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Regulating Strikes in Essential Services - Canada

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A Comparative 'Law in Action' Perspective

Edited by

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CHAPTER 5

Canada

Eric Tucker[*]

* I would like to thank Tyler Fram and Andrew Link for their outstanding research assistance and Christopher Rootham for his insightful comments on an earlier draft. Of course, I am responsible for any remaining errors.

1 GENERAL BACKGROUND: COUNTRY PROFILE

Canada is a federal state in which, as a general matter, labour relations come under provincial or territorial jurisdiction with a residual federal jurisdiction covering labour relations in federally regulated areas, including the federal public service, inter-provincial transportation and communications, and the postal service. Although it is estimated federal labour law covers about 10% of the Canadian workforce, because its jurisdiction extends to matters of national importance the federal government plays a disproportionately large role in regulating essential service strikes. Because there are ten provinces and three territories in Canada, each with their own labour relations laws, it is impossible to provide a comprehensive account of Canadian essential service strikes regulation. Therefore, the focus of this report is on federal and Ontario laws, with occasional forays into other jurisdictions where warranted.

Canada is best described as a liberal market economy with some social democratic tendencies. Historically, it has generally preferred to give capitalist enterprises a large measure of market freedom, but it has, to different degrees at different times and places, established public enterprises and created regulatory structures that limit market freedom in the name of securing the public welfare. In part, this can be explained by the fact that it is a large territory with a relatively small population, but more importantly since the turn of the twentieth century there have been various populist and labourist political formations that pressed for such arrangements. The New Democratic Party, founded in 1961, is the current heir to this tradition and it has formed the government at one time or another in seven provinces and one territory, although it has never formed the federal government. Its influence has fluctuated; at the end of 2017 it formed two provincial governments and was the official opposition in two others. Two other parties have dominated Canadian politics: the Liberals (centre-left) and Conservatives (centre-right).

In broad political terms, it is important to recognize that, like most advanced capitalist countries, since the 1970s its policy orientation shifted away from the Keynesian welfare state model that dominated in the decades after World War II toward neoliberalism.[1] The neoliberal turn has had a significant impact on the legal regulation of essential services, which this chapter explores in detail.

Canada is a parliamentary democracy based on the English model it inherited. Its legal system is rooted in the common law, with the exception of Quebec, which is a civil law jurisdiction. Prior to 1982, the principle of

1. *Harvey*, 2005; *Cahill/Konings*, 2017.

parliamentary sovereignty within jurisdictional boundaries was near absolute. This changed dramatically in 1982 with the adoption of the *Charter of Rights and Freedoms*.[2] Charter rights now limit executive and legislative powers and, in the last fifteen years, the Charter has become an important source of labour rights with significant consequences for the regulation of essential service strikes.

The legal status of trade unions was ambiguous in Canada prior to 1872 when the government enacted the *Trade Union Act*.[3] As a result, workers became formally free to join a union, bargain collectively and, under certain conditions, collectively withdraw their labour, without fear of prosecution. But none of these freedoms was legally protected by rights. Employers could fire workers for joining unions or acting collectively.

It was not until the Second World War and its immediate aftermath that Canadian jurisdictions adopted the Wagner Act model (WAM) of labour relations, which provided a legally protected right to organize and engage in lawful trade union activities, including striking, in exchange for severe limitations on legal freedoms, most importantly the freedom to strike.[4] Statutory collective bargaining schemes, however, did not extend to most public sector workers until the late 1960s. The public sector collective bargaining laws of the 1960s often departed from the private sector model in significant ways, including the freedom to strike which was more tightly controlled, in part because of concerns about the disruption of essential services. Again, these limits will be explored in more detail.

Under the WAM, private sector union density increased, peaking at around 30% in the late-1950s to early 1960s. So too did collective bargaining coverage.[5] Since that time density has steadily declined and is now estimated to be about 16%. Public sector union density grew rapidly in the late 1960s, reaching around 70%, where it has hovered ever since.

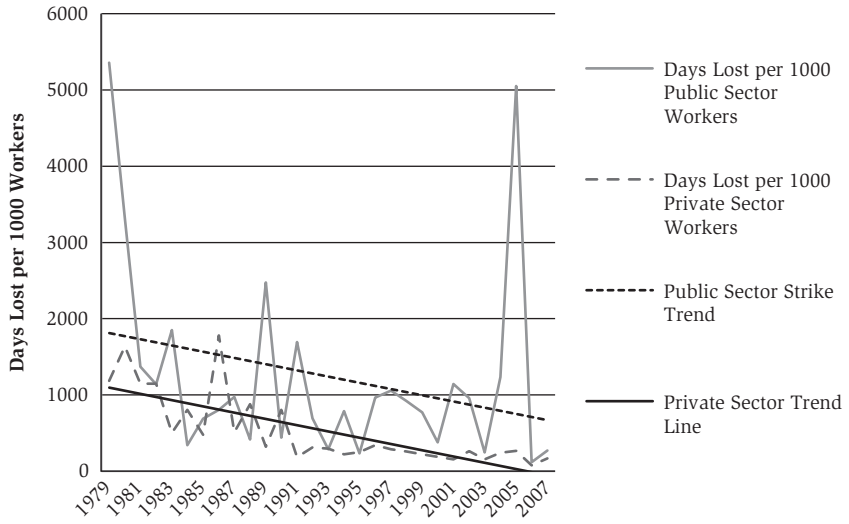
Since enterprise bargaining is built into the DNA of the WAM, there is little incentive for employers' associations to form for the purposes of collective bargaining. While there are exceptions, such as large-scale construction where sectoral bargaining is the norm, employer associations do not play a direct role in Canadian collective bargaining, although they actively seek to advance employer interests, including by intervening in legal cases where permitted.

Strike activity in Canada, like in most of the advanced capitalist countries, has declined precipitously in recent decades.[6] Figure 1[7] illustrates the downward trend for both private and public sector strikes in Canada from 1979 to 2007. In the past decade the number of person days lost to strikes in the private and

2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
3. *Tucker*, 1991.
4. *Fudge/Tucker*, 2001 and 2010, 15.
5. The discrepancy arises because bargaining unit members are not always required to be union members.
6. *Tucker*, 2014.
7. *Ibid.*

public sectors has fluctuated widely but the overall downward trend has not changed.[8]

Figure 5.1 Public and Private Sector Strike Rates per 1000 Workers, 1979 to 2007



2 COLLECTIVE LABOUR RELATIONS

As mentioned above, the Canadian collective bargaining regime is based on the WAM, but before clarifying its principal features regarding organizing, bargaining, and striking, it is important to highlight the distinction between freedoms and rights already averted to. Using the Hohfeldian conceptual framework, we think of freedoms and rights as jural relations between people.[9] You are free to do something when no one else can call upon the state to stop you. This is different from a legal right, which entails a legal duty on others not to interfere with your action. The distinction is crucial in labour law.

Beginning with organizing, as noted above, Canadians were legally free to organize unions from at least the late-nineteenth century, but it was only in the late-1930s that organizing became a legally protected right. Labour statutes prohibited employers from interfering with or threatening union organizing activity, although the law preserved their freedom to express their opposition to

8. *Government of Canada*, 2018.
9. *Hohfeld*, 1919.

unions. This produced a grey zone about the boundary between fair and unfair employer labour practices.[10]

The law also formally decriminalized collective bargaining in the late-nineteenth century but collective agreements were not legally enforceable since the common law viewed them as contracts in restraint of trade. Moreover, employees had no protected right to bargain collectively until post-war labour legislation imposed a duty on employers to bargain in good faith with certified trade unions that demonstrated majority support within a bargaining unit. As well, those laws made agreements enforceable through grievance arbitration.

The issue of strikes is a bit more complex. Workers also were generally free to strike but, under common law, the withdrawal of labour was a breach of contract that allowed the employer to summarily dismiss the striking workers. Statutory collective bargaining laws gave workers a legal right to strike in that it protected their employment status while on strike and provided a legal right to return to their jobs after the strike ended. However, these laws also placed severe restrictions on the freedom to strike, discussed below.

As already mentioned, public sector workers were frequently subject to a different legal regime regarding strikes. Some statutes denied public sector workers any freedom to strike, while others permitted limited strikes but required the maintenance of essential services. Often interest arbitration was a substitute to resolve bargaining disputes. We will return to these issues, *infra*.

Prior to the *Charter*, labour rights and freedoms were rooted in common law and statute. This has now changed. The *Charter* explicitly protects freedom of association, but the scope of that protection is undefined and requires judicial interpretation. From the outset courts accepted that freedom of association protected the freedom to organize, but that freedom was not under threat in Canada since it was rarely restricted by government. The more important issue for workers excluded from statutory collective bargaining schemes was whether the *Charter* required the government to protect the right to organize. The general answer was no, except in limited cases where it could be demonstrated that workers are incapable of exercising their freedom without rights protection.[11]

The question of whether the *Charter* protects the freedom or right to bargain and strike is much more important in the context of essential services where governments frequently restrict these freedoms. The Supreme Court of Canada (SCC) initially rejected the proposition that freedom of association protected either, but in 2007 the court unexpectedly reversed itself. It held that freedom of association protected the freedom to bargain collectively and that it entailed a duty to bargain in good faith. This made collective bargaining both a

10. *Slinn*, 2008, 53.
11. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 (2001).

constitutionally protected freedom and right.[12] Eight years later, the SCC also held that freedom of association protects the freedom to strike.[13]

There are, however, two important caveats. The first is that the *Charter* only applies to government action. This is less of an issue in the essential services context where government is normally the actor, either as legislator or as employer. The second caveat is that the *Charter* permits violations of protected rights where the restriction can be demonstrably justified in a free and democratic society. This is very significant since the SCC stated that interference with associational rights may be permitted in situations involving essential services.[14] This issue will be examined in more detail, *infra*.

Until recently, international labour rights played an insignificant role in Canadian labour law. There were several reasons for this. One is that since Canada is a dualist country, international treaty obligations entered into by the federal government does not become domestic law unless implemented by domestic legislation, and provincial legislatures are under no constitutional obligation to pass implementing legislation.[15]

A second reason is Canadian governments' limited embrace of International Labour Organization (ILO) norms. This was evidenced by the fact that prior to 14 June 2017, Canada had only ratified one of the two foundational conventions supporting freedom of association (Convention 87, but not Convention 98). Of course, the lack of ratifications did not immunize Canada from complaints that it violated freedom of association, since the ILO considers that all members are bound to respect freedom of association regardless of whether they have ratified its underlying conventions. In fact, Canadian unions frequently complained to the ILO and its supervisory bodies often upheld those complaints and made recommendations to the offending government. However, those recommendations had no legal force and no political impact either. As a result, governments felt free to ignore the ILO and the violations continued.[16]

In recent years, however, international law has come to play a much more significant role through its influence on the development of constitutional law. The turning point came when the SCC determined that the meaning of freedom of association under the *Charter* should be as generous as it is in international law and thought. The SCC translated the soft law of the ILO and various UN declarations into hard constitutional law in Canada and, as we shall see, that has had a significant influence on the development of constitutional labour rights in Canada.[17]

12. *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 (2007).
13. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (2015).
14. *Health Services*, para. 108.
15. *Macklem*, 2012.
16. *Adams*, 2006
17. *Health Services*; *Bogg/Ewing*, 2012, 379; *Langille*, 2007, 363.

3 THE RIGHT TO STRIKE

As mentioned, the WAM imposes significant restrictions on the freedom to strike. In particular, recognition strikes and strikes during the life of a collective agreement are prohibited. There are also procedural requirements that must be satisfied for a strike or lockout to be legal. These vary from jurisdiction to jurisdiction, but typically include the following. First, the union must have won a strike vote among the members of the bargaining unit. Second, the union and the employer must have bargained to impasse and undergone mediation or conciliation without success. Third, they must wait a prescribed number of days after mediation/conciliation has failed before taking industrial action. Fourth, some jurisdictions, including the federal jurisdiction but not Ontario, require the union provide the employer with advance notice of the strike.[18]

In general, the law only permits economic strikes to support collective bargaining demands. Sympathy or political strikes are almost always unlawful since unions can only legally strike during the narrow window of opportunity that opens when no collective agreement is in force and the procedural hurdles have been cleared. Political and sympathy strikes are not exempt from these general rules and so are illegal if they are untimely. Canadian unions have so deeply absorbed these norms that no case has ever posed the question of whether a union in a legal strike position could engage in a sympathy or a political strike.

The definition of a strike is quite broad and in addition to a complete work stoppage includes any concerted action undertaken with a common understanding designed to restrict or limit output. Thus, a partial work stoppage, a slowdown, or a work-to-rule campaign are all considered strikes.[19]

It is important to emphasize that while the general restrictions described here apply to both private and public sector workers, public sectors workers and particularly essential service workers are subject to additional restrictions, described *infra*.

4 THE EXPERIENCE WITH STRIKES IN ESSENTIAL SERVICES

There are no recent studies of the prevalence of strikes in essential services, if only because in Canada essential services strikes are heavily regulated and,

18. *Fudge/Tucker*, 2001 and 2010; *Slinn/Tucker*, 2016, 171; *Adams*, 1993, 11.7 et seq.
19. Labour Relations Act, 1995, SO 1995, c 1, s 1(1) 'strike' includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output; Canada Labour Code, RSC, 1985, c L-2, s 3(1) 'strike' includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output; *Adams*, 1993, 11.1(i).

because of that fact, likely infrequent. This was not always the case. As statutory collective bargaining laws were extended to public sector workers in the 1960s, much attention was paid to the issue of essential service strikes. For example, in 1968 Professor Harry Arthurs conducted a major study of strikes in essential services and reported that from 1946 to 1966 strikes in essential industries had become more frequent and that person days lost in total and per strike were increasing. [20]

If we consider the Canadian experience with essential service strike regulation from a qualitative perspective, it has revolved around two fundamental questions: what are essential services and how should essential service disputes be resolved? We address the former question here and the latter in Section 5 of this chapter.

Historically, the concept of essentiality in Canada has been a political one. What activities are so important to the public welfare such that stoppages pose unacceptable risk and hardship to the broader public? The answer to that question has changed over time and place. For example, one of Canada's earliest collective bargaining laws, the *Industrial Disputes Investigation Act* of 1907 (IDIA) required the parties to undergo a process of conciliation prior to a labour stoppage in mining, transportation, communications and public utilities. These services were understood at the time to be so essential as to warrant restrictions on actions that the parties were otherwise free to undertake.[21] During war time the IDIA was extended to war production industries, expanding the scope of essential services. The post-World War II collective bargaining statutes retained compulsory conciliation as a general requirement, not because governments considered the economy as a whole an essential service, but rather because compulsory conciliation had come to be seen as a good industrial relations strategy for avoiding unnecessary conflict. However, these laws only applied to the private sector and so there was not a great need to be concerned over the definition essential services.

The exception was with respect to municipal police and fire-fighters. Although these workers were generally excluded from the normative private sector schemes, they were soon given access to collective bargaining through sector specific statutes.[22] While some statutes permitted police strikes, in practice *ad hoc* legislation usually prevented police from exercising this freedom.[23] However, most statutory schemes applicable to police and fire-fighters expressly prohibited strikes and substituted binding interest arbitration by

20. *Arthurs*, 1971, 1 et seqq.
21. Industrial Disputes Investigation Act, 6-7 Edward VII, ch. 20 (1907); *Fudge/Tucker*, 2001 and 2010, 52 et seqq.
22. For example, see the Fire Departments Act, SO 1947, c 37; the Police Amendment Act, SO 1947, c 77.
23. In October 1969 Montreal police and fire-fighters went on a legal strike. During the sixteen hours that the strikes were permitted bank robberies increased and a riot occurred during which one police officer was fatally wounded. The army was called out and back to work legislation was quickly passed. Online at http://archives.cbc.ca/on_this_day/10/07/.

neutral third parties. This interference with free collective bargaining was justified because of the overriding public safety interest in maintaining these services and that judgment has never been seriously challenged.[24]

Outside of police and fire-fighters, the issue of determining which services were essential only became pressing when government extended collective bargaining to the public and para-public sectors more broadly, beginning in the mid to late 1960s. One contemporary commentator, Paul Phillips, described the scope of essential services to be 'whatever the responsible public authority believes it to be at any point in time.' Reflecting the ambiguities of the time, Harry Arthurs described essentiality as lying 'mid-way along the progression from very limited cases where a labour dispute actually does create (or threatens to create) a danger, to that very broad class of cases where the dispute touches the public interest in a very incidental way.'[25]

We will look more closely *infra* at the ways in which Canadian governments have defined essential services in the context of the strike regulation laws of Ontario and the federal jurisdiction. However, the freedom of governments to define essential services (and to regulate essential service strikes) is now limited by the SCC's interpretation of the *Charter*'s protection of freedom of association. Here we deal only with constitutional limits on the government's freedom to define essential services.

The basic question asked by the court in the *Saskatchewan Federation of Labour* (*SFL*) case is 'whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.'[26] If a law substantially interferes, then the burden shifts to the government to demonstrate that the restriction is demonstrably justified in a free and democratic society. Here is where the scope of essentiality comes into play. The first step in a section 1 defence under the *Charter* is to establish that the law aims to achieve a pressing and substantial objective. In the *SFL* case, the court accepted that maintaining essential services is such an objective, but before the argument can succeed, the court has to be convinced that the services the government is protecting are sufficiently essential so that their protection is a pressing and substantial objective. This raises the need to demarcate what services are essential or when the consequences of a labour disruption are sufficiently serious to justify interference with the constitutional freedom to strike.[27]

The court begins its discussion with the definition of essential services in international law. For this purpose, they accept a summary of that law presented in an affidavit filed by Professor Patrick Macklem, who identifies three situations

24. *Jackson*, 1995, 313 et seqq.; *Haney*, 1974; *Downie/Jackson*, 1980.
25. *Phillips*, 1975, 39 (italics in original); *Arthurs*, 1971.
26. *Saskatchewan*, at para. 78.
27. *Ibid.,* para. 86.

in which the ILO's supervisory bodies have justified strike restrictions on essential service grounds:

(1) in the public service only for public servants exercising authority in the name of the state;
(2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); or
(3) in the event of an acute national emergency and for a limited period of time.[28]

Without getting into the details of the contested Saskatchewan legislation, the SCC found that it was overly broad because 'the categories of workers whose right to strike may be abrogated because they provide essential services is subject to the employer's unilateral discretion.'[29] While the court does not provide a bright-line definition of essential services, its reference to international law is significant because in the past the court has expressed the opinion that freedom of association in Canada should be interpreted as generously as it is in international law. The court was also disturbed by the absence of a collaborative process for categorizing services as essential and determining the number of employees necessary to maintain them.[30]

Since the *SFL* decision, there has been one lower court judgment that dealt directly with the question of whether the government had a pressing and substantial interest that justified an infringement of the right to strike. The case arose out of continuing conflicts between the teachers' unions and the Ontario provincial government, which the government resolved by passing legislation that imposed terms and conditions on unions that did not reach an agreement by a set date. One effect of measure was that it deprived workers of the freedom to strike that they otherwise would have enjoyed. The unions successfully challenged the legislation as a violation of their *Charter* rights. The court accepted that the legislation substantially interfered with their freedom to strike and held that the interference was not justified. Central to the court's holding was its conclusion that the government's purpose was fiscal restraint rather than maintaining or restoring essential services. It then stated: 'It is only in exceptional circumstances that a breach of rights under the *Charter* will be justified based on economic concerns.'[31]

It will take further litigation to clarify where and how courts will draw the line demarcating services as essential, but it is clear that governments no longer have the absolute right unilaterally to make that determination.

28. *Ibid.*
29. *Ibid.*, para. 87.
30. *Ibid.*, at para. 89.
31. *OPSEU v Ontario*, 2016 ONSC 2197, at para. 238 (2016).

5 RESTRICTIONS ON THE RIGHT TO STRIKE IN ESSENTIAL SERVICES

5.1 The Constitutional Framework

It is clear that any discussion of statutory restrictions on the right to strike of employees in essential services must begin with a consideration of Canada's newly constitutionalized labour rights, including the right to unionize, the right to bargain collectively, and the right to strike. We have previously discussed how this body of law affects the definition of essentiality. Here we discuss the impact of constitutional labour rights on the government's power to regulate essential service strikes by excluding workers from the right to organize, bargain, or strike, or imposing substantial limits on their exercise.

Canada historically rarely deprived workers of their freedom to form associations, even for police and other public security workers. As well, it rarely denied workers the freedom to bargain collectively. Instead, Canada has generally secured essential services related to public security by denying workers the freedom to strike – the no-strike model – or limiting the strike to maintain essential services – the designation model. There are exceptions,[32] however, including members of the armed forces, who are not covered by any collective bargaining legislation.[33]

Another exception was the he Royal Canadian Mounted Police (RCMP) whose situation merits closer examination because of their recent successful constitutional challenge to their exclusion from collective labour rights. The RCMP provides police service at the federal level and for many of Canada's provinces and territories. As such, it is the closest thing Canada has to a national police force. In part because of its long history of involvement in internal security and strikebreaking, the government was concerned about RCMP officers having connections to the labour movement. Indeed, from 1918 to 1974 they were prohibited by an order-in-council from engaging in union-related activity on pain of instant dismissal.[34] When the order-in-council was lifted in 1974, the head of the RCMP recognized there was a high level of discontent among officers and instituted the Division Staff Relations Representation Program (DSRRP) to

32. An interesting recent exception was 2003 legislation passed in Quebec, which declared certain home care and child-care workers not to be employees. The effect of the law was to remove them from any statutory collective bargaining scheme so that any attempt to bargain collectively was potentially a violation of competition law. The legislation was declared unconstitutional in 2008, a year after the SCC recognized that freedom of association protected collective bargaining. See *Confédération des syndicats nationaux c Québec (Procureur General)*, 2008 QCCS 5076 (2008).
33. The Public Service Alliance of Canada (PSAC) unsuccessfully petitioned the Canadian government in 1971 to create statutory collective bargaining schemes for the military. See PSAC, *Collective Bargaining Rights for Members of the Armed Forces* (Presented to the Committee on Legislation Review April 1971).
34. *Fudge/Tucker*, 2001 and 2010, 100 et seqq. For a history of the restrictions on freedom of association of RCMP members, see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2009 CanLII 15149 (ON SC), < http://canlii.ca/t/2315w > , retrieved

provide for a weak form of consultation. The program was formalized in regulation in 1989 and renamed the Staff Relations Representation Program (SSRP). Then, in 1996, a Pay Council was created to provide officers with a mechanism for being consulted on compensation issues. RCMP officers chose representatives to participate in both these bodies, which were the only bodies the RCMP recognized for the purposes of discussing workplace and wage issues. Neither body was independent of government nor was there a role for collective bargaining. Both bodies were limited to consultation.

RCMP officers first challenged their exclusion from any statutory collective bargaining law in early years of *Charter* litigation but were unsuccessful. The SCC embraced a thin interpretation of freedom of association as only protecting the freedom to form associations. Since the law did not prohibit RCMP officers from forming associations their *Charter* rights were not violated.[35]

In 2006, an independent association of RCMP officers, the Mounted Police Association of Ontario (MPAO), launched a fresh challenge to the constitutionality of the RCMP's representation scheme. Their case was bolstered in 2007 when the SCC adopted a broader view that freedom of association that protected collective bargaining and this time the challenge succeeded. The SCC held that the SRRP substantially failed to provide RCMP officers with a meaningful process of collective bargaining by denying them representation by an association independent of government and by depriving officers of a sufficient degree of choice in the selection of their representatives. The SCC also rejected the government's defence that the infringement was justified because unionization would compromise the force's neutrality.[36] The effect of the judgment is to limit severely the power of government to protect essential services by depriving workers of the right to form independent unions or bargain collectively.

This leaves governments with the option of regulating strikes, but their power is constitutionally limited. In order to determine whether restrictions on strikes are constitutional, the court must answer two key questions. The first is whether the restrictions on the freedom to strike substantially interfere with a process of collective bargaining. A complete ban on strikes, or even broadly drawn restrictions, will constitute substantial interference, so this is unlikely to be the difficult point in litigation. Rather, the key question will be whether the government can satisfy the court that the interference is demonstrably justified. The starting point for the justification will be that the freedom to strike is limited to maintain essential services, which, as discussed in section 4, involves the court in patrolling the boundaries of what constitute essential services. Assuming the government satisfies the court that it has a pressing and substantial objective, it must then demonstrate minimum impairment. That inquiry will

on 2018-03-08. Even today, statutes prohibit police from being members of unions that are affiliated with the labour movement. For example, see Police Services Act, RSO 1990, c P-15, s 117.

35. *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 (1999).
36. *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 (2015).

lead the court to examine the scope of the restrictions, the process by which they were developed, and the alternative provided to the strike.

Where the government adopts the no-strike model, the court will want to be satisfied that a less restrictive approach that preserved a limited right to strike could not have met its legitimate interest in preserving essential services. As well, it will require that the strike alternative provides the affected workers with an acceptable substitute, such as binding interest arbitration by a neutral third party. Where the government has selected a designation model, as in the *SFL* case, the court will examine whether the processes for determining which services are essential and how those essential services will be provided are minimally impairing.

In the *SFL* case, the trial judge found that the restrictions went far beyond what was necessary to maintain essential services. The SCC agreed:

> The *unilateral* authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the trial judge's conclusion that the *PSESA* impairs the s. 2 (*d*) rights more than is necessary.[37]

5.2 Securing Essential Services by Exclusion from Collective Labour Relations Rights (No Right to Bargain Collectively and/or No Right to Strike)

In general, few Canadian workers are *ex ante* deprived of the right to bargain collectively. One such group is employees of the Canadian Security and Intelligence Service. Except for clerical and secretarial employees, they have no right to bargain or strike. As discussed earlier, RCMP officers were in a similar situation until the SCC found their exclusion was unconstitutional in 2015. In response, the government enacted legislation in 2017 that provides RCMP officers with a process to unionize and bargain collectively.[38]

It is far more common for governments to deprive essential service workers *ex ante* of the right to strike. As mentioned earlier, this is the common approach to public security workers, such as police, fire-fighters and prison guards. Not surprisingly, when the federal government provided RCMP officers with a statutory collective bargaining scheme, they adopted the no-strike model, providing them with arbitration instead.

Ontario, hospital workers are the other major group subject to the no-strike model. In 1965 following a strike at a public hospital, the Ontario government enacted the *Hospital Labour Disputes Arbitration Act* (HLDAA), which provides that in the event of an impasse the parties are obliged to submit their dispute to

37. *Saskatchewan*, 81.
38. *Federal Public Sector Labour Relations Act*, SC 2017, c 9.

arbitration.[39] Another group of workers recently deprived of the right to strike are employees of the Toronto Transit Commission (TTC).[40] The government enacted the exclusion in 2011 at the request of the City of Toronto. Prior to the enactment, the government had ended a number of TTC strikes through back-to-work legislation.

Workers and unions who strike unlawfully potentially face very serious penalties regardless of the circumstances. Some no-strike laws specify the consequences of violations of the law, but many incorporate the laws that govern unlawful strikes generally. For example, the recent TTC strike law expressly incorporates by reference the provisions of the *Labour Relations Act* (LRA) regarding unlawful strikes.[41] All contraventions of the LRA, including untimely strikes, are regulatory offences for which individuals are liable to fines of up to $2,000 and unions up to $25,000 for each day they are in violation. However, prosecutions can only be instituted with the written consent of the Labour Board. Labour boards also have the power to issue unlawful strike declarations, which have the same legal effect as a court order. Striking workers and union leaders who defy court orders could face civil or criminal contempt proceedings that could result in fines or jail.[42]

Apart from statute, employers can discipline individual workers who strike illegally, including termination. Employees can challenge disciplinary action through the grievance procedure, but arbitrators accept that unlawful striking is a disciplinary matter, the only issue being whether the severity of the penalty is justified in the circumstances of the case. As well, employers can bring grievances against the union, which is under a strict obligation not to participate in or facilitate unlawful strikes and to use its influence to end them when they occur. Arbitrators have the power to award damages against the union should they breach the peace obligation.

Unlawful strikes may give rise to tort liability. While there is no nominal tort of breach of statute (unless it was the intent of the legislature to create such liability), unlawful strikes by essential service workers will likely be tortious on other grounds. For example, an action for civil conspiracy using unlawful means could succeed on the basis that the strike violated a statutory prohibition on strikes.

In addition to the sanctions discussed above, in some circumstances essential service workers could be prosecuted for criminal breach of contract. Under the law, which dates back to 1878, it is a crime to wilfully breach a contract if you have reasonable cause to believe that the probable consequences

39. For the background and early experience, see *White*, 1995, 82 et seqq; *Arthurs*, 1971, 82 et seqq. The current statute is RSO 1990, c H-14.
40. *Toronto Transit Commission Labour Disputes Resolution Act*, 2011, SO 2011, c 2.
41. *Ibid.*, s 17.
42. *Fudge/Glasbeek*, 1992. In another famous incident, the leader of the postal workers' union, Jean-Claude Parrot was convicted of criminal contempt for refusing to order his members back to work after Parliament enacted back-to-work legislation. See *R v Parrot*, 106 DLR (3d) 296 (ONCA) (1979) and *Mandel/Glasbeek*, 1979, 10.

of doing so will be to endanger human life, cause serious bodily injury, expose valuable property to serious injury or destruction, deprive the residents of a municipality of their supply of light, power or gas, or delay or prevent the running of trains.[43] However, the likelihood of prosecution is remote. Indeed, we have not located a single reported case.[44]

Strikes in defiance of the no-strike model are uncommon. The authors of a study of public sector bargaining between 1978 and 2008 found that of the 791 contracts negotiated under this regime, unions struck just 4 times.[45] The most significant strike undertaken by Ontario workers under the no-strike regime was in 1981 when approximately 10,000 health care workers covered by the HLDAA walked off the job. The Ontario government obtained a court injunction ordering the nurses back to work. The leader of the union, Grace Hartman, refused to order her members back to work and the Attorney General threatened mass prosecution of union leaders and even possibly of members. The strike collapsed soon thereafter. Seventeen union leaders were subsequently charged with contempt. Pursuant to a plea deal, Hartman was sentenced to 45 days of imprisonment, two other leaders received 15 day sentences, and the remainder received suspended sentences and were fined $300 each. Striking workers faced disciplinary action by their employers. Thirty-four local leaders were dismissed but arbitrators reinstated most, subject to lengthy disciplinary suspensions without pay. Striking workers were meted out 5,500 letters of reprimand and 3,442 disciplinary suspensions.[46] Later that year acute care nurses implemented a work-to-rule campaign and an overtime ban to show their displeasure over the lack of progress in negotiations. While these actions are strikes under Ontario law, no disciplinary action followed.[47]

To date, unions have not challenged the constitutionality of the no-strike model, but it only became possible to do so in 2015 after the *SFL* decision.[48] Prior to that time, unions would have brought their complaints to the ILO. There were two early complaints by unions in Ontario and Alberta objecting to older legislation that barred government employees from striking, the *Public Service Employee Relations Act* (Alberta) and the *Crown Employees Collective Bargaining Act* (Ontario).[49] In its reports, the Committee on Freedom of Association (CFA) found that both statutes were overly broad because they covered employees of

43. *Criminal Code of Canada*, RSC 1985, c C-46, s 422. Craven, 1999, 142 et seqq.
44. But, see *Johnston et al v Mackey et al.*, (1937) 67 CCC 196 (NSSC), where the court held that a strike involving wilful breaches of contract, where the probable consequence of the strike would have resulted in serious property damage in violation of the Code, was tortious.
45. *Campolieti/Hebdon/Dachis*, 2016, 201.
46. *Deverell*, 1982, 179; *White*, 1990, 73 et seqq.
47. *Haiven/Haiven*, 2002, 5 et seqq.
48. At the time of writing, the Amalgamated Transit Workers Union, Local 113 filed an application challenging the no-strike legislation, but as of the time of writing there is no report of the case's progress. See *Kalinowski/Ferguson*, 2015.
49. SA 1977, c 40; SO 1972, c 67, s 25.

crown agencies such as liquor control boards whose work was not essential. Apart from over-breadth, the Committee found the restrictions were otherwise justified and that the statutes provided adequate safeguards to protect the interests of those workers deprived of the right to strike, including adequate, impartial and binding conciliation, and arbitration procedures.[50]

The most recent ILO complaint arose out of the 2011 legislation prohibiting strikes by TTC workers. The Committee did not consider metropolitan transportation to be an essential service in the strict sense of the term, but it recognized urban transit as a public service of primary importance where the requirement of a minimum service might be justified.[51] Both Ontario and Alberta subsequently replaced the no-strike model for public sector workers with a controlled strike model, but in neither case was the action taken as a response to the CFA's findings. Rather, in both provinces, their first elected New Democratic Party government made the change.[52]

5.3 Securing Essential Services by Imposing Limitations on the Right to Strike (Controlled Strike Model)

The controlled strike model is the predominant approach to regulating essential service strikes in Canada that do not involve public security service workers. The approach was first adopted by the Federal government when it created a statutory collective bargaining scheme for the federal public service in the *Public Service Staff Relations Act* in 1967 (PSSRA)(now the *Federal Public Service Labour Relations Act* (FPSLRA).[53] The PSSRA was unusual in that it offered unions the choice between the no-strike model, leading to binding arbitration, and the controlled strike model. Many governments subsequently adopted the controlled-strike model when they created public sector statutory collective bargaining schemes, although most did not offer unions the choice of opting for the no-strike/binding interest arbitration model, except under limited circumstances.

Three Canadian jurisdictions also integrated the controlled strike model into their private sector collective bargaining statutes where the unfettered strike model is the norm. One justification for imposing *ex ante* restrictions on private sector strikes is that private sector workers are increasingly performing work

50. Interim Report – Report No 187, Nov. 1978, Case No 893 (Canada) – Complaint date: 04-NOV-77 – Closed; Definitive Report – Report No 214, March 1982, Case No 1071 (Canada) – Complaint date: 06-JUL-81 – Closed.
51. Report in which the committee requests to be kept informed of development – Report No 377, March, 2016, Case No 3107 (Canada) – Complaint date: 05-DEC-14 – Follow-up.
52. For Ontario, SO 1993, c 38, for Alberta, SA 2016, c 10.
53. SC 1967, c 72. In 2003, the statute was renamed the *Public Service Labour Relations Act*, SC 2003, c 22 and in 2017 it was renamed again as the *Federal Public Sector Labour Relations Act*, S.C. 2017, c. 9. Unless I am making specific reference to an earlier version of the legislation, I will use FPSLRA acronym. On the origins and background of the act, see *Arthurs*, 1971, ch. 3, and *Rootham*, 2007, 27 et seqq.

that is vital to public health and safety. For example, a 1995 Task Force Report recommended there be a designation process in the *Canada Labour Code* (CLC), in part because privatization of certain crucial functions, like air traffic control, shifted their labour relations from the FPSLRA to the CLC.[54]

As well, in British Columbia and Quebec, the use of replacement workers during strikes is highly restricted. As a result, the risk increases that a work stoppage could significantly disrupt the production of goods and services necessary for the public's health and safety or result in substantial property damage or deterioration, thus providing a justification for *ex ante* strike restrictions.[55]

It is not possible to provide an account of the many variations on the controlled strike model in Canada and so we will focus on two, the FPSLRA and the CLC.

5.3.1 Federal Public Service Labour Relations Act

The designation process under the FPSLRA has been quite controversial and has undergone at least three major changes. At the time of writing, it is likely to revert to the model that was in place prior to the most recent changes in 2013.

In its first iteration, the act defined essential services narrowly 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 closely tracked the ILO's definition. The government initiated the designation process by proposing a list of designated positions and then the parties bargained in an attempt to reach an agreement. If the parties could not agree, the Public Service Staff Relations Board had jurisdiction to resolve the matter. A 1982 SCC judgment, *CATCA*, narrowly interpreted the scope of the board's powers, so that it could only determine which services were essential, but could not interfere with the government's determination of the level of service required.[56] The effect of the SCC's judgment was to expand the government's power to designate and, in the following years, the percentage of public service positions designated as essential jumped sharply.[57] However, because unions had the option of electing arbitration, they could opt out of the controlled strike model if designation levels made the strike option ineffective.

54. For a discussion of the background to the adoption of the designation model and its rationale, see *Adell*, 2001, 28 et seqq.
55. For a discussion and strong expression of judicial support for limiting the freedom to strike to protect essential services, see *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 (1997).
56. *Canadian Air Traffic Control Association v Canada (Treasury Board)*, [1982] 1 SCR 696 (1982).
57. *Adell*, 2001, 30 et seqq.; *Swimmer*, 1995, 377 et seqq.; *Panitch/Swartz*, 2003, 93 et seqq.; *Finkelman*, 1986, 691 (limited use of designations prior to CATCA; effect of SCC judgment severely limits capability of union to mount an effective strike).

The government tweaked the model in 2003 after a lengthy review process by an Advisory Committee and a Task Force. The government repealed and replaced the PSSRA with the *Public Service Labour Relations Act* (PSLRA). With regard to essential services, the new law aimed to strengthen the role of negotiation in creating essential service agreements. It required the government to notify the union within 20 days after the union gave notice to bargain that it considered employees in the bargaining unit occupied essential service positions. The parties were then required to begin good faith bargaining to enter into an essential services agreement. This involved a three step process. First, it was necessary to determine which services are necessary to insure public safety or security in the vent of a strike. If the parties cannot agree, the PSLRB (now the Federal Public Service Labour and Employment Relations Board (FPSLREB) will decide the issue. The next step is to determine the level of service to be performed during a strike. This question is determined exclusively by the employer, subject to very limited review. Once these two matters are settled, the third step is to determine the types, number and specific positions necessary to provide the essential services at the designated level of service. If the parties cannot agree, the FPSLREB will decide the issue.[58]

The third iteration was enacted in 2013 by a Conservative government that was quite hostile toward organized labour. Bill C-4, *Economic Action Plan Act 2013 No. 2*, greatly expanded the power of the government to act unilaterally in almost every phase of the designation process. The amended act provides:

> Section 119(1): The employer has the exclusive right to determine whether any service, facility or activity of the Government of Canada is essential because it is or will be necessary for the safety or security of the public or a segment of the public.

While the statute preserved a narrow definition of essential service, it granted the government near total discretion to determine what activities fit within it. The statute also gave the government the exclusive right to designate which positions perform essential services. While the law requires the government to consult with the union after it has made its decision, the union has no power to challenge the decision and submit the disagreement to the FPSLREB for a determination. Furthermore, the option of selecting arbitration rather than the controlled strike model is sharply limited so that unions can only demand arbitration if 80% or more of the bargaining unit is designated as essential. Given the power of the government, this creates an incentive to designate just under 80% of the bargaining unit leaving the union with an ineffective strike weapon and little or no bargaining power. Moreover, even in those circumstances when a union can opt for arbitration, the government changed the rules to tilt

58. See *PSLRA*, S.C. 2003, c. 22; Rootham, 2007, 195 et seqq. for a lengthy description. Subsequent cases further clarified the process. For a summary, see *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2011 FCA 143 (CanLII). The change in the name of the labour board was made in 2017. See S.C. 2017, c. 9.

arbitration outcomes in its direction. It lists two factors to which the arbitrator must give preponderant weight. While one of these factors existed in the previous model, the necessity of attracting and retaining public servants, the second is new. It requires the arbitrator to give preponderant weight to 'Canada's fiscal circumstances relative to its stated budgetary policies.' This sharply steers arbitrations toward outcomes favourable to the government, compared to prior language requiring consideration of ability to pay, which arbitrators treated cautiously because of the power of government to increase taxes.[59]

The 2013 version of the law remains on the books but the current Liberal government introduced legislation in 2016 to repeal the 2013 amendments.[60] The more labour friendly orientation of the Liberals is one motivation for the change, but the more important story is the constitutional one. In order to determine whether the *Charter* right to strike has been violated, the court asks 'whether the legislative interference with the right to strike in a particular case amounts to substantial interference with collective bargaining.'[61] In the *SFL* case, the court was considering Saskatchewan's *Public Service Essential Services Act* (PSESA), passed in 2008, which introduced a designation model for regulating essential service strikes.[62] The SCC found that the PSESA violated the right to strike 'because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process.'[63] Of course, this is true for all designation models, so the constitutionality of the law will depend on whether the violation can be justified under s. 1.

The SCC accepted that the 'maintenance of essential public services is self-evidently a pressing and substantial objective' and that the prohibition on strikes including the sanctions imposed on violators of the essential service restrictions are rationally connected to the goal of maintaining essential public services. 'The determinative issue here, in my view, is whether the means chosen by the government are minimally impairing…'[64]

The SCC found the government went well beyond what was reasonably required to protect its legitimate interest in the maintenance of public services. First, the legislation provided the government with unilateral discretion to identify by regulation which services are essential without any opportunity for discussion or access to an impartial and effective process to dispute the government's determination. Second, the law also provided that in the event an essential services agreement is not reached, the employer had the unilateral power to determine how essential services would be maintained, including the classifications of employees who must continue to work and the number and

59. S.C. 2013, c. 40; *Rootham et al.,* 2013; *Goldman/Scott,* 2013.
60. Bill C-34, An Act to amend the Public Service Labour Relations Act and other Acts, 42nd Parliament, 1st Session (2016).
61. *Saskatchewan*, para. 78.
62. Public Service Essential Services Act, SS 2008, c P-42.2.
63. *Saskatchewan*, at para. 78.
64. *Ibid.,* paras. 79 et seq.

names of employees within each classification. Finally, the SCC also found the act failed to provide access to a meaningful alternative mechanism for resolving bargaining disputes, such as arbitration. The court summed up its findings:

> Given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses, there can be little doubt that the trial judge was right to conclude that the scheme was not minimally impairing.[65]

The *FPSLRA* clearly violates the right to strike. The only question is whether the violation is minimally impairing. Based on the *SFL* judgment, it is almost certain the current law could not be justified under s. 1. It allows the government unilaterally designate which services are essential without access to an effective and impartial process to dispute the government's determination, and it severely limits access to arbitration when extensive designations deprive bargaining units of the effective ability to strike.

Interestingly, the Canadian Labour Congress filed a complaint with the ILO regarding the 2013 legislation after the *SFL* judgment, perhaps in the belief it would provide it with additional leverage in lobbying the federal government to amend the FPSLRA.[66] Although at the time of writing the amending legislation has not moved beyond first reading, which occurred on 28 November 2016, in the most recent round of bargaining the government offered all affected unions the option of selecting interest arbitration as a dispute resolution mechanism, essentially putting them back in the pre-2013 regime.

5.3.2 Canada Labour Code

As noted earlier, the CLC is one of the few private sector collective bargaining statutes that deals with essential service strikes *ex ante* and does so through the designation model. The CLC provides:

> 87.4 (1) During a strike or lockout not prohibited by this Part, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public.

The law provides that within fifteen days after notice to bargain has been given either the employer or the union may give notice of the services that must be provided in the event of a strike or lockout and the number of employees in the bargaining unit that would be required for that purpose. If the parties are

65. *Ibid.*, at para. 96.
66. By the time the Committee issued its definitive report in March, 2017, the Canadian government had introduced a measure to repeal Bill C-4. See ILO Case No. 3143 – Complaint Date 13-May-2015; Report of the Committee on Freedom of Association, 381st Report of the Committee on Freedom of Association, GB.329/INS/17, at paras. 173–219.

unable to reach an essential services agreement, either may refer outstanding differences to the labour board. The Minister of Labour may intervene in the labour board's hearing to provide her views on what is required to maintain essential services. The law gives the board broad powers to determine what services are essential and to specify the manner and extent to which those services are to be provided. The board also has the power to review and modify its orders during a strike or lockout. Finally, if the board is satisfied the provision of essential services will render the strike or lockout ineffective, it may direct that binding arbitration be available to resolve the dispute (s. 87.4 (2) – (8)).[67]

In addition to the formal designation process, the law grants the Minister extraordinarily wide discretionary power:

> 107. The Minister, where the Minister deems it expedient, may do such things as to the Minister seem likely to maintain or secure industrial peace and to promote conditions favourable to the settlement of industrial disputes or differences and to those ends the Minister may refer any question to the Board or direct the Board to do such things as the Minister deems necessary.

As we shall see in Section 7 of this chapter, the Minister has used this section to bypass the designation process.

5.4 General Observations on the Controlled or Designated Strike Model

Strikes in violation of the designation provision are rare in Canada. Indeed, strikes under the designation model are uncommon. A study of public sector strikes between 1978 and 2008 found that among the 422 contracts negotiated under this regime, unions struck 34 times or in about 8.0% of all negotiations.[68] This study did not identify which strikes, if any, were illegal. However, it seems illegal strikes under the designation model are exceedingly rare. For example, Haiven & Haiven's examination of strikes in the Canadian health care sector between 1999 and 2002, identified only one unlawful strike among those governed by the designation model, and that dispute was resolved within a few days with no record of disciplinary action being taken.[69] The penalties against a union or a designated essential service worker who strikes unlawfully are much the same as those available against workers and unions who strike unlawfully under the no-strike model.

As mentioned earlier, the designation model violates the right to strike, so to pass constitutional muster it must be justified on the basis that it was enacted to achieve a pressing and substantial objective and that the means used minimally impaired the right to strike. Depending on how the courts interpret

67. For a brief overview, see *Adell*, 2001, 32 et seqq.
68. *Campolieti/Hebdon/Dachis*, 2016, 201. It is interesting to note that the frequency of strikes under this model is nearly double the frequency under the right-to-strike model (4.6%).
69. *Haiven/Haiven*, 2002, 8 et seq.

these requirements, they impose a counterweight to the propensity of governments to extend its control over the designation process in order to increase designations, while restricting or barring access to arbitration when the result is to render strikes ineffective.

6 COMPENSATORY MEASURES FOR RESTRICTIONS

It bears repeating that the constitutional right to strike recognized in the 2015 *SFL* case constrains the government in its choice of alternatives when strikes are prohibited or controlled. The SCC considers the quid quo pro in the context of the s. 1 defence, where it asks whether the violation was minimally impairing. In the *SFL* case, the SCC did not really have to consider the suitability of substitutes because the legislation failed at an earlier step in the analysis. However, the court did point to the failure of the law to provide 'any access to a meaningful alternative mechanism for resolving impasses, such as arbitration.'[70] The court then cited former Chief Justice Dickson's dissenting opinion in the *Alberta Reference* case, which it has now embraced, on the need for a fair and effective substitute:

> Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party…The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.[71]

In the *SFL* case, the law provided no alternative dispute resolution mechanism for bargaining units that lost an effective right to strike. As a result, the SCC did not need to elaborate on what would be a fair and effective substitute.

The approach taken in the Saskatchewan legislation was highly unusual. The common practice in most essential service schemes is to provide impartial binding interest arbitration as the alternative to the right to strike. This is certainly true when the no-strike model is adopted, such as is the case for police, firefighters, hospital workers and, most recently in Ontario, Toronto transit workers. In the context of the designation or controlled strike model, the usual practice is to provide access to arbitration either by election of the union, or when the percentage of bargaining unit members prohibited from striking exceeds a certain percentage, rendering the right to strike ineffective. The PSLRA originally adopted the former approach, while the 2013 amendment introduced

70. *Saskatchewan*, para. 93.
71. *Ibid.,* para. 94.

the latter, with 80% being the magic number. If passed, Bill C-34 will restore the election model. If not, it is arguable that the law will fail to pass constitutional muster because of the very restrictive access it provides to arbitration as an alternative dispute resolution mechanism.

The arbitration model used in Canada generally complies with the ILO's protocol, which requires access, independence, and binding-ness. The largest conflict has arisen around various attempts by government to tilt the proceedings in the employer's favour by requiring arbitrators to take into account the government's ability to pay. For example, the TTC legislation requires the arbitrator to consider the following factors:[72]

(1) The employer's ability to pay in light of its fiscal situation.
(2) The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
(3) The economic situation in Ontario and the City of Toronto.
(4) A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
(5) The employer's ability to attract and retain qualified employees.

While the last three considerations would likely be viewed as neutral and widely accepted in arbitral jurisprudence, the first two are part of a more recent trend to bend arbitral awards in the direction of employer interests. Nevertheless, the ILO's Committee of Freedom of Association found the prescribed considerations to be acceptable because they 'would appear to allow for sufficient discretion and flexibility.'[73]

It should also be noted that Canadian interest arbitrators have traditionally resisted giving great weight to employer ability to pay arguments, if only because the government's ability to pay is, to a significantly degree, a function of its own fiscal policies. As one prominent arbitrator stated:

> Interest arbitrators in the Canadian public sector have, apparently, universally rejected the legitimacy of an 'ability to pay' argument. They have not allowed governments as employers to hide behind their own skirts in their role as the source of funds, to escape pay increases indicated by the other criteria.[74]

This attitude, and the belief that strengthening the ability to pay criteria would reduce wage premiums associated with arbitration (see below), has recently led governments to require arbitrators to take into account the government's fiscal situation and policies in making their awards. Indeed, the same

72. *Toronto Transit Commission, supra* Section 5.1.
73. Case No. 3107, para. 242.
74. *University of Toronto* (13 Feb 1981) (Christie) at 8, cited in *Atlantic Pilotage Authority v Canadian Merchant Service Guild*, [2006] CLAD No 457 (Christie), at para. 37.

arbitrator quoted above returned to the issue 25 years later and expressed a more nuanced view:

> In a 2004 interest arbitration between The Saint John Board of Police Commissioners and the Saint John Police Protective Association, CUPE, Local 61 (June 9, 2004, unreported) the I stated:
>
> > I continue to adhere to the views of interest arbitrators as I saw them in the University of Toronto Award with respect to a 'pure' ability to pay argument by an employer in an interest arbitration. By this I mean the argument that a public employer lacks 'ability to pay' because there is no money allocated in its budget, or in the budget of the employer's governmental funding body. On the other hand, I accept that what constitutes an appropriate wage settlement may well be affected by the economic circumstances in which a public employer finds itself. I also recognize that these two concepts may be very closely related.
>
> Thus, while a public sector employer's budget, whether self-imposed or struck by another government funding agency, cannot be accepted as a simple proxy for economic circumstances, what constitutes an appropriate wage settlement may well be affected by economic circumstances.[75]

The other way some governments have attempted to influence the outcome of interest arbitration is by intervening in the appointment process. Although statutes vary, the common practice is that only individuals mutually agreeable to the parties are appointed. However, in an effort to influence the process, in 1995, a newly elected Conservative government abandoned the practice of appointing experienced arbitrators and instead appointed retired judges, without consulting with the unions involved. The first four judges approached by the government refused the appointment but it found other retired judges who agreed to take the position. The Canadian Union of Public Employees (CUPE) challenged the government's action on administrative law grounds since at the time courts had not recognized constitutional labour rights. The case went to the SCC, which held that the minister's exercise of authority was patently unreasonable:

> The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the …HLDAA… was to provide an adequate substitute for strikes and lockouts. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998, 'the parties must perceive the system as neutral and credible'. … I would … affirm the fundamental principle … that the HLDAA required the Minister to select arbitrators from candidates who were qualified not only by their impartiality, but by their expertise and general acceptance in the labour relations community.[76]

There is a large literature examining the impact of different dispute resolution mechanisms on collective bargaining outcomes. For example, interest arbitration has often been criticized because of its so-called chilling and narcotic

75. *Ibid.,* at paras. 39 et seq.
76. *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para. 49.

effects: the parties become dependent on arbitration to resolve their difference and hence become less able to achieve mutually acceptable bargaining outcomes. Joseph Rose reviewed the Canadian research and found that it strongly supported the conclusion that arbitration is associated with low settlement rates.[77] Rose also found that arbitration results in protracted delays in achieving settlement.[78]

The greatest concern, however, is on the model's impact on wage settlements. Initial studies focused on the no-strike model versus the right-to-strike model. One of the earliest Canadian studies found that while the switch to the no-strike model reduced dispute costs, the trade-off was higher wage costs. The study also found that ability to pay did not influence arbitrated outcomes.[79] A much more recent study by Campolieti, Hebdon, and Dachis compared the impact of the three models on wage outcomes over the period from 1978 to 2008. The authors found that the no-strike model with compulsory arbitration produced a higher wage premium compared to the right-to-strike model. As well, they found that legislative strengthening of the ability to pay criterion did not reduce the wage premium. They also found that the designation or controlled strike model was associated with a statistically significant decrease in wages relative to the right-to-strike model, making it the least favourable for unionized public sector workers. The reasons for this are not hard to fathom. Essential service designation reduces the effectiveness of the strike threat, especially in a context in which the percentage of bargaining unit members designated as essential has been increasing and access to arbitration as an alternative to limited strikes has been decreasing.[80]

7 SECURING ESSENTIAL SERVICES BY FURTHER MEANS

In addition to the three models for regulating essential service strikes discussed so far (right to strike; no-right to strike; and controlled strike), governments in Canada have invoked other powers in an ad hoc manner to end or postpone otherwise legal strikes. Indeed, the frequent use of such measures led Leo Panitch and Don Swartz to claim that we are living in a state of 'permanent exceptionalism', while Bernie Adell has suggested the emergence of a fourth model of regulation, the 'instant back-to-work model.'[81] The principal tool here is back-to-work (BTW) legislation, where governments terminate lawful strikes by ad hoc, post-dispute statutory enactments, although a few statutes grant the

77. Rose, 2008, 552. Earlier studies include: *Anderson/Thomas*, 1977; *Rose*, 1996; *Hebdon/Mazerolle*, 2003. A more recent study reached similar conclusions. See *Campolieti/Hebdon/Dachis*, 2016, 202 et seqq.
78. *Rose*, 2008, 551.
79. *Currie/McConnell*, 1991, 693.
80. *Campolieti/Hebdon/Dachis*, 2016. Also, see *Dachis*, 2008
81. *Panitch/Swartz*, 2003, 423.

executive extraordinary power to intervene on an ad hoc basis to end or postpone strikes. Collectively, these will be referred to as BTW measures.

A good example of this kind of ad hoc intervention occurred at the time I was writing this chapter. College teachers in Ontario went on a lawful strike that affected 500,000 students. Negotiations were bogged down and after five weeks the Ontario government enacted BTW legislation.[82] While post-secondary education is clearly not an essential service and college teachers enjoy the right to strike, the government ended the strike when it became convinced that an end was not in sight and the strike's continuation threatened to put the students' terms in jeopardy. In its view, the substantial harm to the public justified this ad hoc intervention. The act provides for mediation/arbitration to resolve the dispute. The union has promised to challenge the measure's constitutionality, but I suspect it will face an uphill battle.[83]

BTW legislation ending strikes at post-secondary institutions is rare, but BTW measures are not. Since 1950, governments in Canada resorted to back to work measures 169 times.[84] A comprehensive analysis of trends in the usage of these measures is beyond the scope of this paper, however, it should be noted that they were used quite infrequently prior to the 1970s. Not surprising, the frequency of their use increased with the retreat from Keynesianism and the beginnings of the neo-liberal turn in the mid-1970s. Interestingly, the use of BTW measures has declined recently. Since 2003, Canadian governments deployed BTW measures fifteen times. However, this decline should be viewed in the context of the decline in strike frequency in both the public and private sectors noted earlier.

BTW measures are used most frequently to end strikes in the education (primary and secondary), health care, and transportation and communication sectors. For jurisdictional reasons, provincial governments are responsible for BTW measures in education, health care and local transport, while the federal government is largely responsible for BTW measures in inter-provincial transport and communications.

When governments use BTW measures, they must decide how the dispute should be resolved. Again, a detailed study of the dispute resolution mechanisms invoked is beyond the scope of this study, but the Canadian Foundation of Labour Rights (CFLR) maintains a database of BTW measures from 1982 to the present, which records whether the dispute was resolved by arbitration or by a government imposed settlement. According to their calculation, binding arbitration was used in 40 of the 90 recorded cases. However, a perusal of the 'settlement imposed' cases reveals that they include a diversity of settlement procedures, including instances where particular terms were imposed but others were sent to arbitration, or where final offer selection was ordered rather than

82. *Colleges of Applied Arts and Technology Labour Dispute Resolution Act, 2017*, SO 2017, c 21.
83. *Breen*, 2017.
84. *Panitch/Swartz*, 2003, 184; *Canadian Foundation for Labour Rights*, 2018.

interest arbitration. Therefore, while it is certainly the case that governments do impose settlements, the CFLR's database likely overstates its frequency.[85]

One additional factor that influences the use of BTW measures is the political orientation of the government in power. Broadly speaking, conservative governments are more likely to invoke BTW measures than more liberal ones. I have intentionally not attached party labels to these descriptors, however, because in the current context in which parties of all stripes have embraced or at least accepted the austerity agenda, the use of BTW measures cannot be neatly mapped onto the political label of the party in power.[86]

That said, it will be helpful to provide an illustration of the way BTW measures were used by the last Conservative federal government in 2011.[87] The first strike in which this government directly intervened was by the Canadian Union of Postal Workers. The union adopted the tactic of short, local rotating strikes. It did this because there is a history of the federal government ending their strikes through BTW work legislation on the basis that the disruption endangered the safety and security of the public, even though governments have not declared Canada Post to be an essential service. The union aimed to avoid this outcome because brief rotating local strikes did not realistically pose any threat to the public. The rotating strikes started on 2 June 2011 and continued until 15 June when Canada Post declared a national lockout. On the same day, the Minister of Labour, Lisa Raitt, announced the government would be introducing BTW legislation. Minister Raitt justified the government's action by referring to the impact of the dispute 'on Canadians and on the Canadian economy.'[88] There was no suggestion that the rotating strikes endangered the safety or security of the public.

The bill was introduced on 20 June and passed and received Royal Assent on 26 June, after a 58-hour filibuster by the opposition. Rather than send the entire dispute to arbitration, the government imposed a wage settlement that was less generous than the employer's last offer and left other outstanding matters to be resolved by final offer selection.[89]

On 14 June, in the midst of the postal workers strike, the Canadian Autoworkers (CAW) announced that its 3,800 members employed by Air Canada in sales and services were going on strike following 10 weeks of negotiation. Although Air Canada is a private carrier, on 16 June, the Minister announced she was tabling BTW legislation. When questioned, the Minister responded that the strike would cause economic difficulty for Canadians, even though reports suggested that the economic effects of the strike were minimal and her own department advised against using BTW legislation because the

85. *Canadian Foundation for Labour Rights*, 2018.
86. *Evans/Smith*, 2015.
87. Generally, see *Stevens/Nesbitt*, 2014, 118.
88. Quoted in *Lee*, 2012, 216.
89. Restoring Mail Delivery for Canadians Act, SC 2011, c 17.

walkout was little more than a nuisance.[90] The union and the employer reached an agreement later that day.

That was not the end of Air Canada's troubles. Its unionized flight attendants rejected tentative deals negotiated by the union in August and October 2011. Following the second rejection, the union gave notice that it was going to strike on 13 October. The Minister stated that the government would intervene. 'We will be clear that a work stoppage is unacceptable in this time of fragile economy.'[91] The House was not sitting and so it would have been necessary to call it back into session to pass BTW legislation. Minister Raitt discovered a way around this and invoked her power under the little-used s. 107 of the CLC, referred to earlier, that empowers the Minister to 'do such things as to the Minister seem likely to maintain or secure industrial peace…' She referred the dispute to the Canadian Industrial Relations Board asking it to determine whether the rejection of the two tentative agreements by the bargaining unit 'created conditions that are unfavourable to the settlement of the industrial dispute at hand.'[92] This was, of course, a nonsensical question, but it had the effect of precluding a strike until the Board addressed the matter. The parties subsequently agreed to refer their dispute to binding arbitration.

Air Canada still had to settle with its baggage handlers, represented by the IAMAW, and pilots, represented by Air Canada Pilots Association. The baggage handlers rejected a tentative deal and on 6 March 2012, the union gave strike notice. Within 24 hours Air Canada notified the pilots that they would be locked out. Before a strike or lockout materialized, on 12 March Minister Raitt introduced Bill C-33, which prohibited strikes and lockouts and substituted final offer selection for the resolution of any outstanding matters. The bill sped through the legislative process and received royal assent on 15 March.[93]

The baggage handlers responded with wildcat strikes, the first occurring in Toronto when Minister Raitt landed there. Air Canada disciplined three participating workers, but an arbitrator subsequently substituted a three-day suspension. Air Canada later disciplined eight organizers of the protest. Of these eight, four resigned and two were later reinstated. Wildcat strikes spread to Montreal and Air Canada fired 37 baggage handlers, although arbitrators subsequently reinstated most. Union officials stepped in and called for the wildcat actions to end, as required by law. Some Air Canada pilots subsequently conducted a 'sick-out' in protest, but the CIRB ruled that the action was an unlawful strike in violation of the BTW legislation and ordered it to end. The pilots' union was also under and obligation to counsel its members to end the job action, which it did, and the protest ended.[94]

90. *Stevens/Nesbitt*, 2014, 127.
91. Quoted in *Lee*, 2012, 217 et seq.
92. *Ibid.*, at 218.
93. Protecting Air Services Act, SC 2012, c 2.
94. *Stevens/Nesbitt*, 2014, 127 et seq.

Of course, these BTW measures were undertaken prior to the SCC's recognition of a constitutional right to strike. Nevertheless, the Canadian Union of Postal Workers (CUPW) launched a Charter challenge, and the court delivered its judgment in 2016, after the *SFL* decision.[95] Justice Firestone found that the legislation clearly abrogated the union members' right to strike. The only question was whether the violation was demonstrably justified. The judge found that the government had a pressing and substantial objective in preventing a postal disruption but that the legislation was not minimally impairing. In particular, he found that the imposition of a wage settlement by the government violated the requirement to provide an impartial substitute for the strike. He also found that the process for appointing the arbitrator was flawed because the parties were not consulted. Notably, even before the *Charter* challenge, the Federal court quashed the first two appointments, the second on the ground of a reasonable apprehension of bias.[96]

As with other areas of strike regulation, governments will now have to defend the constitutionality of BTW measures and this may discourage their promiscuous use. However, the level of constitutional protection will depend on the future development of the case law.

Before leaving this section, it is also necessary to advert to an additional mechanism for securing essential services, informal agreements or unilateral undertakings by the union. Haiven and Haiven's research demonstrates that health care unions covered by the unfettered strike model maintained essential health care services during strikes. They did this both because of their commitment to professional responsibility and because they understood that unless these services were provided critical public support would be lost and governments would likely step in with BTW measures. In these situations, nurses tended to go beyond what was necessary and undermined their own bargaining leverage.[97]

8 EVALUATION AND CONCLUSION

Because of the jurisdictional and legislative diversity that characterizes Canadian labour law, this study has focused on Ontario and the Federal jurisdiction and has not attempted to provide a comprehensive overview of the practice of essential service strike regulation.[98] Nevertheless, our discussion has ranged over the principal models currently used and has touched on important cases that have arisen in other Canadian jurisdictions. Therefore, the picture presented

95. *Canadian Union of Postal Workers v Her Majesty in Right of Canada*, 2016 ONSC 418. (Disclosure: I provided an expert witness affidavit in support of the union's claim).
96. *Ibid.*, paras 194 et seqq. Unions representing workers various groups of Air Canada employees also challenged the BTW measures. These cases have now been settled.
97. *Haiven/Haiven*, 2002, 44 et seqq.
98. See *Adell*, 2015, for a broader although by no means comprehensive study of Canadian essential service strike regulation.

is a fair representation of the 'Canadian' approach to the regulation of strikes in essential services.

As this study has demonstrated, Canada uses three models to regulate essential service strikes: 1) the unfettered strike model (backstopped by BTW measures); 2) the no-strike model; and 3) the designation model. I assess each model according to the following criteria: its effectiveness at maintaining a proper level of service; supporting effective collective bargaining; and its compliance with constitutional and international standards.

8.1 The Unfettered Strike Model (Including BTW Measures)

As we have seen, the unfettered strike model does not generally operate in sectors where services are essential in the strict sense, such as in police and fire-fighting. However, it does apply to some groups of workers who provide services that, if withdrawn for an extended period, could cause significant harm to the public. Teachers are a good example.

Intuitively, one might think the unfettered strike model is ineffective at maintaining essential services. After all, it cannot guarantee the maintenance of essential services during a strike. However, defenders of the unfettered strike model argue that notwithstanding this possibility, the reality is quite different. As we have seen, Haiven and Haiven present evidence that health care workers under the unfettered-strike model voluntarily maintained essential services during their work stoppages. Indeed, they argued that the level of service exceeded what was necessary and thereby undermined the efficacy of their strike.[99] There are no examples of health care workers taking industrial action that endangered patient safety.

On the other hand, there have been rare instances where police and fire-fighters took advantage of their right to strike and failed to provide essential services, with serious consequences.[100] As well, there have also been instances where lengthy teachers' strikes, if allowed to continue, might have caused serious harm to the public, either because students were at risk of losing a term or because of the challenges parents faced in providing childcare, and there was no prospect that voluntary arrangements would avoid the harm.

On balance, it would be fair to conclude that the unfettered strike model is only moderately effective at securing essential services and for this reason never applies to workers providing essential services in the strict sense of the term, such as police, fire-fighters and prison guards. As well, it rarely applies to public service workers generally. Rather, the model tends to be applied to workers who provide services where a withdrawal poses no immediate threat to the public.

However, as we have noted, the unfettered strike model actually does not exist in Canada for workers when an extended withdrawal of services could

99. *Haiven/Haiven*, 2002, 44 et seqq.
100. *Adams*, 1993.

result in serious harm to the public, since governments enjoy – and exercise – the power to end lawful strikes through back to work measures. From a purely functional perspective, this feature significantly reduces the risk that the Canadian right to strike model fails to protect essential services. Indeed, given the frequent use of BTW measures, their use against strikes that did not threaten essential services, and the hasty resort to these measures, sometimes even before workers have gone on strike, it is arguable governments are using BTW measures in a manner that goes beyond what is needed to maintain a proper level of service.

This observation has important implications for the efficiency of collective bargaining under the right-to-strike/BTW measures model because if the parties believe that the government's tolerance for strikes or lockouts is limited they may be disinclined to agree to concessions or compromises. This can be especially true for employers if they believe the BTW measures will tilt the outcome in their favour. The most glaring example of this was in the Canada Post negotiations where the employer locked out its workers out, presumably knowing this would provide the government with an excuse to pass BTW legislation favourable to its position. Even where the government does not act quickly, the knowledge that the government will terminate the strike sooner or later may discourage the employer from making concessions on novel bargaining demands that challenge traditional management rights, knowing that arbitrators are unlikely to alter the status quo. Moreover, it is also important to keep in mind that during public sector strikes, the employer will often be saving money so that it can afford to wait until the government steps in. This was arguably management's strategy in the recent Ontario college teachers' strike, discussed previously.

Finally, the unfettered strike model obviously does not violate the constitutional right to strike or international labour standards. So the real question is whether the use of BTW measures complies with these rights and standards. As we have seen, this may or may not be the case, depending on the circumstances in which these measures are used and the alternative provided. For example, the intervention of the Canadian government to end Canada Post's lockout of its workers was found to both violate the ILO's principles of freedom of association and Canada's *Charter*.[101]

8.2 The No-Strike Model

The no-strike model is generally effective at ensuring that essential services are maintained without interruption, but not perfect. Strikes by workers subject to this model are rare, but there certainly have been instances when Canadian workers defied the law by engaging in various job actions, including full strikes, despite the risk they and their union will suffer significant penalties as a result.

101. *Canadian Union of Postal Workers*; *ILO*, Case No 2894 (2011).

This model is most frequently applied to workers providing essential services in the strict sense. Its domain, however, has been shrinking as in recent years governments that previously applied the no-strike model to their public service (e.g., Ontario and Alberta) have shifted it into the controlled-strike model.

It is a very different story when we turn to the question of the model's impact on collective bargaining efficacy. As discussed earlier, binding compulsory interest arbitration is the normal alternative to strikes. Canadian research confirms that the substitution of interest arbitration for strikes results in a significant decrease in the likelihood of bargained settlements. This finding is consistent with the narcotic effect of arbitration discussed in the literature.[102]

On the other hand, many workers subject to the no-strike model do not seem to object to it, arguably because the model provides them with a wage premium.[103] For example, police, fire-fighters, prions guards, and nurses in Ontario have neither lobbied the government to shift them to the unfettered or designated strike model nor launched *Charter* challenges alleging that the arrangement violates their right to strike. By contrast, nurses in Alberta, who have a longer tradition of militancy, defied the no-strike model and challenged its constitutionality when applied to them.[104]

This leads to the question of whether the no-strike model violates the constitutional right to strike or is in violation of ILO principles of freedom of association. As we have seen, this will depend on the ambit of the model and whether a suitable substitute, like binding interest arbitration by a neutral third party, is provided. Because the SCC has only recently recognized the constitutional right to strike, and because many workers subject to the no strike model do not object, there are no judicial decisions in this area. The key question will be whether the no-strike model is minimally impairing and presumably that will depend on the court's view of whether the government has shown that neither the controlled nor the right to strike models could achieve the same pressing and substantial objective and that the alternative is fair. With regard to ILO principles, the CFA has criticized Canada for imposing the model on groups of workers who are neither civil servants nor essential service workers.[105]

8.3 The Controlled Strike Model

The controlled strike model has also proven itself to be effective at maintaining essential services during a strike. Indeed, Adell et al. found that 'maintenance of essential services is most likely to be assured by what we would call a true designation system – one where the parties themselves play a real part in working out essential service levels and where disagreements in that respect are

102. *Campolieti/Hebdon/Dachis*, 2016, 202 et seqq.
103. See *supra* Section 6.
104. *Kauffman*, 2017.
105. See *supra* Sections 5.1 et seqq.

resolved by an independent adjudicative tribunal.'[106] However, actual designation models in Canada do not always fully fit this description and tend to decrease the role of unions in negotiating designations and unilaterally increase the level of service that must be provided and the number of positions that must be filled. There can be little doubt that these deviations insure that essential services (and more) are provided.[107] Moreover, at least in the federal jurisdiction, the process of negotiating essential service agreements (under the pre-2013 model, which is now being restored) has been a lengthy and time consuming one. This limits the freedom to strike, since a pre-requisite to a lawful strike is the existence of an essential service agreement.

But, like the no-strike model, its underside is that it undermines unions' ability to engage in effective collective bargaining. As we saw, the loss of bargaining leverage that unions suffer, particularly as designations become more expansive, results in lower wage increases relative to the other models. Giving workers the option to choose the no-strike model partly offsets this effect because of the wage premium from interest arbitration, but then the narcotic effect kicks in to reduce the likelihood of a negotiated resolution.

The controlled strike model may or may not pass constitutional muster or comply with ILO standards, depending on how it is constructed. As we saw, in the *SFL* case, a draconian version of the model that gives the employer the unilateral right to designate without adequate independent supervision, and that does not provide workers with a strike alternative where the level of designation renders strikes ineffective clearly crosses the line. More recently a Quebec labour tribunal applied the *SFL* decision to a provision in the Quebec Labour Code that required a set minimum percentage of employees to remain on the job during a strike in health and social service institutions. The tribunal found that the system of mandatory minima without a right of review by an independent tribunal went beyond what was necessary to ensure the uninterrupted delivery of essential services during a strike. The infringement of the right to strike was not minimally impairing and the tribunal found the provision was unconstitutional.[108] It is unlikely, however, that a scheme that more closely fit the ideal of the 'true designation system' would meet a similar fate.

8.4 Final Observations

From a purely functionalist perspective, it is arguable that Canada's pluralist approach to regulating essential service strikes achieves a reasonable balance between the goal of maintaining required essential services while providing workers with minimally impairing alternatives. Workers providing essential

106. *Adell*, 2015, 195.
107. *Campolieti/Hebdon/Dachis*, 2016, 210.
108. *Syndicat des travailleuses et travailleurs du CIUSSS du Centre-Ouest-de-l'Île-de-Montréal – CSN et Centre intégré universitaire de santé et des services sociaux du Centre-Ouest-de-l'Île-de-Montréal*, 2017 QCAT 4004.

services in the strict sense are deprived of the right to strike, but are provided with binding interest arbitration by a neutral third party. Workers who provide services not all of which are essential in the strict sense are required to negotiate essential service agreements before striking, with disputes to be resolved by neutral labour boards and may opt for arbitration if the level of designation renders strikes ineffective. And finally, there are workers who provide services that are not immediately essential but whose extended interruption may cause serious harm to the public, enjoy a right to strike that may be ended by ad hoc BTW measures with the dispute to be resolved by interest arbitration.

However, there is a discrepancy between Canadian pluralism in theory and practice. In particular, the recent turn to neo-liberal austerity has frequently prompted governments to manipulate the models to reduce unionized public sector workers' bargaining power. The behaviour of the Conservative federal government in 2011 and 2012 is the clearest example of this tendency, but certainly not the only one. While in the past, unions lacking political clout and grassroots militancy took their cases to the ILO where they often won moral victories, since 2015 they can challenge the constitutionality of these laws and Canadian courts have shown some willingness to rein in government to preserve the 'Canadian' pluralist model. It remains to be seen how governments will respond and whether judicial oversight will be strict and sustained.

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