**CITATION:** Canadian Union of Postal Workers v. Canada, 2024 ONSC 3787
**COURT FILE NO.:** CV-18-00610573-0000
**DATE:** 20240711

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** CANADIAN UNION OF POSTAL WORKERS/SYNDICAT DES TRAVAILLEURS ET TRAVAILLEUSES DES POSTES, JAN SIMPSON, MYRON MAY and SOPHIE GRENIER, Applicants

**– and** –

HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA**,** Respondent

**– and** –

CANADA POST CORPORATION**,** Intervenor

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *Paul J.J. Cavalluzzo, Adrienne Telford, and Belraj Dosanjh* , for the Applicants

*Kathryn Hucal, Jon Bricker, Matilyn Venney, and Monisha Ambwami*, for the Respondent

*Christopher Pigott and Rachel Counsell*, for the Intervenor

**HEARD:** April 29 – May 2, 2024

## REASONS FOR DECISION

### I. Back-to-work legislation and the *Charter*

[1] The Applicant, Canadian Union of Postal Workers ("CUPW"), challenges the constitutionality of the *Postal Services Resumption and Continuation Act*, SC 2018, c 25 (the "PSRCA"), which, in the fall of 2018, ended a series of rotating strikes and 14 months of collective bargaining with the Intervenor, Canada Post Corporation ("Canada Post"). CUPW submits that the PSRCA infringes freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and that it cannot be justified under s. 1.

[2] In the first place, the parties have engaged in a debate over whether the entire case is moot.

[3] The PSRCA was enacted six years ago. It spawned a new collective agreement between CUPW and Canada Post. Since that time the parties have committed to be bound, and have been bound, by successive collective agreements.

[4] It is the Attorney General's view that the PSRCA is spent legislation. As such, any question of its constitutionality is moot, and there is no reason for the Court to exercise its discretion to hear a matter which will have no practical consequence for the parties.

[5] On the other hand, labour disputes, strikes, and back-to-work legislation are recurrent issues. It is CUPW's view that even though the resolution of the issues here will not change its current collective agreement with Canada Post, a fulsome consideration of the *Charter* issues raised by the enactment of the PSRCA will provide valuable guidance for the future.

[6] CUPW's primary ground of challenge is that the PSRCA improperly interfered with the union members' collective bargaining and attendant right to strike, and thereby infringed freedom of association under s. 2(d) of the *Charter*. Furthermore, the Applicants submit that the enactment of the PSRCA cannot be justified under section 1 of the *Charter* as the arbitration imposed under the PSRCA was an inadequate substitute for postal workers' right to strike because it substantially undermined their bargaining power.

[7] The Attorney General's response, supported by Canada Post, is that, considering the context – i.e. the negotiation, conciliation, mediation, and strike activity before the PSRCA was enacted, and the mediation/arbitration process after enactment – the right to strike was limited in a way that did not substantially interfere with a meaningful process of collective bargaining and did not infringe s. 2(d). Furthermore, the Attorney General submits that even if s. 2(d) was infringed, this was justifiable under s. 1 of the *Charter* given the acceptable form of arbitration/mediation that the legislation authorized in lieu of CUPW's strike.

## II. Is the matter moot?

[8] Although the question of mootness is conceptually a threshold issue, discussion of it necessarily starts from the end of the negotiation and strike narrative that has consumed much of this case. To understand whether or not the *Charter* challenge here is moot, it is necessary to review not how the collective bargaining and rotating strikes by CUPW began or progressed, but how the conflict between CUPW, Canada Post, and, ultimately, the government of Canada came to an end.

[9] Bill C-89, which became the PSRCA, was introduced in the House of Commons on November 22, 2018. In tabling it, the Minister of Employment, Patty Hajdu, announced that CUPW and Canada Post had been unable to reach a collective agreement despite a lengthy period of bargaining, the assistance of the Federal Mediation and Conciliation Service, and five weeks of what were then ongoing rotating strikes across the country.

[10] The Minister also emphasized delays and uncertainty in postal services that she said were severely harming small businesses, vulnerable individuals, and populations in rural and remote regions. In addition, she made reference to the approaching holiday season – the heaviest mail usage point in the year. These introductory remarks mirrored the concerns outlined in the preamble to the PSRCA, which received Royal Assent on November 26, 2018.

[11] The PSRCA required that postal service be resumed immediately, and prohibited Canada Post from terminating or taking any action against any employee for participating in the rotating strikes. It placed an obligation on CUPW and its officials to notify members and to ensure that they return to work. It also extended the previous collective agreements until a new one was concluded, and prohibited lockouts and strikes for the duration of the extended collective agreement.

[12] Under the PSRCA, CUPW and Canada Post could continue to negotiate toward a new collective agreement, failing which the statute established a mediation-arbitration process for resolving issues on which an agreement could not be reached. The PSRCA set out a process by which the Minister would appoint a mediator-arbitrator.

[13] Unlike the *Restoring Mail Delivery for Canadians Act*, SC 2011, c 17 (the "RMDCA"), which had ended a postal strike in 2011 but which was held to be unconstitutional in *CUPW v. Canada* (2016), 130 OR (3d) 175 (SCJ) ("*CUPW 2016*"), the PSRCA took a more hands-off approach to the parties' ultimate dispute resolution. It mandated a mediation-arbitration process, but left the basic design of the process to the parties to work out with the arbitrator. In adopting this approach, the drafters of the PSRCA appear to have read carefully the *CUPW 2016* ruling.

[14] Whereas the RMDCA had imposed an arbitrator without consultation and had pre-defined the arbitrator's methodology, the PSRCA provided for party input into the appointment of the mediator-arbitrator and then allowed the mediator-arbitrator to select the method of arbitration. In another move away from the RMDCA's approach, the PSRCA did not set the collective agreement's new term, nor did it dictate any specific parameters for wages or pensions. In addition, the PSRCA did not prohibit, as the RMDCA had done, CUPW's officials from encouraging employees not to comply with the back-to-work mandate.

[15] On December 10, 2018, Minister Hajdu announced the appointment of Elizabeth MacPherson as mediator-arbitrator. She was an experienced labour arbitrator who appeared to be acceptable to both parties. CUPW issued a statement praising Mediator-Arbitrator MacPherson's appointment and expressing optimism that she could find an acceptable resolution for all sides.

[16] In mid-December, the process shifted from mediation to arbitration. The parties asked Mediator-Arbitrator MacPherson to employ conventional arbitration, which allows an arbitrator to craft a final award. The arbitration proceeded over 42 days between February 2019 and May 2020. It received oral evidence from 28 witnesses, reviewed volumes of exhibits and written submissions, and visited a number of postal facilities. Mediator-Arbitrator MacPherson's decision was issued on June 11, 2020.

[17] In the arbitration award, CUPW achieved wage increases of 2% in the first and second years of the new collective agreement, 2.5% in the third year, and 2.9% in the fourth year. Mediator-Arbitrator Macpherson applied the replication principle to her decision, and attempted to mirror what CUPW would likely have achieved in negotiation The wage increases turned out to be somewhat less than CUPW had sought, but distinctly more than Canada Post had hoped to pay. The parties agreed that the award would be effective for four years, retroactive to December 31, 2017 and January 31, 2018 for each of CUPW's bargaining units. In September 2021, the parties

agreed to extend the collective agreements awarded by Mediator-Arbitrator MacPherson for another two years.

[18] All of this is to say that there is no further practical effect or legal relevance to the legislation in issue. Both sides agree with that. In bringing this challenge, CUPW has expressed no desire to re-create the 2018 state of affairs. Both CUPW and Canada Post are content to continue abiding by the currently in-force collective agreement regardless of the outcome of the present Application.

[19] Importantly, the PSRCA's limitation on strike activity – i.e. the very thing that this Application challenges as an infringement of the *Charter* – has expired and is no longer in force. Not only did the back-to-work portion of the legislation come to an end, but that provision, in turn, gave way to an arbitral process that has itself been completed. What's more, the arbitral process gave way to a new collective agreement that was ratified by both CUPW and Canada Post. And finally, the post-arbitration collective agreement has now expired, and a new, freely negotiated collective agreement has been ratified and implemented to take its place.

[20] In other words, the PSRCA is a matter of history – not just because the parties agree to treat it that way, but because there is no other way to view it. Its force is spent.

[21] Nevertheless, CUPW seeks two constitutional remedies which, it contends, will have impact into the future. Both are unusual. The first is a non-retroactive declaration of invalidity of the PSRCA under s. 52 of the *Constitution Act, 1982*, without an Order that the legislation is of no force and effect going back to the statutes enactment. The second is an Order under s. 24(1) of the *Charter* compelling the government and Canada Post to again engage in negotiations, but without any threat of back-to-work legislation or even suggestion that such legislation is possible. Under the circumstances, neither remedy is suitable.

[22] The Supreme Court of Canada has explained that "ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights": *R. v. Ferguson*, [2008] 1 SCR 98, at para. 51 [emphasis in original]. The present Application is a challenge to a specific federal statute – the PSRCA – i.e. a law.

[23] The government action at issue is nothing more than the enactment and implementation of this law. A remedy under s. 24(1) of the *Charter* that somehow addresses the government action – compelled negotiation – as a result of the impugned law, but leaves the law itself intact because it seeks to avoid any retroactive effect, makes neither legal nor logical sense.

[24] Either the PSRCA was constitutional when it was enacted or it was not; and, if not, its constitutional defect – its invalidity – means that it was of no force and effect at its very inception. One cannot say that the government or legislature acted unconstitutionally in enacting a law and must never do so, or even talk about doing so, again, but which was, despite that, was constitutionally valid for a time and rights established pursuant thereto can stand.

[25] Counsel for the Attorney General submits that, as an additional consideration, constitutional remedies "must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary": *Doucet-Boudreau v. Nova Scotia (Minister*

*of Education)*, [2003] 3 SCR 3, at para. 56. An Order under s. 24(1) compelling the executive branch of government, or its delegate Canada Post, to negotiate a future collective agreement with a union, and telling it how to conduct itself during those negotiations, does not respect those boundaries.

[26] Again, the Supreme Court has admonished that "courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes": *Ibid*. CUPW's proposal for a s. 24(1) remedy does precisely that; it would move the court from its function as an arbiter of rights to an active policy-making and policy executing function: *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765, at paras. 38-39.

[27] The only remedy that fits this constitutional challenge, if successful, would be a full-throated declaration of invalidity under s. 52(1). It would target the back-to-work legislation that is alleged to have infringed the *Charter* rights in issue, and would declare that not only is the PSRCA not valid, but it never was: *R. v. Albashir*, 2021 SCC 48, at para. 34. CUPW has been clear, however, that a declaration of invalidity of that sort – the most common constitutional remedy for rights-infringing legislation – is not what is being sought in this Application.

[28] In case there is any doubt about the desired remedy, CUPW's chief negotiator, Sylvain Lapointe, stated expressly in his reply affidavit, at para. 102, that CUPW is not interested in setting aside Mediator-Arbitrator MacPherson's arbitral award or resuming the 2018 negotiations where they left off. Given what has transpired since that time, with a new, freely negotiated collective agreement now in place and several years of parties' and individuals' reliance on the rights and duties embodied by the result of the arbitral process, that position is a practical one.

[29] At the same time, CUPW's desire to preserve the current collective agreement undermines its request for a s. 52(1) remedy which would declare its foundation invalid. The lack of a suitable constitutional remedy under the circumstances serves to underscore the Attorney General's point about the case being moot – the legislation that is the subject of the challenge, and all of the fallout from that legislation, is, effectively, water under the juridical bridge. It is no longer meaningful in any legal sense and cannot be attacked.

[30] This mootness, which leads to an absence of any appropriate remedy or of any reason to hear the case, can be countered only "if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it": *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, at 358. To this, Mr. Lapointe responds, at para. 104 of his reply affidavit, that what CUPW seeks is, in effect, a warning to the government and Parliament not to engage in this kind of legislative attack on the right to strike in the future. Counsel for CUPW expresses this request in terms of judicial guidance, and submits that since collective bargaining goes in cycles the issue is bound to come up again and the parties would benefit from the court's normative directions or guidance.

[31] In considering that submission, I am conscious of the standard judicial posture in not answering hypothetical or theoretical questions where there is no live controversy between the parties. As Justice Sopinka put it in *Borowski*, at 361, "in the absence of legislation or other

governmental action which would otherwise bring the *Charter* into play…[w]hat the appellant seeks is to turn this appeal into a private reference."

[32] The reference process, of course, is not available to CUPW as a private litigant: *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 OR (3d) 566, at para. 27 (CA). And while courts do provide guidance for future cases when they provide reasons for decision in a current controversy, outside of the reference process they do not answer theoretical questions or address future disputes that are not yet (or no longer) "ripe" for judicial consideration: *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 25.

[33] In my view, it would be no more appropriate to satisfy the request for future guidance under the present expired legislation as it would be to provide judicial guidance under repealed legislation: see *Regional Municipality of York v. Ontario (Minister of the Environment, Conservation and Parks)*, 2023 ONSC 5708, at para. 28 (Div Ct). As the Court of Appeal has pointed out in other mootness cases, "The mere fact that a party may at some future time resort to the same process which is the subject of the proceedings before the court does not give that party a direct or indirect interest in the litigation so as to give continued life to the controversy which precipitated the litigation": *Tamil Co-operative Homes*, *supra*, at para. 15.

[34] Perhaps even more importantly, a question of this kind answered in the absence of a live dispute will, necessarily, also be a question answered in the absence of an applicable factual record. After all, the negotiations and facts leading up to the PSRCA will be no more relevant than the expired statute itself. And answering a *Charter* question – especially a s. 2(d) question –in a factual vacuum is for the most part an exercise in futility.

[35] In *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101, at para. 70, the Court of Appeal firmly dismissed this type of approach to a s. 2(d) *Charter* challenge:

> The issue of whether the Act infringes the respondents' s. 2(d) rights does not simply require a review and comparison of the provisions in the Act and the other wage restraint legislation. Rather, in accordance with the direction of the Supreme Court in *Health Services* and the 2015 trilogy, this determination requires a contextual and factual analysis of the circumstances and context in which the Act was passed and its impact on collective bargaining. While the decisions at issue found that other wage restraint legislation did not infringe s. 2(d), none of these decisions suggests that wage restraint legislation is compliant with s. 2(d) *per se* if it has specified characteristics. Rather, the courts look at the circumstances under which the legislation was passed, the content of the legislation and the impact of the legislation on collective bargaining in the particular circumstances of the case to determine whether the legislation constitutes a substantial interference.

[36] An important consideration in determining whether to exercise my discretion to hear a case that is moot is the impact of any judgment on judicial economy. That policy prompts a consideration of whether it is worthwhile to consume scarce judicial resources in addressing the moot issue: *Borowski*, *supra*, citing Sharpe, Robert J. "Mootness, Abstract Questions and Alternative

Grounds: Deciding Whether to Decide", in: Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987).

[37] Counsel for CUPW argues that the type of back-to-work legislation at issue here repeats frequently enough that a thorough review of the applicable law and *Charter* rights will have future significance not only the parties hereto but to other labour unions, employers, and governments down the road. And while that may be true in the abstract, it is only true in the abstract. As in any number of other public policy contexts, the truly meaningful and challenging analysis – the devil, as they say – is in the details. One back-to-work statute is simply not the same as the next, except in the most superficial sense.

[38] The Court of Appeal addressed the point squarely in *Harjee v. Ontario*, 2023 ONCA 716, at para. 5, a case which posed a challenge to a public health measure that had already been repealed:

> We are not satisfied that it is a wise use of limited judicial resources to decide these issues in the face of the Regulation having been revoked. While there may be new public health measures taken in this, or a future, pandemic, there is no basis to assume such measures would take the same form as the revoked Regulation.

[39] A ruling on the constitutionality of the specific terms of the PSRCA might provide further guidance in this area of law that might be useful in the event of a future postal strike; or it might not. I concede that the *CUPW 2016* ruling provided some guidance for the drafters of the PSRCA. But the constitutional question in *CUPW 2016* was not moot, and the decision resulted in a retroactive declaration that the RMDCA was of no force and effect: *CUPW 2016*, at para. 250. The fact that parties have paid heed to a judicial decision resolving a live dispute is certainly what one hopes will occur in the ordinary course of legal process. But that is not a reason in itself for a court to opine on a question that is not, or is no longer, the product of a live dispute.

[40] In any case, it is also possible that a fulsome determination of the issues in the present Application will never truly be relevant to any future postal strike or other labour-oriented controversy. Even if a legislature were in the future to enact a carbon copy of the PSRCA, any such ruling would be premised, among other things, on the specific context leading up to the particular statute's enactment and its fallout: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, at paras. 92-93.

[41] None of the parties here, for example, has thought to argue the constitutionality of the PSRCA without reviewing in considerable detail the lengthy 2018 bargaining round, the rotating strikes that accompanied it. None of the parties have, for good reason, argued about the *Charter* jurisprudence or other case law in a factual vacuum. Thus, they have not left out of their submissions the complex impact of the strike action on the operations of Canada Post and on the society and economy more generally, and have not failed to frame the importance of the terms under negotiation, or the nature of the arbitral process and specific award that all of this spawned.

[42] All of that – the precise set of circumstances surrounding the PSRCA – are the fingerprints of the legislation. They form the context that allows us to identify the PSRCA's constitutional strengths and flaws. They are no more likely to be repeated than are any set of fingerprints; each set is unique to its bearer.

[43] With that in mind, there is no reason in legal principle or in judicial economy to consider the *Charter* challenge now that the PSRCA has run its course. There is nothing left to consider, nothing left to remedy, and, in view of the specific factual circumstances leading to its enactment, nothing that will recur with sufficient predictability or precision that can be helpfully addressed at this point.



## III. Should the mootness question have been raised at an earlier stage?

[44] The evidentiary record in this Application is extensive. All three parties here have provided voluminous comparative and historic statistical data on the postal deliveries, delays, volume of mail, geographic and demographic data postal services across Canada, industry details with respect to transport, storage, and other aspects of postal operations, population usage data, and impact of postal services on various economic sectors and social strata. The record also contains details of how the rotating strike action, in which different locations across the country were shut down for different durations with little notice, impacted on Canada Post operations.

[45] Canada Post and CUPW have also traded an impressive volume of materials establishing the detailed sequence of events during the negotiation process. Their respective counsel spent considerable court time in reviewing the step-by-step meetings, from board rooms to hotel rooms, during the many months prior to the PSRCA's enactment. All of this has been done with the aim to establishing for the record how necessary it was, or whether it was necessary at all, for Parliament to enact an end to the rotating strikes that CUPW had implemented. It has also been done with a view to establishing whether the collective bargaining process was a productive endeavor to continue to fruition in November 2018, or was a futile endeavor whose end had no meaningful impact on a stalled bargaining process.

[46] It is Canada Post's view that the evidence establishes that CUPW's rotating strikes had a crippling effect on its operations and a devastating impact on the consumers of postal services such that legislative intervention was an urgent necessity. It is CUPW's view that, although the rotating strike action was admittedly painful to Canada Post, strike action is designed to inflict some pain in an effort to equalize bargaining power; and further, that this particular strike action was designed to foster collective bargaining without shutting down postal services altogether for those who truly needed them.

[47] Counsel for CUPW submits that such an enormous amount of resources have now been spent building a record for this *Charter* challenge that it should not be allowed to go to waste. CUPW's counsel further submits that the mootness issue should have been brought at an earlier stage, and that counsel for the Attorney General should not have waited until the hearing on the merits to raise what is really a preliminary point. It is CUPW's position that, having now heard the entire Application with the benefit of this extensive record, it is incumbent on the court to decide the *Charter* issue on its merits.

[48] It is the Attorney General's position that it was not possible until CUPW had formulated its entire case, including a clarification of the remedies it is seeking, to determine whether the matter was moot. Counsel for the Attorney General further submits that whether the matter is raised at the outset or at the end, a moot question ought not be answered and that a moot question remains moot regardless of whether the hearing on the merits has already taken place.

[49] In *Borowski*, at 260, Justice Sopinka considered a similar set of arguments. He reasoned that although the court has discretion to answer a moot question, the parties' expenditure and the stage of the action do not in themselves provide sufficient grounds for the exercise of that discretion. It was the Supreme Court's unanimous view that such considerations would all but undermine the mootness doctrine, which plays an important role in defining and limiting judicial process and cannot be countered by the parties' timing or the stage of the hearing:

> The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

[50] Judicial economy and the hearing now being completed do not counter the fact that the matter is moot. As in *Borowski*, I am faced with a threshold issue that comes at the tail end of a case; but in these circumstances the tail really can, and does, wag the dog. The fact that a motion to dismiss on mootness grounds was not brought at earlier in the litigation process may impact on costs – to be discussed at a later stage; but it does not impact on the analysis of mootness or the impact of that ruling.

## IV. Did the legislation infringe s. 2(d) of the *Charter*?

[51] My conclusion on mootness is a complete answer to the issues in this Application. I will nevertheless take a few pages to provide an admittedly abbreviated version of my analysis of the *Charter* issues. Although not necessary, I do this in an effort to ward off any need for the parties to have to repeat the hearing on the merits in the event that the mootness doctrine is later held not to apply.

[52] Even a cursory review of the voluminous record establishes that there were serious social and economic dislocations resulting from CUPW's strike actions during the fall of 2018. Counsel for CUPW submits that a strike is not a picnic; in fact, inflicting economic pain on the employer, and, as a spin-off, on the employer's customers and public, is precisely the effect that a union's exercise of the right to strike is meant to have.

[53] It is generally understood that *Charter* protections do not provide workers with an unfettered right to strike "while insisting that the state remain idle and indifferent to the infliction on others of serious economic harm": *RWDSU v. Saskatchewan*, [1987] 1 SCR 460, at para. 31. At the same time, it is now equally understood that "[a] legislative provision cannot substantially interfere with freedom of association, either in purpose or in effect, without infringing s. 2(d) of

the *Canadian Charter*": *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, at para. 160.

[54] It is difficult for back-to-work legislation to avoid infringing the s. 2(d) right, regardless of the harm that the strike action may be causing. Unless the Attorney General and Canada Post could establish that collective bargaining was so utterly futile that there was nothing to interfere with when the PSRCA was introduced, the legislation amounts to interference with collective bargaining and an infringement of freedom of association. While there is certainly evidence of an impasse here, and the government appears to have been convinced that further collective bargaining would not lead to a negotiated result, that prospect remains speculative.

[55] Interestingly, the evidence establishes that Canada Post and the government had offered a "cooling off" period such that the rotating strike actions would be discontinued by CUPW in December 2018 through to the end of the holiday season and the parties would engage in mediation. The proposal envisioned that strike action could begin again at the end of January of the new year if negotiations did not prove fruitful in the meantime. The idea was to engage in further negotiations in a calmer atmosphere, and to take the heat off of the busiest postal season by alleviating the public pressure on Canada Post over the spectre of a Christmas strike.

[56] That proposal, which was rejected by CUPW, signifies that Canada Post's concern was primarily with its own economic fortunes; but it also signals that the prospect of a settlement was not entirely futile. Negotiations were just taking longer than expected, and they were moving into the most economically significant season of the year for postal services. In fact, counsel for Canada Post stresses the evidence showing that Canada Post suffered a $260 million loss in 2018, whereas in the previous calendar year it had earned a profit of $17 million.

[57] That rationale for legislative action does not fit with the Supreme Court's understanding of the scope of s. 2(d)'s protections. The Court has declared not only that the right to strike is a piece of the collective bargaining process, but that it is "essential" to the collective bargaining process and the "irreducible minimum" of the s. 2(d) right: *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245, at paras. 54, 61.

[58] A government that imposes back-to-work legislation in order to protect a fragile economic sector can do so, but if that is the impetus for the legislation then it will be a *Charter* breach, at least in the first instance. The constitutional analysis of that intervention will entail a balancing of societal interests that is more appropriately engaged under s. 1 of the *Charter*: *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016, at paras.52-53. The PSRCA may or may not have been justifiable, but the *prima facie* rights infringement, as opposed to its justification, is established by Canada Post's own approach in seeking the legislation when further negotiation, difficult as it may have been, was still an option: *RWDSU*, *supra*, at para. 78.

[59] Before leaving the topic of the infringement of rights, I will briefly observe that CUPW has also argued that the PSRCA violates its members' freedom of expression under s. 2(b) of the *Charter*. That, however, is not the way the courts have analyzed the right to strike and legislation requiring an end to a strike. Unlike the associated activities of picketing and communicating one's views, a strike itself is strictly economic activity.

[60] It has long been held that economic activity on its own is not a form of expression protected by s. 2(b) of the *Charter*: *Rosen v. Ontario (Attorney General)*, 1996 CanLII 443 (Ont CA). Under back-to-work legislation, "[u]nions remain free to express whatever views they want about both the Act and the government that enacted it": *Ontario English Catholic Teachers Assoc. v. Ontario (Attorney General)*, 2022 ONSC 665, at para. 224, rev'd on other grounds 2024 ONCA 101. While a strike is expressive activity in the most generalized understanding of that term, the right to strike has been addressed by the Supreme Court directly under s. 2(d) rather than obliquely under s. 2(b).

[61] I will also pause to note that CUPW has included in its materials a brief on international labour law and the right to strike written by Professor Emeritus Patrick Macklem, a well-respected expert in the field from the University of Toronto. Professor Macklem demonstrates that under the jurisprudence of the International Labour Organization ("ILO"), legislative intervention is possible under an "essential services" rationale or an "acute national emergency" rationale. It is interesting to note that postal services have been excluded as essential in a decision of the ILO, and that an acute national emergency suggests an urgent intervention on the level of a *coup d'etat* or other polity-threatening circumstance. A gap in postal services does not fit either of the ILO categories.

[62] Professor Macklem's analysis is thorough and cogent. It is helpful in understanding the parameters of similar provisions in the *Canada Labour Code* and how those might principles fit into a *Charter* analysis. Having said that, the Supreme Court has recently opined that the ILO case law itself is not binding in Canadia law, pointing out that the Committee rendering those decisions is more of a political than a judicial body as we think of those respective institutional functions. At most, the cases referenced in the Macklem study are "relevant and persuasive, but not determinative, interpretive tools": *Société des casinos*, *supra*, at paras. 195-196.

[63] Interestingly, Professor Macklem does explore the question of whether an arbitral process can replace the right to strike. He explains, at para. 138 of his Report, that "any compulsory arbitration system must be truly independent to be in conformity with the principle of free and voluntary collective bargaining, compulsory arbitration must not contain legislative criteria that predetermine arbitral outcomes." As discussed below, that principle is instructive for the case at hand, although in the *Charter* framework it fits more into a s. 1 analysis than an analysis of the rights infringement itself.

[64] It is in the context of a justification for a breach, and not the breach itself, that a replacement mechanism for strike action and collective bargaining can be considered. As Chief Justice Dickson indicated in *RWDSU*, at para. 31, legislation can interfere with the ordinary course of collective bargaining, which includes a union's ability to engage in a strike, only if it is "justified in abrogating the right to strike and substituting a fair arbitration scheme."

## V. Was the legislation justified under s. 1 of the *Charter*?

[65] Since judicial economy does not call for any analysis beyond the conclusion that the matter is moot, I will refrain from running through the full test of justification as set out in *R. v. Oakes*, [1986] 1 SCR 103. Instead, for the sake of completeness, I will jump briefly to the one point that, if the question were not moot, would save the constitutionality of the PSRCA: the statute's minimal impairment on *Charter* rights.

[66] As discussed above, Parliament enacted the RMDCA in June 2011. That legislation, like the PSRCA, put an end to a strike by CUPW and was subsequently challenged as an infringement of s. 2(d) of the *Charter*. In *CUPW 2016*, Justice Firestone held that the RMDCA indeed did infringe freedom of association in that it undermined a meaningful process of collective bargaining. As he put it, at para. 185, "The facts of this case reveal that the right to strike was actively contributing to a meaningful process of collective bargaining at the very moment of its abrogation by the [RMDCA]."

[67] More importantly for present purposes, Justice Firestone found that the RMDCA could not be justified under s. 1. He reasoned that the statute had the pressing and substantial objective of securing a 'vital' service to vulnerable and rural Canadians", and that the prohibition on the right to strike…is rationally connected to the…objective": *Ibid.*, at para. 202. Where the statute faltered was at the minimal impairment stage of the *Oakes* analysis.

[68] Specifically, in *Saskatchewan Federation of Labour*, *supra*, at para. 81, Justice Abella had observed that a statute is not minimally impairing of rights if, *inter alia*, it is enacted with "the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses." Following that logic, the court in *CUPW 2016* reasoned, at paras. 215-216, that "the arbitration process contemplated by the [RMDCA] was structurally inadequate and not impartial" in that it dictated maximum wage increases for CUPW members.

[69] Interestingly, the *CUPW 2016* determination mirrors the ILO jurisprudence as set out in Professor Macklem's expert report. He explains that in the ILO's Case No. 2035 (Canada) and its Case No.1768 (Iceland), compulsory arbitration schemes were held to be offside given that they prescribed specific, substantive criteria for the arbitrators to follow in their awards.

[70] In addition to imposing substantive terms, the RMDCA suffered from process defects that made the legislative exercise unfair and, ultimately, impermissible. For one thing, the RMDCA allowed an arbitrator to be appointed by the government without consultation and with an apprehension of bias: *CUPW 2016*, at para. 215. The RMDCA also required arbitration on a "final offer" basis, where the arbitrator was obliged to choose the entire proposal of one party rather than fashioning a unique award that draws from both sides: *Ibid.*, at para. 7.

[71] None of those problematic features are present in the PSRCA. The PSRCA requires Canada Post and CUPW to be consulted on the choice of arbitrator. Indeed, neither side took issue with the appointment of Elizabeth MacPherson, an experienced labour arbitrator acceptable to both sides. The present legislation also allowed the arbitrator to adopt conventional arbitration rather than a "final offer" approach, which is a far more objective and non-partisan way to proceed. Finally, and perhaps most importantly, no issues, including wages, work conditions, governance, etc., were excluded from the arbitration. The parties were free to fashion the issues that were important to them.

[72] The Supreme Court of Canada has instructed on numerous occasions that, "s. 2(d) guarantees a process, not an outcome or access to a particular model of labour relations. Freedom of association is indeed non-statutory, but the manner of its exercise may be spelled out in legislation": *Société des casinos*, *supra*, at para. 121. The presence of a fair, neutral, and meaningful dispute resolution mechanism goes a long way toward ensuring that the otherwise

offending legislation is "carefully tailored so that rights are impaired no more than necessary": *Ibid*., at para. 80, quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, at para. 160.

[73] The expert on industrial relations put forward by CUPW, Professor Robert Hebdon of McGill University, confirmed in his testimony that the PSRCA is a fair and neutral piece of legislation. Indeed, he went so far as to opine that the government had effectively cured all the deficiencies of the previous legislation – i.e. the RMDCA.

[74] In terms of the final stage of the *Oakes* test, I will note that the fair arbitral process that accompanied the termination of the strike served to reduce any deleterious effects of the PSRCA. As indicated, the statutory arbitration process produced a new collective agreement that the CUPW membership has ratified, and which has, in turn, led to an even newer collective agreement, none of which CUPW seeks to overturn.

[75] Counsel for CUPW argues that a lingering deleterious effect of the PSRCA is that its enactment fostered a feeling of powerlessness, and engendered a level of cynicism on the part of some union members. While I do not doubt that such sentiments exist, the positive results of the process for CUPW, for Canada Post, and for the economy at large, certainly outweigh them.

[76] Cynicism by dissatisfied individuals over the way the system works may be an unfortunate by-product of the resolution of a labour dispute, but it is not a ground for constitutional challenge. As the Court of Appeal has observed, "There will likely always be some union members who are dissatisfied with their association's inability to influence government policy or with the terms of a negotiated collective agreement": *Ontario English Catholic teachers*, *supra*, at para. 112.

[77] In fact, I see no cause for cynicism in the way that the issues here have played out. It will be recalled that Professor Peter Hogg and Allison Bushell famously characterized *Charter* rulings as a form of "dialogue" between the courts and legislatures, each reacting to the other to arrive at the optimal level of rights protection and government functionality: Hogg, Peter W. and Bushell, Allison A., "The *Charter* Dialogue between Courts and Legislatures", 35 *Osgoode Hall Law Journal* 75 (1997). It is hard to imagine a better instance of dialogue than the government having paid heed to the problematic design of the RMDCA as discussed in *CUPW 20*16, and having enacted legislation that specifically addresses those *Charter* defects.

[78] The Supreme Court has consistently said that, "Legislation substantially interfering with a meaningful bargaining process by limiting the right to strike might nevertheless be justified under s. 1, as long as an appropriate alternative mechanism is put in place": *Société des casinos*, at para. 119. That is precisely what Parliament did in enacting the PSRCA.

## VI. Disposition

[79] The Application is dismissed. It is moot.

[80] If the Application were not moot, the PSRCA would infringe s. 2(d) of the *Charter* but would be justified under s. 1. The Application would in any case be dismissed.

## VII. Costs

[81] The parties may make written submissions with respect to costs. I would ask counsel for the Attorney General and counsel for Canada Post to provide me with brief submissions within two weeks of today's date, and counsel for CUPW to provide me with equally brief submissions within two weeks thereafter.

**Date:** July 11, 2024 **Morgan J.**