 2(d) challenges against the *Expenditure Restraint Act* (ERA) (see above Case # 3, which was heard at the Supreme Court of Canada in February 2014, and Cases # 10 and # 11 as well as below, Cases # 13 and # 14) There was a seventh challenge against Bill C-10 by the Association of Justice Counsel (see below, Case # 21, referred to under **Closed Cases: 2013 – 2014** section)

Initiator of the Challenge – Professional Institute of the Public Service of Canada (PIPSC).

Current Level of Court – A hearing took place from late October to early November 2013 in the Ontario Superior Court of Justice and the Court delivered its decision on February 12, 2014. This case was heard jointly with a similar challenge filed by the PSAC (see *below*, Case # 13). A decision to appeal to the Ontario Court of Appeal will be made after the Supreme Court of Canada rules on the *RCMP v Meredith* case against the ERA (see *above*, Case # 3), which was heard in February 2014.

Previous Judgements on this Case – The Ontario Superior Court denied both the PIPSC and the PSAC appeal, ruling that “the wage restraints imposed by the legislation do not demonstrate substantial interference with the freedom of association.” Both PIPSC and PSAC sought and were granted intervener status at the Supreme Court of Canada in the RCMP (Meredith and Roach) case (see *above*, Case # 3) which was heard on February 19, 2014.

It should be noted that by order of the Court, the unions are proceeding only with the ERA challenge at this time, as the PSECA regulations have not been enacted. Both PIPSC and PSAC may proceed with the PSECA challenge when the regulations are enacted.

Both PIPSC and PSAC contend that the ERA violates the right to freedom of association guaranteed by the *Charter* because it compromises the essential integrity of the collective bargaining process by retroactively invalidating provisions of existing collective agreements and undermining future bargaining.

The unions' challenge to the PSECA contends that the Act goes against the fundamental right to equal pay for work of equal value, as protected by the equality rights enshrined in the *Charter*, by not providing an adequate mechanism to address wage discrimination at the bargaining table.

Union Legal Counsel – PIPSC are represented by Fay Faraday of Faraday Law.

Interveners – There are no interveners at this time.

ILO Complaint – There has not been an ILO complaint filed against the *Expenditure Restraint Act* or the *Public Sector Equitable Compensation Act*.

Case # 13 *The Federal Expenditure Restraint Act, Bill C-10 (March 2009) and the Public Sector Equitable Compensation Act, also a part of Bill C-10 (March 2009)*

Summary of the Legislation – The *Expenditure Restraint Act* (ERA), as part of the federal government’s 2009 *Budget Implementation Act*, Bill C-10, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases, such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrides previously negotiated collective agreements containing wage increases above the imposed salary caps.

The *Public Sector Equitable Compensation Act* (PSECA), also a part of Bill C-10, removed the right of public sector workers to collectively file complaints for pay equity with the Canadian Human Rights Commission, thereby forcing women to file complaints as individuals. It imposes a \$50,000 fine on any union that encourages or assists their own members in filing a pay equity complaint.

Nature of Court Challenge – Both Acts are in violation of section 2(d) of the *Charter* (they deny collective bargaining and the right to strike), and the PSECA is also in violation of Section 15 (equality rights).

Note – There are currently six section 2(d) challenges against the *Expenditure Restraint Act* (ERA) (see above, Case # 3, which was heard at the Supreme Court of Canada in February 2014, and Cases # 10, # 11, # 12 as well as below, Case # 14) There was a seventh challenge against Bill C-10 by the Association of Justice Counsel (see below, Case # 21, referred to under **Closed Cases: 2013 – 2014** section)

Initiator of the Challenge – Public Service Alliance of Canada (PSAC).

Current Level of Court – See above, Case # 12 which has the same status as this case.

Previous Judgements on this Case – See above, Case # 11, as this case was heard in conjunction with the PIPS case, and the Ontario Superior Court issued the same judgement for both cases.

Union Legal Counsel – PSAC are represented by Andrew Raven, a partner with Raven, Cameron, Ballantyne & Yazbeck.

Interveners – There are no interveners.

ILO Complaint – There has not been an ILO complaint filed against the *Expenditure Restraint Act* or the *Public Sector Equitable Compensation Act*.

Case # 14 The Federal *Expenditure Restraint Act*, Bill C-10 (March 2009) and the *Public Service Labour Relations Act*, PSLRA (November 2003)

Summary of the Legislation – The *Expenditure Restraint Act* (ERA), as part of the federal government’s 2009 *Budget Implementation Act*, Bill C-10, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases, such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrides previously negotiated collective agreements containing wage increases above the imposed salary caps.

The *Public Service Labour Relations Act* (PSLRA) is the legislation that governs collective bargaining between the federal government and unions representing federal public service employees. Section 113 of the PSLRA restricts the scope of bargaining in the federal public service by prohibiting bargaining and inclusion in a collective agreement, of a large number of significant workplace issues including pensions, classifications, staffing and key elements of job security.

Nature of Court Challenge – The ERA is a violation of section 2(d) of the *Charter* (denies collective bargaining and the right to strike) and section 113 of the PSLRA violates of section 2(d) because it denies federal public service employees from bargaining collectively key provisions related to their working conditions.

Note – There are currently six section 2(d) challenges against the *Expenditure Restraint Act* (ERA) (see above Case # 3, which was heard at the Supreme Court of Canada in February 2014, as well as Cases # 10, # 11, # 12 and # 13) There was a seventh challenge against Bill C-10 by the Association of Justice Counsel (see below, Case # 21 referred to under **Closed Cases: 2013 – 2014** section)

Initiators of the Challenge – Confédération des syndicats nationaux (CSN) / Union of Canadian Correctional Workers

Current Level of Court – The case is still pending before the Québec Superior Court. Expert reports. Affidavits were filed in October 2013 but there is still no hearing date scheduled.

Union Legal Counsel – CSN / Union of Canadian Correctional Workers are represented by Eric Levesques with Laroche Martin law firm.

Interveners – None

ILO Complaint – There has not been an ILO complaint filed against the *Expenditure Restraint Act*.

**Case # 15 The Federal *Public Service Labour Relations Act* (PSLRA)
(November 2003)**

Summary of the Legislation – The federal *Public Service Labour Relations Act* is the legislation that governs collective bargaining between the federal government and unions representing federal public service employees. The PSLRA restricts the scope of bargaining in the federal public service by prohibiting bargaining and inclusion in a collective agreement of a large number of significant workplace issues including pensions, classifications, staffing and key elements of job security.

Nature of Court Challenge – Violation of section 2(d) of the *Charter* because it denies federal public service employees from bargaining collectively on key provisions related to their working conditions.

Initiators of the Challenge – the Professional Institute of the Public Service of Canada (PIPSC) and the Canadian Association of Professional Employees (CAPE).

Current Level of Court – PIPSC and CAPE filed a Notice of Application with the Ontario Superior Court of Justice in May 2008. Since then both unions have filed their affidavit evidence, received the employer's evidence and have started preparing to file reply evidence. Cross-examination, written and oral arguments have yet to occur.

The challenge is currently in abeyance given the SCC's decision in *Fraser* and the pending decision on three cases which were heard by the Supreme Court of Canada in February and May 2014 (*see above, Cases # 1, # 2 and #3*).

Union Legal Counsel – PIPSC and CAPE are represented by Steve Barrett, a partner with Sack, Goldblatt & Mitchell.

Interveners – There are no Interveners.

ILO Complaint – No complaint has been filed.

Case # 16 Manitoba – This is a challenge to *Manitoba Hydro's policy* of having employees join a union as a prerequisite to be able to work on major hydroelectric projects.

Summary of the Legislation – The lawsuit does not involve legislation.

Nature of Court Challenge – Manitoba Hydro's policy of having employees join a union as a prerequisite to be able to work on major hydroelectric projects is a violation of workers' freedom of association rights under section 2(d) of the *Charter*.

Initiators of the Challenge – The Merit Contractors Association of Manitoba with a group of five individual contractors (Barry Millen, Terri Fordham, Rick Lesiuk, Floyd Stoneham and Michel Paul Pilotte).

Current Level of Court – In June 2012, Merit Contractors filed lawsuit as a *Charter* challenge with the Manitoba Court of Queen's Bench against Manitoba Hydro the Hydro Projects Management Association (HPMA), Allied Hydro Council (AHC) and the Locals of the International Association of Heat and Frost Insulators and Allied Workers, IBEW Local 2034, and Operating Engineers Local 897 (Case CI12-01-78487). The Court has held a number of hearings on contested motions throughout 2013 and up to May 2014. A preliminary hearing has yet to be scheduled.

Previous Judgements on this Case – There has yet to be a judgement on this case. By way of background, the lawsuit concerns an alleged government directive that all work performed under the Burntwood Nelson Agreement (BNA) and the Transmission Line Collective Agreement (TLCA) must be performed by members of predesignated unions. The BNA and TLCA were entered into between the Manitoba Hydro Projects Management Association (HPMA) and the Allied Hydro Council (AHC) without direct involvement of the unions.

Merit Contractors are asking for declarations that mandatory membership in unions is contrary to the *Charter* section 2(d) right to associate, which they argue also provides a right not to associate. The contractors' argument is that they are required to join a union and pay dues but never agreed to this. As well, one of the plaintiffs already belongs to a union (that is not a predesignated union), and says he should not be forced to leave that union to join another union that he does not support.

It is IBEW's position is that the issues raised fall under the jurisdiction of the Labour Board or an Arbitrator and that the Court has no jurisdiction over the issues. The union filed a Motion to dismiss the challenge on that basis.

After IBEW filed its motion to dismiss the motion for lack of jurisdiction, the plaintiffs decided to file their own motion to amend the original claim in two substantial respects:

Firstly, they want to add the Province of Manitoba as a defendant because they allege the BNA and the TLCA are the instruments of government policy advanced through Manitoba Hydro.

Secondly, they want to alter the nature of the challenge somewhat by alleging that part of the breach by the defendants is that workers and potential workers, under the two collective agreements, are required to join unions that they “have not freely chosen” as their bargaining agents “in their employment with their contractor employers.”

Their original claim challenged the requirement that employees join and support unions; the amended claim challenges the ability of government to pre-designate any unions on government contracts.

Because of the number of parties involved and the complexity of the issues, a Case Management Judge was appointed to deal with all preliminary motions in order to move the matter along. Several of these motions have been heard in Court but no judgements have been released to date.

Because IBEW has filed a jurisdictional challenge, the union has not yet filed a Statement of Defense, which will be unnecessary if the Court has no jurisdiction.

If the Court concludes it has jurisdiction, IBEW would consider whether there were grounds to appeal. IBEW expects the litigation to proceed over many years and to require substantial expenditures to finance.

Union Legal Counsel – It is not known at this time who the legal counsel is for IBEW and the other unions named as defendants. Merit Contractors are represented by Peter Gall of the well-known management lawyer who is a partner with Gall Legge Grant and Munroe. He was formerly a partner with Heenan Blaikie LLP.

Interveners – It is not known at this time if there will be interveners.

ILO Complaint – No complaint has been filed.

CLOSED CASES: 2013 – 2014**Case # 17 Québec – Challenge to the *Anti-Corruption Act*, Bill 15 (June 2011) – section 61, which amended Section 85 of the *Act respecting labour relations, vocational training and manpower management in the construction industry***

Summary of the Legislation – This specific amendment forces employees of the Québec Construction Commission (CCQ) to disaffiliate from their current union, Local 573 of the Canadian Office and Professional Employees Union (COPE), and makes it illegal for them to affiliate with a union or union central whose members are construction workers (including the FTQ, CSN, CSD and CTC).

Nature of Court Challenge – COPE argued that the amendment noted above prevents members of COPE Local 573 from exercising their freedom of association rights under Section 2.(d) of the *Charter*.

Initiator of the Challenge – The Canadian Office and Professional Employees Union (COPE) on behalf of COPE Local 573 members.

Current Level of Court – In an unanimous decision released in February 2014, the Quebec Court of Appeal found the section 61 of the *Anti-Corruption Act* to be an infringement of section 2(d) the freedom of association. However the Court determined that it was justified in a free and democratic society under section 1 of the *Charter*. COPE decided against appealing to the Supreme Court of Canada.

Union legal counsel – COPE was represented by internal legal counsel, Pierre Gingras.

Interveners – There are no interveners

ILO Complaint – A complaint (Case No. 3015) was filed by the Canadian Office and Professional Employees Union (COPE) on behalf of Local 573 in March 2013. The ILO Committee on Freedom of Association has not yet dealt with the complaint.

Case # 18 British Columbia – Mexican government's claim that its sovereign immunity will be violated if the B.C. Labour Relations Board are allowed to rule on a UFCW allegation that Mexico and its consulate in Vancouver colluded with the operators of a B.C. agriculture operation to bust the union

Summary of Legislation – A violation of section 6(1) of the B.C. *Labour Relations Code* – Unfair Labour Practices (“Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere

with the formation, selection or administration of a trade union or contribute financial or other support to it”). And a violation of section 9 – Coercion and intimidation prohibited (“A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.”)

Nature of the Court Challenge – Whether or not the Mexican government has sovereign immunity from prosecution under the B.C. *Labour Relations Code*.

Initiator of the Challenge – United Food and Commercial Workers – Canada (UFCW Canada) Local 1518.

Current Level of Court – On January 15, 2014, the Supreme Court of British Columbia denied a petition by Mexico to quash documentary evidence and testimony corroborating that the Mexican government blacklisted Mexican migrant workers from returning to Canada because they were suspected of being union sympathizers. The evidence had been presented in 2012 to the BC Labour Relations Board (BCLRB) by UFCW Canada Local 1518.

The BCLRB hearings were stopped in March 2013, awaiting the hearing of Mexico's petition. The petition argued that because Mexico has sovereign immunity, the BCLRB should not have been allowed to consider testimony from former consular officials, or to receive leaked consular documents and other Mexico files and documentary evidence that overwhelmingly pointed to blacklisting activity.

Because the petition was struck down, the case and all the evidence returned to the BCLRB. On March 21, 2014, the BCLRB ruled that Mexican government and consular officials blacklisted Mexican seasonal migrant workers who were suspected of being union sympathizers, preventing them from returning to Canada. The Board also found that Mexico had altered documents in an attempt to cover up its union-busting activities.

Union Legal Counsel – UFCW Canada Local 1518 was represented by Chris Buchanan of Hastings Law Office.

Interveners – There were no interveners

ILO Complaint – There was not an ILO complaint filed regarding this case.

Case # 19 Federal – Challenge to an agreement between the Treasury Board and the Professional Institute of the Public Service Canada (PIPSC) which was made into an order by the Public Service Labour Relations Board (PSLRB)

Summary of the Legislation – This case did not involve a challenge to legislation. The specific challenge relates to an agreement made between Treasury Board and PIPSC regarding disclosure of personal contact information for all bargaining unit members for purposes of providing representation, holding strike votes and etc. That agreement had been made into an order by the PSLRB.

Nature of Court Challenge – Elizabeth Bernard, a Rand formula non-member of PIPSC, brought an application for judicial review to set aside the PSLRB order on the basis that it violated her rights under the *Privacy Act* and under section 2(d) of the *Charter*.

Initiator of the Challenge – Elizabeth Bernard brought the challenge forward and is self-represented. The SCC has appointed an amicus curiae (an individual who is not a party or an attorney in the case, but who has knowledge of or a perspective on, that makes her or his views valuable to the court)

Current Level of Court – On February 12, 2014, the Supreme Court of Canada released its decision and upheld a decision of the Federal Court of Appeal. The Court ruled that the disclosure of a federal public servant's personal contact information by the employer to the union that represented her was authorized by the federal *Privacy Act*.

The Court held that there was a "sufficiently direct connection" between the employer's purpose in collecting the information and the union's intended use of the information that an employee could reasonably expect that the information would be used in the manner proposed.

Moreover, given unions' representational duties, the Court held that a union has a right to basic personal information about employees that is collected by the employer as part of the employment relationship, and that the disclosure of this information does not violate employees' section 2(d) and section 8 *Charter* rights.

Union Legal Counsel – PIPSC was represented by Peter Engelmann of Sack Goldblatt Mitchell LLP. PSAC was an Intervener in the case and is represented by Andrew Raven, a partner with Raven, Cameron, Ballantyne and Yazbeck LLP.

Interveners – There were no interveners

ILO Complaint – There was not an ILO complaint filed regarding this case.

Case 20 Alberta – Personal Information Protection Act (PIPA) (May 2010)

Summary of the Legislation – Certain sections of the *Personal Information Protection Act* (PIPA) violate an individual's freedom of expression as defined by section 2(b) of the *Charter*.

Nature of Court Challenge – Violation of section 2(b) of the *Charter* (freedom of expression).

Initiator of the Challenge – United Food and Commercial Workers – Canada (UFCW Canada) Local 401.

Current Level of Court – The decision of the Alberta Court of Appeal was appealed by the Alberta Attorney General and the Alberta Information and Privacy Commissioner to the Supreme Court of Canada (SCC) and was heard on June 11, 2013. The SCC delivered its decision on November 15, 2013, in favour of the UFCW Canada. The following quote from the ruling sums up the SCC decision:

PIPA imposes restrictions on a union's ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective bargaining strategies in the course of a lawful strike. In our view, this infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over personal information that they expose by crossing a picketline.

Accordingly, we would answer the constitutional questions as follows:

1. Do the Personal Information Protection Act, S.A. 2003, c. P-6.5, and the Personal Information Protection Act Regulation, Alta Reg. 366/2003, violate s. 2(b) of the Canadian Charter of Rights and Freedoms insofar as they restrict a union's ability to collect, use or disclose personal information during the course of a lawful strike?

Yes.

The SCC declared PIPA to be invalid but suspended the declaration of invalidity for a period of 12 months to give the Alberta legislature time to decide how best to make the legislation constitutional. UFCW Canada was awarded costs throughout.

Union Legal Counsel – UFCW Canada Local 401 was represented by Gwen Gray and Vanessa Cosco of Chivers & Carpenter.

Interveners – Employer-side: Attorney General of Canada
 Attorney General of Ontario
 Privacy Commissioner of Canada
 Canadian Civil Liberties Association
 British Columbia Civil Liberties Association
 Information and Privacy Commissioner of Ontario
 Coalition of British Columbia Businesses
 Merit Canada
 Information and Privacy Commissioner of BC

Union-side: Alberta Federation of Labour
 Canadian Civil Liberties Association
 British Columbia Civil Liberties Association

ILO Complaint – There was not an ILO complaint filed regarding this case.

Case # 21 The Federal *Expenditure Restraint Act*, Bill C-10 (March 2009)

Summary of the Legislation – This Act, as part of the federal government’s 2009 *Budget Implementation Act*, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases, such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrides previously negotiated collective agreements containing wage increases above the imposed salary caps.

Nature of Court Challenge – Violation of section 2(d) of the *Charter* (denies collective bargaining and right to strike).

Initiator of the Challenge – The Association of Justice Counsel.

Current Level of Court – On August 11, 2012, the Ontario Court of Appeal (OCA) overturned a November 2011 Ontario Superior Court (OSC) decision that ruled that the ERA infringes section 2(d) because it “substantially limits, both in purpose and effect, the freedom of association guaranteed by the *Charter*.” The Association sought leave to appeal to the Supreme Court of Canada, but the SCC denied leave to appeal on February 14, 2013.

Union Legal Counsel – The Association of Justice Counsel was represented by Andrew Lokan with Paliare, Roland, Rosenberg & Rothstein.

Interveners – There were no interveners

ILO Complaint – There was not an ILO complaint filed regarding this case.

Case # 22 Ontario *Labour Relations Act*, LRA, section 127.2 – “non-construction employer” provisions

Summary of Legislation – Section 127.2 of the *Labour Relations Act*, 1995, permits an employer that does not sell construction services to third parties to bring an application to the Labour Relations Board for a "non-construction employer" declaration.

Nature of the Court Challenge – Violation of section 2(d) of the *Charter* (denies collective bargaining and the right to strike).

Initiators of Challenge – Canadian Union of Skilled Workers (CUSW)

Current Level of Court – CUSW's application for leave to appeal to the Supreme Court of Canada was denied. On May 8, 2012, the Ontario Court of Appeal upheld the Divisional Court decision to overturn the Labour Relations Board decision that found section 127.2 of the *Labour Relations Act* violated section 2(d) of the *Charter* as it substantially interfered with the process of collective bargaining.

Union Legal Counsel – CUSW was represented by Lorne A. Richmond with Sack Golblatt Mitchell LLP.

Interveners –	Employer-side:	Greater Essex County District School Board
	Union-side:	Provincial Building and Construction Trades Council of Ontario

ILO Complaint – There was not an ILO complaint filed regarding this case.

Case 23 Québec *Labour Code*, Section 21 dealing with agricultural workers

Summary of the Legislation – Section 21 of the Québec *Labour Code* stipulates that agricultural workers are excluded from collective bargaining if they work on farms that have three employees or less working on a year-round basis.

Nature of Court Challenge – Violation of section 2(d) of the *Charter* because it denies agricultural workers employed on farms that have three or less employees the right to join a union and bargain collectively. The Québec *Labour Code* also violates section 15(1) in that section 21 of the *Code* was discriminatory towards farm workers, and particularly, migrant workers.

Initiator of the Challenge – United Food and Commercial Workers – Canada (UFCW Canada).

Current Level of Court – UFCW Canada launched a *Charter* challenge before the Québec Labour Commission where it was seeking certification of a bargaining unit constituted exclusively of migrant workers from Mexico. Relying on *B.C. Health* (and before *Fraser*), the Board found in April 2010, the provision was unconstitutional because it denies agricultural workers the guarantee of freedom of association.

The Québec Attorney General and the farm lobby group FERME appealed this decision to the Québec Superior Court.

On March 11, 2013, the Québec Superior Court ruled that “in relationship to agricultural workers who work on farms which ordinarily and continuously employ less than three workers, Section 21 of the *Code* is discriminatory as being a significant hindrance on their ability to exercise their fundamental right of freedom of association.” The Court however disagreed with the union's section 15(1) argument, ruling “any difference in treatment does not arise as a result of their status as migrant workers, but rather as a result of the nature of the industry in which they work.”

The government of Québec announced in April 2013 that it will not appeal the Québec Superior Court decision.

Union Legal Counsel – UFCW Canada was represented by Pierre Grenier and Sibel Ataogul of Melançon, Marceau, Grenier & Sciortino.

Interveners – There were no interveners

ILO Complaint – There was not an ILO complaint filed regarding this case.

Case # 24 New Brunswick – Random drug testing in the workplace

Summary of the Legislation – This *Charter* challenge does not pertain to a particular piece of labour legislation but a random drug testing policy instituted by Irving Oil in New Brunswick.

Nature of Court Challenge – A challenge to Irving Oil's random drug testing policy in violation of Section 7 (right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice) and Section 8 (the right to be secure against unreasonable search or seizure) of the *Charter*.

Initiator of the Challenge – The Communications, Energy and Paperworkers Union (CEP) Local 30.

Current Level of Court – On June 14, 2013, the Supreme Court of Canada released its decision in a case between Irving Pulp and Paper Limited and the Communication

Energy and Paperworkers Union of Canada regarding Irving's unilateral introduction of random alcohol testing in the workplace. The Supreme Court upheld the arbitration board's decision that Irving had not presented sufficient evidence of a workplace alcohol problem to warrant random testing, despite that Irving operated a dangerous workplace.

Union Legal Counsel – CEP Local 30 was represented by Joël Michaud with Pink Larkin.

Interveners –	Employer-side:	Construction Owners Association of Alberta Construction Labour Relations — an Alberta Association Enform Canadian National Railway Company Canadian Pacific Railway Company Via Rail Canada Inc. Alliance of Manufacturers & Exporters of Canada Canadian Mining Association Mining Association of British Columbia Mining Association of Manitoba Inc. Québec Mining Association Ontario Mining Association Saskatchewan Mining Association
	Union-side:	Alberta Federation of Labour CEP Local 707 Canadian Civil Liberties Association Power Workers' Union

ILO Complaint – There was not an ILO complaint filed regarding this case.

Case # 25 Québec's Act Respecting Conditions of Employment in the Public Sector, Bill 142 (December 2005)

Summary of Legislation – The *Act Respecting Conditions of Employment in the Public Sector* was passed abruptly in December 2005 by the Québec Liberal government after several months of bargaining with unions representing public sector workers in the province. The Act imposed six-year collective agreements on about 500,000 public sector workers in the province, including predetermined salary increases within a strict budget framework that had been imposed since negotiations had begun. Non-monetary conditions were also imposed on a group of unions that had not achieved agreement on these terms within a strict deadline also imposed by the government.

Nature of the Court Challenges – Several public sector unions and labour centrals brought motions before the Québec Labour Relations Commission alleging the government's failure to bargain in good faith. A constitutional challenge was also brought before the Superior Court alleging Bill 142 violated the freedom of association and the freedom of expression.

In a January 2012 decision, the Labour Commission allowed the complaints for bad faith bargaining on the basis that the government had refused throughout negotiations to touch its strict monetary framework, in addition to insisting that statutory pay equity adjustments be negotiated alongside salary increases. The Attorney General moved for judicial review of this decision.

Initiators of Challenges – Almost all Québec public sector unions representing government, education and healthcare staff, including the three labour centrals: Centrale des syndicats du Québec (CSQ), Confédération des syndicats nationaux (CSN) and Fédération des travailleurs et travailleuses du Québec (FTQ).

Current Level of Court – On January 10, 2013, the Superior Court of Québec rendered two decisions: one denying the unions' constitutional challenge, and the other allowing the Attorney General's judicial review of the Commission's decision.

None of the unions involved in the case sought leave to appeal at the Supreme Court of Canada.

Union Legal Counsel – Each union that was a part of the challenge had its own legal counsel. The lead counsel included Claudine Morin (CSQ), Guy Martin (CSN) and Louis Ménard (FTQ).

Interveners – There were no interveners

ILO Complaint – A complaint (Case No. 2467) was filed by the Association des substituts du procureur général du Québec in January 2006. The ILO Committee on Freedom of Association ruled in March 2007 that Bill 142 violated the ILO's freedom of association principles.

POTENTIAL FUTURE *CHARTER* CHALLENGES

Case # 26 *The Nova Scotia Essential Health and Community Services Act, Bill 37 (April 2014)*

The Act provides for a broad definition of essential services encompassing some 35,000 public employees who work in a range of occupations, including nursing, hospital support workers, group home care, home care, ambulance dispatching and paramedic workers. It mandates that essential services agreements be negotiated prior to any strike action through a process that is heavily weighted in favour of the employer.

A union may apply to the Labour Relations Board for arbitration if it feels that the level of employees designated essential is so high that it has the effect of depriving employees of a meaningful right to strike. If arbitration is granted, the Minister of Labour has the right to choose the method. However, whatever method is chosen by the Minister, the independence is undermined, as the arbitrator is forced consider “the employer’s ability to pay in light of the fiscal position of the government” in making an award.

Case 27 *The Federal Act to amend the Income Tax Act (labour organizations), Bill C-377 (not yet proclaimed)*

Bill C-377, if passed, would force unions to provide an incredibly onerous level of detailed financial disclosure about their work on behalf of their members.

The Private Member's Bill, sponsored by Conservative MP Russ Hiebert, would require all unions and each of their locals to disclose detailed financial information, such as salaries, supplier contracts, loans, accounts receivables, investments, and spending on organizing, collective bargaining, education, lobbying and all political activities. All this information would be made public on a federal government website. Failure to comply would result in a \$1,000/day fine for every day not in compliance.

Bill C-377 has nothing to do with taxation or tax policy, and everything to do with imposing costly burdens on unions and disclosing sensitive information to employers for strategic advantage. The draft legislation does little or nothing to promote transparency or accountability to union members. Instead, it imposes significant and unnecessary costs on trade unions, making it more difficult to organize and engage in collective bargaining on behalf of their membership.

In June 2013 the Senate of Canada approved a number of amendments to Bill C-377 that caused it to be sent back to the House of Commons. But Parliament was prorogued soon afterward. That means the bill technically never left the Senate, and it was bumped back in the Senate when the new government session began on October 16, 2013. The Bill passed second reading in the Senate on May 13, 2014.