

THE FAILURE TO REMOVE ESSENTIALITY FROM COLLECTIVE
BARGAINING

An Analysis of the Designation Model and the Usage of Ad Hoc Legislation in
British Columbia's Health Sector

By

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Abstract

Strikes in essential services are a very difficult area to regulate. British Columbia has adopted the designation model where unions are given the limited right to strike in non-essential jobs. The designation model is hailed by many industrial relations scholars as one of the solutions to balance the union's right to strike with the protection of the public. Under the designation model, free collective bargaining should occur because the impact of essential services would be removed from the bargaining table. With free collective bargaining, the government would not be required to resort to ad hoc legislation to end strikes.

The designation model has been used in British Columbia's health sector since its adoption. Although the parties have evolved to efficiently designate essential services staffing levels, the parties still have difficulty settling collective agreements. This difficulty can be seen in the 2001 round of collective bargaining where the government imposed ad hoc legislation that ordered striking nurses and paramedical professionals back to work and imposed collective agreements on the parties.

Ad hoc legislation may be a natural by-product of the designation model because it forces unions to adopt alternative strike mechanisms. Alternative strikes allow the union to inflict economic and service harm on the employer with minimal pain to its membership. Therefore, the employer bears a greater burden under this type of strike and an impasse in bargaining may occur. With an impasse, governments may be justified to enact ad hoc legislation. However, broad legislation, like the type enacted by the British Columbia government in 2001 and 2002 that imposed collective agreement language and repudiated previously agreed to agreements, adversely affect free collective bargaining and should be avoided.

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Introduction

Many industrial relations scholars believe that without the right to strike,¹ free collective bargaining cannot occur.² Nowhere else is the right to strike issue more contentious than in the public sector. Unlike the private sector, where a strike is intended to drive settlement by placing economic pressure on both parties to a labour dispute, the public sector has systemic features that lead to questions regarding the appropriateness of the strike mechanism. One of the key differences is the effect of the strike on third parties. In the private sector, the parties hurt by a strike are usually limited to the employer and the union. The employer will lose revenue during a strike and the union members will lose wages. Third parties, such as customers, are not usually seriously affected in a strike because they usually have the option to purchase goods and services from other providers. The situation is different in the public sector. Since most public services are provided in a monopoly setting, the public is almost always affected. The strike's effect on the public raises interesting policy issues about whether the right to strike is a viable option in the public sector environment.

Since the public sector was allowed to unionize in the 1960s, industrial relations scholars and legislators have wrestled with the problem of balancing the

¹ Hereinafter, the "right to strike" will include the right to strike and the right to lockout.

² The importance of this right has been recognized by the International Labour Office in Convention No. 87 (the *Freedom of Association and Protection of the Right to Bargain Convention, 1948*); Convention No. 98 (the *Right to Organize and Collective Bargaining Convention, 1949*); Convention No. 151 (the *Labour Relations (Public Sector) Convention, 1978*); Canada has only ratified Convention No. 87.

union's right to strike with the protection of the public's interest. Models have arisen over the years that range from replacing the union's right to strike with compulsory interest arbitration, to allowing a limited ability if essential services are maintained, to allowing unions to strike without any restrictions.³ Over the years, provincial and federal governments have adopted these models in one form or another.⁴

Even though many Canadian jurisdictions have a statutory mechanism to deal with strikes in essential services, provincial and federal governments still take a very interventionist approach when strikes occur. Legislators often use their legislative powers to end strikes with the use of ad hoc legislation. Ad hoc legislation ranges from imposing "cooling off periods", to assigning mediators to help the parties settle, to directly setting the terms of a new collective agreement. The use of ad hoc legislation is controversial in most circumstances and is considered quite dangerous by many industrial relations scholars. There are many reasons for this assessment, and I will examine them in the paper. Fundamentally, the use of ad hoc legislation indicates that there may be a failure in the mechanisms designed to deal with strikes in essential services.

Industrial relations scholars have recognized flaws within the models because the limitations on the right to strike in these models reduce the likelihood for freely negotiated collective agreements. It is widely recognized that

³ Bernard Adell, Michel Grant, and Allen Ponak, *Strikes in Essential Services*, (Kingston: IRC Press, 2001 [Adell, Grant, and Ponak]).

⁴ For example, the Ontario Hospital employees do not have the right to strike but have compulsory interest arbitration if the parties do not come to a settlement under the *Hospital Labour Dispute Arbitration Act*, R.S.O. 1990, c.H.14 [HLDAA].

compulsory interest arbitration, which is required in the “no strike model”, creates a chilling and narcotic effect on bargaining.⁵ The chilling and narcotic effect reduces the likelihood of the parties to settle collective agreements voluntarily in subsequent rounds of bargaining. At the other extreme, jurisdictions without any restrictions to the right to strike, the likelihood for freely negotiated collective agreements is diminished because of the potential risk to the public’s health and safety in a strike. When governments in these jurisdictions face a strike that will affect the public’s health or safety they are left with few options: either to agree to the union’s demands or to use ad hoc legislation to force the employees back to work. Therefore, it appears that the intermediate approach through the limited strike, or designation model would serve as the best compromise.

Because it is perceived as a compromise, the designation model has been adopted by the federal jurisdiction and six provincial jurisdictions. The underlying principle of the designation process is the removal of the concept of essentiality from the collective bargaining process.⁶ Theoretically, once “essentiality” is removed from a strike, the strike reverts to the standard interplay of power

⁵ The chilling refers to parties’ disincentive to settle in collective bargaining because they realize that there would be compulsory interest arbitration if there is an impasse. Because of the chilling effect, over the long run, parties may rely in compulsory interest arbitration to reach settled collective agreements. Therefore, they will experience a narcotic effect – an addiction to compulsory interest arbitration. See J. Rose & M. Pczak, “Bargaining Under Compulsory Arbitration Systems” in E. Deom & A.E. Smith, eds., *Proceedings of the 30th Conference of the CIRA* (CIRA, 1994) 239. See also P. Weiler’s arguments against compulsory arbitration in: Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law*, (Toronto: Carswell, 1980 at 223 [Paul Weiler]).

⁶ Don Munroe, “Keynote Address” (Essential Services Designation Conference: Proceedings of the Labour Relations Board & CLAMS Conference, UBC Faculty of Commerce and Business Administration, Centre for Labour and Management Studies, 11-12 May 1995) Vancouver, BC: CLAMS 1995, at 2.

between the parties. With economic sanctions imposed on both parties, free collective bargaining should occur, with voluntary settlements usually resulting.

The use of the designation model can be seen very clearly in British Columbia's health sector. Unlike the health sector in Ontario or Alberta, which have a compulsory interest arbitration model, British Columbia's *Labour Relations Code*⁷ allows strikes as long as they do not threaten essential services. The designation model has been put to use many times within the health sector because strikes that threaten health care are perceived to immediately endanger the health and safety of the population. The question, however, remains whether the designation model is really effective in removing the concept of essentiality from collective bargaining, so that free collective bargaining can occur.

In this paper, I will attempt to answer this question by examining the jurisprudence surrounding the designation process in British Columbia, with particular attention to its application to the health sector. I will also look at the background of the health sector and analyze the evolution of the strike within the sector. From this analysis, I will argue that, although the designation model appears to be the best compromise between the unions' right to strike and the protection of the public interest, it has not resulted in a regime of free collective bargaining in the health sector as shown by the fact that the parties in the past round of collective bargaining were not able to settle the majority of their agreements independently without some form of intervention from the

⁷ R.S.B.C. 1996, ch. 244 [LRC] and Joseph Weiler, *Interest Arbitration: Measuring Justice in the Workplace*, (Toronto: Carswell, 1981).

government. This indicates that the current designation model has failed to remove essentiality from the collective bargaining equation.

I will argue that the reason that the designation model cannot drive settlement is because it assumes that strikes in health care still occur in a traditional fashion. The strike model has evolved over the years to incorporate alternative striking mechanisms, and I will argue that this fact reintroduces essentiality as a major factor in the dispute and thereby renders the designation model ineffective. In essence, the designation model appears to be effective only in traditional strikes. Once alternative striking mechanisms are used, essentiality is reintroduced as a major factor in the dispute and an impasse may result in collective bargaining.

Chapter 1: Protection of Essential Services in British Columbia

1.1 History

As in other jurisdictions in Canada, the protection of essential services in British Columbia is a product of evolution. The legislative evolution in the province has been multi-faceted and has occurred since the first introduction of essential services legislation in 1968⁸ to the most recent amendments to the *LRC*

⁸ *Mediation Commission Act*, SBC 1968 c.26 [MCA].

in 2001.⁹ There are many possible explanations for the volatility within this area of labour law. Given the highly politicized nature of essential services, it has been noted that rhetoric and fear-mongering may be a primary reason for legislative amendments. For example, Professor Joseph Weiler stated that: "... if the local media and more vocal politicians are to be believed, our essential services are at the mercy of intransigent administrators and greedy trade unionists who use outmoded, crude economic weapons to settle their employment conditions while ignoring the interests of the public."¹⁰ It is thus a possibility that a reason for the numerous legislative amendments over the past forty years is due to the ideological shifts within government. Politics and labour relations have always been intertwined in British Columbia.¹¹ The labour movement has been associated with the British Columbia New Democratic Party (NDP) since the 1930s. The NDP has been a strong political party in British Columbia, historically attracting at least one third of the popular vote.¹² The strength of the NDP is countered by right of centre parties such as the Social Credit and the current British Columbia Liberal Party. Over the past thirty years, labour relations legislation and policy have often mimicked the ideological stance taken by the political party in power. For example, during the 1980s, some of the

⁹ *Skills Development and Labour Statutes Amendment Act*, S.B.C. 2001, c.33.

¹⁰ Joseph Weiler, "The Essential Services Disputes Act (BC)" in Joseph Weiler ed. *Interest Arbitration: Measuring Justice in Employment* (Toronto: Carswell, 1981) 99 at 100 [J. Weiler].

¹¹ For an in depth analysis on the volatility of BC public sector labour policy that occurs after changes in government, please refer to: Mark Thompson, "Labour Relations in BC Public Service: Blowing in the Political Wind" in Gene Swimmer ed. *Public Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills: Oxford University Press, 2001) at 155.

¹² *Ibid.*, at 156.

most neo-liberal labour policies in Canada were developed by the Social Credit government, while the reign of the NDP during the 1990s marked some of the most generous collective agreement settlements ever achieved by the British Columbia Government and Service Employees' Union in the direct public service.¹³

Essential services legislation has not been protected from the swings of British Columbia's political pendulum. Excluding ad hoc legislation, from 1968 to the current iteration of the *LRC* there have been seven significant changes in the legislative approach to essential services. I will now briefly describe five major Acts that reflect those shifts.

1.1.1 Important Historical Legislation

The first enactment of essential services legislation was the *Mediation Commission Act* in 1968. The *MCA* established a commission to perform interest arbitration if a dispute endangered the "public interest or welfare".¹⁴ The commission did not enjoy much credibility and was boycotted by the British Columbia Federation of Labour.¹⁵ The unions' lack of faith in the commission was caused by its inconsistent and arbitrary rulings. One documented example

¹³ *Ibid*, at 166.

¹⁴ *Supra* note 8, s. 18.

¹⁵ The commission's lack of credibility was based on several factors: the failure of the government to consult with the unions prior to the introduction of the bill, the appointment of an ex-Supreme Court of BC Judge as the Chairperson, and several arbitration decisions that were clearly unfavourable to the unions. See: *J. Weiler, supra*, at 102-103.

occurred within the construction sector, where the Teamsters union turned to the commission to adjudicate a collective agreement. The resulting collective agreement imposed by the commission included a wage settlement that was less than the final offer of the employer.¹⁶ The result of this arbitration led most unions that were bound by the *MCA* to turn to ad hoc interest arbitration instead of the commission. It was noted by Professor Joseph Weiler that even the provincial government chose an independent arbitrator for a dispute in British Columbia Hydro instead of turning to the commission.¹⁷

This lack of trust in the commission led to its demise in 1972. Unlike the Social Credit government in 1968, the NDP appointed three special advisors to draw up a new Labour Relations Code. Amongst their recommendations, the advisors recommended a new structure to deal with strikes in essential services. The advisors reinstated the right to strike and gave the union side alone the right to unilaterally invoke interest arbitration.¹⁸ The *LRC 1973* was thereby much more union friendly than the *MCA*. The problem however, was that the *LRC 1973* failed to address the notion of an essential service strike. As the unions had almost a unanimous animosity to interest arbitration, it was unlikely that they would forego the right to strike.¹⁹ Therefore, as Professor Arthurs suggested, the

¹⁶ *Ibid.*, at 103.

¹⁷ *Ibid.*

¹⁸ *Labour Relations Code*, SBC 1973, c.122, s.73 [*LRC 1973*] S. 73 of *LRC 1973*'s is limited to only Firefighters, Police or Hospital Unions. Therefore, only the unions representing employees in these sectors have the right to opt for interest arbitration as an alternative to a strike.

¹⁹ Joseph Weiler, *Interest Arbitration: Measuring Justice in the Workplace*, (Toronto: Carswell, 1981).

absence of any prohibition against strikes in essential services was likely to result only in the government introducing ad hoc legislation.²⁰

The firefighters strike of 1974 highlighted the frailties of *LRC 1973*. The Lower Mainland firefighters did not opt for interest arbitration under the Act and refused to perform any firefighting duties. In response, the government ordered them back to work with ad hoc legislation.²¹ The ad hoc statute also amended the *LRC 1973*, giving the government the authority to impose a “cooling off” period of 21 days during which strikes were prohibited for future labour disputes.²²

Perhaps the most revolutionary change to essential services legislation occurred in 1975. Under the *Labour Code of BC Amendment Act*,²³ the government developed a designation process for essential services disputes. This change removed the right to strike from firefighters, police officers, and hospital employees. Instead, during a strike, the Labour Relations Board was given the authority to designate employees that were essential. Those employees designated were required to work during the strike to maintain essential services. The most often cited case under this regime was the 1976 Vancouver General Hospital strike.²⁴ In this dispute, the Labour Relations Board

²⁰ Harry Arthurs, “The Dullest Bill: Reflections on the Labour Relations Code of British Columbia”, (1974) 9 U.B.C.L.R. 280 at 295.

²¹ *Essential Services Continuation Act*, SBC 1974, c. 108.

²² *LRC 1973*, *supra* note 18, s. 73(7).

²³ SBC 1975, c. 33, s. 15 [*LRC 1975*].

²⁴ *Paul Weiler*, *supra* note 5, at 210.

was required to determine the essential services levels for the non-professional employees represented by the Hospital Employees Union (HEU). The Board was required to determine the number of beds that were essential in order prevent “immediate danger to life, health, or public safety.” After the designation process was completed, the strike occurred.

Although there was great media outrage about the role of the Board in matters pertaining to life and death, Professor Paul Weiler was of the view that the controlled strike generated pressure for settlement on both the HEU and the Hospital.²⁵ Professor Paul Weiler explained that the pressure to settle had an immediate impact on the union. Once the strike started, the union members faced the unattractive reality of having their regular earnings replaced with meagre strike pay.²⁶ As the strike progressed, membership support declined in both Vancouver General Hospital and other hospitals where job action was pending. This pressure led the HEU executives to look for a compromise with the government and the employers.

On the employer side, in addition to political pressure to settle, the designation model forced many hospital administrators to perform front line hospital work. This additional pressure drove many hospital administrators to pressure the Health Labour Relations Association, their accredited bargaining agent, for a settlement.²⁷ Settlement was ultimately reached through the

²⁵ *Ibid*, at 212.

²⁶ *Ibid*.

²⁷ *Ibid*, at 213.

introduction of the *Hospital Services Continuation Act*²⁸ and the designation model was eventually extended to both the private and public sector.²⁹

The *LRC 1973* was repealed in 1987 by the Social Credit government. Following the trend of volatility influenced by political ideology, the *Industrial Relations Act*³⁰ gave the government broad powers to intervene in essential services disputes. Professors Adell, Grant, and Ponak commented that the neo-liberal overhaul of the Labour Code by the Social Credit government gave the government the broadest range of powers to intervene compared to any other jurisdiction in Canada.³¹ Although the designation model was maintained, modifications were made to give the government extra capability to limit strike action. For example, the government was given the power to impose a 40 day cooling off period³² in a dispute and the government could request the commissioner of the Industrial Relations Council to establish a Public Interest Inquiry Board, with a Public Interest Advocate to represent the public.³³ In addition to these changes, the threshold for intervention, which can effectively be defined as the point where a strike can be determined to interfere with essential services, was reduced. The *IRA*'s definition of essentiality included strikes that threatened the economy in addition to strikes that threatened the health, safety or

²⁸ SBC 1976, c. 21.

²⁹ *Labour Code of British Columbia Amendment Act*, SBC 1976, c. 26.

³⁰ Created by the: *Industrial Relations Reform Act*, SBC 1987, c. 27 [IRA].

³¹ *Adell, Grant, and Ponak, supra* note 3, at 43.

³² *IRA, supra* note 30, s. 137.8.

³³ *Ibid*, ss. 137.92 and 137.93.

welfare of the province.³⁴ This effectively pulled the entire private sector into the essential services regime once again.

When the NDP government regained power in 1991, it immediately initiated a royal commission to develop a new labour code.³⁵ In 1992, these recommendations were adopted in the *Labour Relations Code*.³⁶ The *LRC 1992* repealed the neo-liberal changes that the Social Credit government implemented in the *IRA*, such as government's ability to impose cooling off periods and the low threshold for intervention. The *IRA*'s threshold for intervention, which had included threatened harm to the economy, was repealed and replaced with the threshold in *LRC 1973*.³⁷ The *LRC 1992* maintained the designation model but increased the focus on mediation rather than adjudication. This was different from previous iterations of the labour code, where essential services levels were either negotiated or adjudicated between the parties. The *LRC 1992* puts increased reliance on the mediation process by giving the Labour Relations Board the authority to appoint mediators to assist the parties to come to an agreement on the essential service levels.³⁸

The *LRC 1992* remained essentially unchanged until 2001 when the Liberal government amended several sections, including the essential services

³⁴ *Ibid*, s. 137.8.

³⁵ British Columbia. Ministry of Labour and Consumer Services. Sub-committee of Special Advisors, *Recommendations for Labour Law Reform: a Report for the Honourable Moe Sihota, Minister of Labour* (Victoria: Queen's Printer, 1992).

³⁶ SBC 1992, c. 82 [*LRC 1992*].

³⁷ The threshold for intervention in *LRC 1973* was: "To prevent immediate and serious danger to health, safety or welfare...".

³⁸ *Ibid*, s. 72(3).

provisions. The essential services amendment was the reintroduction of the provision of education services as an essential service.

1.2 Legislative Methodology

In the brief description of the historical provisions that covered essential services, it is interesting to note that governments have mainly focused on three areas to make amendments: the scope of coverage, the threshold for intervention, and the method of protection. These areas have proven to be the pressure points in essential services legislation because they have the greatest impact on the union's right to strike. The following will be an analysis of the legislative changes pertaining to each of these areas.

1.2.1 Scope of Coverage

One important dimension of government regulation of essential services is the scope of its coverage. Since 1968, the scope of coverage has ranged from inclusive regimes that covered both public and private sectors to exclusive regimes that covered only health, fire and police services. Table 1 will display the changes in scope of coverage since 1968.

Table 1: Scope of Coverage

Act	Scope of Coverage	Year
<i>Mediation Commission Act</i> ³⁹	All trade-unions and employers, private and public sector	1968
<i>Labour Code of BC</i> ⁴⁰	Firefighter, police or hospital unions	1973
<i>Labour Code of BC Amendment Act</i> ⁴¹	Any trade union	1976
<i>Essential Services Disputes Act</i> ⁴²	Police, firefighters, hospital workers and Schedule employers – crown corporations, BC Government	1977
<i>Industrial Relations Act</i> ⁴³	Private sector, those appointed under <i>Public Service Act</i> , crown corporations and the broader public sector	1987
<i>Labour Relations Code</i> ⁴⁴	Any trade union	1992
<i>Fire and Police Services Collective Bargaining Act</i> ⁴⁵	Firefighters and Police Officers	1995

Table 1 indicates that there appears to be stabilization in the scope of coverage of essential services legislation. Since 1976, an inclusive regime has covered both public and private sector employers. Other than the brief period

³⁹ *Supra* note 8.

⁴⁰ *Supra* note 18.

⁴¹ SBC 1976, c. 26 [*LRC 1976*].

⁴² SBC 1977, c. 83 [*ESDA*]. Removes specified employers from the coverage from *LRC 1976*. *LRC 1976* still in effect and covers employers excluded from the *ESDA*.

⁴³ *Supra* note 30.

⁴⁴ *Supra* note 36.

⁴⁵ SBC 1995, c. 40 [*Fire and Police Services Collective Bargaining Act*].

from 1973 to 1976, when the scope was limited to the fire, police and hospital sectors, every political party in power appears to have accepted the consensus that essential services legislation should cover every sector in the province.

1.2.2 Threshold of Intervention

Perhaps a more volatile area of change relates to the threshold of intervention: the minimum effect on the public interest which is required to invoke the essential services provisions. In recognition of the importance of this “gatekeeper” to essential services regulation, there have been many changes to the statutory wording on threshold of intervention. Table 2 shows the changes since 1968.

Table 2: Threshold of Intervention

Act	Threshold	Year
<i>Mediation Commission Act</i>	To protect the public interest and welfare	1968
<i>Labour Code of BC Amendment Act</i>	To prevent immediate and serious danger to life, health or safety	1975
<i>Essential Services Disputes Act</i>	To prevent immediate and serious danger to life, health, or safety or an immediate and substantial threat to the economy and welfare of the Province	1977
<i>Industrial Relations Act</i>	To prevent disputes which pose a threat to the economy of the Province or to the health, safety, or welfare of its residents or to the provisions of education services	1987
<i>Labour Relations Code</i>	To prevent immediate and serious danger to health, safety or welfare	1992
<i>Skills and Development and Labour Statutes Amendment Act</i> ⁴⁶	To prevent immediate and serious danger to health, safety, welfare or educational services.	2001

Table 2 indicates that there is more volatility in the threshold of intervention than in the scope of coverage. It appears that this volatility is associated with the political party in power and its ideology of labour relations. For example, during the NDP's reign in 1975, the legislature raised the threshold to the "prevention of serious and immediate danger...." The words "serious and immediate" contemplate that essential services regulation does not come into play whenever there is a "danger" of any sort to the public. I will analyse the

⁴⁶ SBC 2001, c. 33. Amends *Labour Relations Code*, RSBC 1996, c. 244, s.72.

jurisprudence pertaining to the statutory language in the current law section of this paper.

The threshold of intervention was significantly lowered during the reign of the Social Credit government from the late 1970s to the early 1990s. Under the *ESDA*, the threshold was lowered such that any immediate and substantial threat to the economy would be deemed essential. The *ESDA* adopted this language from the ad hoc legislation introduced during a dispute that involved BC Ferries and BC Rail.⁴⁷ A further reduction of the threshold occurred in 1987 when the words “immediate and substantial” were removed, so that a dispute would be deemed essential if it merely “... poses a threat to the economy....”⁴⁸ This brought many more labour disputes within the scope of essential services.

In line with the historical trend of legislative amendment upon a change in the ruling political party, the *IRA* was repealed when the NDP took power in 1992. The *LRC 1992* discarded the essential services language in the *IRA* and reinstated the language from the 1975 Labour Code. Labour disputes that resulted in a detrimental effect on either the economy or on education were not deemed to be essential service disputes any longer. In addition to raising the threshold back to the prevention of “... immediate and serious danger to health, safety and welfare”, the NDP government excluded fire and police services from the *LRC* in 1995.⁴⁹ Under the *Fire and Police Services Collective Bargaining Act*,

⁴⁷ *Railway and Ferries Bargaining Assistance Act*, S.B.C. 1976, c. 48, s.16(1).

⁴⁸ *IRA*, *supra* note 30, s. 137.8.

⁴⁹ *Fire and Police Services Collective Bargaining Act*, *supra* note 45.

fire and police services were effectively declared 100% essential, because either party has the right to demand the Minister of Labour to provide interest arbitration if they are unable to settle a collective agreement.⁵⁰ Once interest arbitration has been authorized, the union and employer cannot authorize job action.⁵¹

After the defeat of the NDP by the BC Liberal party in 2001 education was re-declared 100% essential. S. 11 of the *Skills and Development and Labour Statutes Amendment Act*,⁵² amended s. 72 such that the threshold would be met if a dispute threatens “the provision of education programs to students and eligible children under the *School Act*.”⁵³ The reintroduction of education as an essential service was perhaps done as a response to rotating strikes conducted by teaching support staff in 2000. This amendment was opposed by the BC Federation of Labour and the BC Teachers’ Federation. They believed it was unnecessary since the last teachers’ strike occurred in 1993.⁵⁴ It is also interesting to note that Freedom of Association Committee of the International Labour Office (ILO) has recently found that the re-inclusion of education as an essential service, along with five other statutes that the British Columbia government enacted in 2001, violated Convention No. 87 (*Freedom of*

⁵⁰ *Ibid.*, ss. 3-4. S. 3 allows both parties to apply to the Minister for a direction to resolve their dispute via interest arbitration. Once an application is made, the minister will determine whether a mediation officer had been appointed under s. 74 of the *LRC* and if it had failed to settle the dispute. If the mediation officer had failed to settle the dispute, the Minister will be authorized to submit the dispute to interest arbitration.

⁵¹ *Ibid.*, s. 4.

⁵² *Supra* note 9, s. 11. S. 11 Amended s. 72 of the *LRC*.

⁵³ *LRC*, *supra* note 7, s. 72(1)(a)(ii).

⁵⁴ “B.C. Liberals’ labour plans a step backward, labour group, teachers say” *Canadian Press Newswire* (16 July 2001) J1 16’01.

Association and the Protection of Right to Bargain, 1948).⁵⁵ The ILO has recommended that the re-inclusion of education as an essential service should be repealed, and that the government should “adopt legislative provisions ensuring that workers in this sector may enjoy and exercise the right to strike, in accordance with freedom of association principles.”⁵⁶

However, unlike previous changes in government, no other amendments were made as of the date of this paper. Therefore, even though the BC Liberal party is widely accepted to be neo-liberal and a reincarnation of the former Social Credit party, it has not followed the historic trend of modifying the threshold of intervention to make it more difficult for unions to strike.

1.2.3 Remedial Powers

Like the threshold for intervention, the provisions of essential services legislation pertaining to remedial powers have also fluctuated with the change of government. Remedial powers refer to the powers the government has to deal with essential services strikes. Scholars have also used the remedial powers category to define the general legislative philosophy the government has towards essential services strikes. For example, in *Adell, Grant and Ponak*, the authors categorized three types of legislative philosophies present in Canadian

⁵⁵ *330th Report of the Committee on Freedom of Association*, GB.286/11 (Part I), ILO, 286th Sess., (2003) at para 305(a)(i).

⁵⁶ *Ibid.*

jurisdictions; the no strike model, unfettered strike model, and the designation model.⁵⁷ Under their classification scheme, British Columbia is currently under the designation model. This, however, was not always the case, as can be seen in Table 3.

⁵⁷ *Supra* note 3, at 13.

Table 3: Remedial Powers

Act	Powers	Year
<i>Mediation Commission Act</i>	Commission acts as an interest arbitrator	1968
<i>Labour Code of BC</i>	Union may unilaterally opt for binding arbitration if collective bargaining fails	1973
<i>Essential Services Continuation Act</i> ⁵⁸	Permits Cabinet to order maximum 21 day cooling-off period	1974
<i>Labour Code of BC Amendment Act</i>	Minister may request Board to designate facilities, productions, and services. 21 day cooling off period and unilateral arbitration still in effect	1975
<i>Labour Code of BC Amendment Act</i>	Increase cooling off period to 40 days	1976
<i>Essential Services Disputes Act</i>	Increase cooling off period to 90 days ⁵⁹	1977
<i>Industrial Relations Act</i>	Reduce cooling off period to 40 days	1987
<i>Labour Relations Code</i>	Removes all cooling off periods. Designation only.	1992
<i>Fire and Police Services Collective Bargaining Act</i>	Interest arbitration for Firefighters and Police Officers	1995

Table 3 indicates that British Columbia legislation has at times had characteristics of all three essential services models. During the years of 1968 to 1975, the legislation had characteristics of both a no strike model and an unfettered strike model. The MCA's use of adjudication and ad hoc interest arbitration effectively created a no-strike era in British Columbia. After the NDP

⁵⁸ SBC 1974, c. 108. Ad hoc legislation enacted because of a firefighter's strike. Also amends s. 73 of the LRC 1973.

⁵⁹ This act only applied to Police, firefighters, hospital workers and Schedule employers – crown corporations and BC government.

enacted of the *Labour Code of BC* in 1973, the pendulum swung to the other end. Under the *Labour Code*, a firefighting, police, or hospital union could unilaterally opt for interest arbitration if collective bargaining failed, but there was no any provision in place if a union opted not to go to interest arbitration. Therefore, during the short time from 1973 to 1975, British Columbia was essentially operating under an unfettered strike model. The only remedial power that the government had during this timeframe was the use of ad hoc legislation to order employees back to work.

The remedial power of designation was first introduced in the 1975 amendment to the *Labour Code*.⁶⁰ Since then, designation has been a permanent fixture in the various iterations of the *Labour Code*. It therefore appears that the various governments have come to accept the designation model as the best way to regulate an essential services strike. However, even with this acceptance, there have been peripheral amendments over the years to expand the powers of the executive to regulate essential service disputes. These amendments mostly came in the form of provisions authorizing the minister to order “cooling off” periods during a strike. “Cooling off” periods ranged in length and, once ordered, forced the parties to end the job action and resume bargaining. The length of cooling off periods ranged from 21 days during the reign of the NDP in the 1970s to 90 days during the Social Credit government

⁶⁰ The union’s right to unilaterally request interest arbitration was carried forward within the HEU collective agreement in the health sector. This clause was eventually struck out in *Health Employers Assn of British Columbia (Re:)* BCLRB No. B48/97 aff’d on reconsideration by BCLRB Letter Decision No. B326/98 where the Board ruled that the Union violated s. 11 and 47 of the *LRC* by pressing for the inclusion of the clause to impasse.

of the 1980s. Cooling off periods were rescinded in the 1992 amendment to the *LRC* and were not reinstated by the BC Liberal Government in 2001. Although cooling off periods have not been reinstated into the *LRC*, the government has still used them in ad hoc legislation.

Finally, the remedial power to order compulsory interest arbitration still exists in British Columbia. This remedial power is, however, limited to the police and firefighting sectors of the public service. Therefore, excluding the police and firefighting sectors, the remedial powers that exist today are weakest since 1973. Unless it resorts to ad hoc legislation, the government only has the designation process to limit the effects of a strike in essential services.

1.3 Current Law

The current essential services law is enunciated in ss.72 and 73 of the *LRC*. Except for the inclusion of education services as an essential service under the *Skills Development and Labour Standards Act*⁶¹ in 2001, the legislation has remained essentially unchanged since 1992.

The authority to designate essential services comes from s. 72(1) and (2). These two sub sections form a two part process that must be followed before designations are made by the Board. The threshold for intervention is stated in s. 72(1), which gives the Chair of the Board the authority to investigate a dispute

⁶¹ *Supra* note 9.

to see whether it "...poses a threat to the health, safety, or welfare of the residents of British Columbia."⁶²

Excluding education services, threats to health, safety, or welfare are the only criteria the Chair of the Board may consider in determining threats to the residents of British Columbia. Since collective bargaining essentially involves an economic dispute between the employer and the union, it has been determined that it is consistent with public policy that the *LRC* place limits on strikes if it affects the listed criteria.⁶³ Or, as Chairperson Lanyon stated in *Bulkley Valley*:

No employer or union should be allowed to impose unacceptable harm on the general public in its efforts to win a dispute. As important a value as collective bargaining is in our society, the imposition of limits upon it is a simple recognition that there are more important values⁶⁴.

This limitation is partially accepted by the ILO which has stated that "... essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population."⁶⁵ British Columbia's definition of essentiality is, however, broader than the ILO's because of its inclusion of the concept of "welfare".

⁶² *LRC*, *supra* note 7, s. 72(1)(a)(i).

⁶³ *The Board of School Trustees of School District No. 54 (Bulkley Valley)*, B.C.L.R.B. No. B147/93 online: QL (BCLB) [*Bulkley Valley*] at 10 QL. Please also refer to ss. 2(1)(f) and (g) of the *LRC* which states that the purpose of the *LRC* is to minimize the effects of labour disputes on persons who are not involved in the dispute and to ensure that the public interest is protected.

⁶⁴ *Ibid.*, at 18.

⁶⁵ International Labour Office, *Freedom of Association and Collective Bargaining*, International Labour Conference, Eighty-First Session 1994, Report 3 (Part 4B) (Geneva: ILO, 1994) at 70.

1.3.1 Definition of Welfare

Welfare was defined in *Bulkley Valley*, a case where the Bulkley Valley and Vancouver school boards applied to have grade 12 education (the last year of high school) designated as an essential service in anticipation of a teachers' strike in 1993. Chairperson Lanyon adopted Professor Paul Weiler's definition of welfare to include public safety, profound human needs, certain economic activity, and amenities of life.⁶⁶ These categories include services such as social assistance, transportation links, continuation of certain government operations, and garbage collection.⁶⁷ However, Chairperson Lanyon also cautioned that a labour dispute that threatens this broad definition of welfare does not automatically attract designation. Instead, a dispute may attract designation after circumstances combine to produce severe consequences that were not present when the dispute originally began.⁶⁸ For example, a strike by garbage collectors may not immediately warrant designation even though it may create an annoyance to the population. However, designation may occur if the accumulation of garbage, after a certain period of time, poses a threat to welfare that was not present when the strike first began.

⁶⁶ *P. Weiler, supra* note 5, at 238.

⁶⁷ *Bulkley Valley, supra* note 63, at 12 QL.

⁶⁸ *Ibid.*

The *Bulkley Valley* principle is very broad, because its definition of welfare encompasses both the public and private sectors. In particular, the inclusion of economic activity under the concept of welfare appeared to go beyond the actual wording of s. 72(1)(i). It can also be argued that the inclusion of economic activity under the definition of welfare is overly broad and contrary to the *LRC*, because the direct reference to the protection of the “health of the economy” in the *IRA* had been repealed in 1992. Vice-chair Germaine clarified this issue in *Corporation of the City of Victoria and CUPE*⁶⁹ where he limited effects to the economy to economic activity that is an aspect of or dependent upon infrastructural services.⁷⁰ An example of a labour disputes involving infrastructure services that resulted in a determination that they had serious effects on economic activity were the 1998 and 2000 BC Ferries disputes. The Board used tourism as a factor in determining the number of sailings to designate as essential. This was the case because tourism was the largest employer in many communities on Vancouver Island, and BC Ferries transported 90% of all visitors to Victoria.⁷¹

Although it may appear that the inclusion of the term “welfare” seriously weakens the union’s right to strike, the Board has been fairly hesitant to designate services as essential because of it. In *City of Victoria*, the Board refused to designate city outside workers as essential even though the city was

⁶⁹ B.C.L.R.B. Letter Decision B280/94.

⁷⁰ *Ibid.*, at 3 QL.

⁷¹ *British Columbia Ferry Corp. (Re:)* B.C.L.R.B. No. 288/2000 at para 12 See also: *British Columbia Ferry Corp. (Re:)* B.C.L.R.B. B518/98.

about to host the Commonwealth games. The city argued that the sight of garbage in the parks could potentially affect future tourism because Victoria would be in the spotlight of the world. The Board has also refused to designate Handydart bus drivers who transport people who are physically or mentally unable to use conventional transportation.⁷² The Handydart service was relied on by the disabled community, some of whom required constant medical attention, and the employer argued that all trips authorized by a medical practitioner should be deemed essential. The Board rejected this argument because the primary service of the Employer was to provide transportation, not medical services.⁷³ Chairperson Lanyon stated that there were sufficient alternative methods of transportation available to the community. He acknowledged the additional expense that families may endure during the labour dispute, but reasoned that economic damage, inconvenience and community frustration does not automatically make a service essential, as there needs to be evidence that the dispute is causing immediate or serious danger to the public.⁷⁴ The public however was still protected because the Board retained jurisdiction to designate services if the length of the dispute created circumstances that threatened welfare, and the parties were able to agree to the designation of certain routes that transported clients who required renal dialysis and cancer treatment.

⁷² *Farwest Handydart Services Inc. (Re:)* B.C.L.R.B. Letter Decision B15/96 [*Farwest Handydart*].

⁷³ *Ibid.*, at para 12.

⁷⁴ *Ibid.* at para 12-13.

As can be seen from the above analysis, it can be quite difficult for the Board to determine whether services affected by a labour dispute are essential. The determination of essentiality is the first part of the process that the Board must undertake before it can designate. After a determination that a labour dispute poses a threat to an essential service, the Board must designate appropriate essential service levels to protect the public against serious and immediate danger to its health, safety and welfare. The following two subsections will be a detailed examination of the process the Board follows in making these determinations.

1.3.2 Determination of whether Services are Essential

The determination of whether services are essential is done by the Chair of the Board. This is usually done with a s.72(1)⁷⁵ application by one of the parties. Normally, the employer in the dispute makes the application because of its obvious interest in maintaining service during a strike. Upon receipt of the application, or on her/his own motion, the Chair will initiate an investigation. The investigator will contact the parties and identify major issues. In *Bulkley Valley*, Chairperson Lanyon identified the relevant factors that the investigators will examine: the type of employer and union involved in the dispute; the type of

⁷⁵ S. 72(1) in full states: If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute, (a) investigate whether or not the dispute poses a threat to (i) the health, safety or welfare of the residents of British Columbia, or (ii) the provision of educational programs to students and eligible children under the School Act, and (b) report the results of the investigation to the minister.

“facilities, productions or services” which the employer seeks to have designated; the stage of the dispute (e.g. whether a strike vote has been taken, whether strike notice has been served, whether a strike is in progress); the length of the dispute; and the impact of any work stoppage upon both the parties to the dispute and the public.⁷⁶

S. 72(1) gives the Board broad powers to investigate a dispute, with a low threshold for initiating such an investigation. The low threshold is required because the wording in s.72(1)(a) requires the Chair to investigate whether or not a dispute “... poses a threat...” The term “poses a threat” envisages that investigators can investigate disputes that may turn out to not pose a threat, or, that they may reinvestigate a dispute that was initially determined not to pose a threat, to see if circumstances have changed.⁷⁷ Under this test, investigators may determine that many disputes affect welfare and may pose a threat to the population. However, the determination of what poses a threat may not actually result in designation. Rather, the determination of whether a dispute warrants designation is stated in the second part of the test as per s. 72(2).

1.3.3 Designation of Essential Service Levels

Once an investigation is complete, the report, along with any recommendations by the Chair for designation, will be forwarded to the Minister

⁷⁶ *Bulkley Valley*, *supra* note 63, at 7 QL.

⁷⁷ *Ibid.*, at p 8 QL.

of Labour.⁷⁸ If the Minister, upon examination of the report or on his/her own initiative, considers the dispute to pose a threat to health, safety and welfare, s/he may: choose to do nothing; independently investigate the matter; have the Board do a further investigation; or direct the Board to designate as essential those “facilities, productions and services that the Board considers necessary or essential to prevent immediate and serious danger to the health safety or welfare of the residents of British Columbia.”⁷⁹ If the decision is to designate, there would be a prohibition of job action until the designations are complete.⁸⁰

Designation can only be done on facilities, productions, and services which the Board considers necessary to prevent immediate and serious danger. This s. 72(2) standard is much higher than the standard required to initiate an investigation under s. 72(1) because of the inclusion of the words “immediate and serious danger.” The interpretation of “serious” and “immediate” has been determined through jurisprudence. Although most of the jurisprudence comes from health care, there have been cases outside of the health industry that provide guidance on the limits of “immediate and serious” danger. For example, it was determined that the provision of electrical services in general fit the definition of serious and immediate, but not all of the components of the service were designated.⁸¹ This is contrasted with *Farwest Handydart*,⁸² where the

⁷⁸ *LRC*, *supra* note 7, s. 72(1)(b).

⁷⁹ *Bulkley Valley*, *supra* note 63, at p 7 and *LRC*, *supra* note 7, s. 72(2)(b).

⁸⁰ *LRC*, *supra* note 7, s. 72(6).

⁸¹ *BC Hydro Authority*, BCLRB B181/94 [*BC Hydro*].

⁸² *Supra* note 72.

disruption of transportation services for the disabled was not considered an immediate and serious danger even if the transportation was for medical treatment. In *Bulkley Valley*, a decision prior to the enactment of the *Skills Development and Labour Statutes Amendment*⁸³ that deemed education as essential, the Board designated grade 12 education because its interruption posed an immediate and serious danger to the welfare of British Columbia. What can be taken from these decisions is that it is very fact specific and that there is not a prescribed formula to determine whether disruption to a facility, production, or service would constitute an immediate and serious danger.

In analyzing the Board decisions on what constitutes an “immediate and serious” danger, it must also be noted that the parties have often agreed to essential service levels prior to adjudication, so the Board is required to adjudicate only the more controversial designation requests. This, perhaps, sheds light on what the Board eventually designates. For example, basic levels of service were agreed to by the parties in *Farwest Handydart* and *BC Hydro* before adjudication. Therefore, since the parties are in the best position to judge what services should be designated as essential, items raised to adjudication may not be representative of services that immediately and seriously affect public health and safety.

This focus on mutual agreement on designation levels, often through mediation, is a fairly new concept in British Columbia’s essential services laws. Prior to the enactment of the current *LRC* in 1992, there was a greater focus on

⁸³ *Supra* note 9.

adjudication. This evolution toward mutual agreement and mediation was perhaps spurred by the 1992 strike within the health sector, when the Board was bombarded with the requirement to designate service levels for many employers and many unions on an employer by employer basis.⁸⁴

Promotion of Mediation

If a particular service is declared essential, under s. 72(3) of the *LRC*, the minister may appoint a mediator to assist the parties to designate the level of staffing to provide the essential services level. If a mediator is appointed, the mediator must prepare a report to the Associate Chair of the Mediation Division within 15 days of his/her appointment.⁸⁵ Within 30 days of receiving the report, the Associate Chair must designate the facilities, productions and services as essential, incorporating any of the mediator's recommendations at its discretion.⁸⁶ However, if a mediator is not appointed, the parties are still required to negotiate essential services levels. If the parties cannot come to an agreement, the parties must refer any outstanding issues to the Labour Relations Board for formal adjudication.

There is evidence that the use of mediation has significantly reduced the requirement for adjudication. For example, in the 1996 round of designation for

⁸⁴ *Adell, Ponak and Grant, supra* note 3, at 44.

⁸⁵ *LRC, supra* note 7, s. 72(4).

⁸⁶ *Ibid*, s. 72(5).

the health sector, Chairperson Lanyon commented on the significant number of issues that were settled before adjudication was required:

One of the lessons learned ... was that the parties are sophisticated, capable and mature enough to settle most issues on their own or with the assistance of mediation, and at the end of the day comparatively little adjudication may be required. The result was that mandatory mediation was incorporated as part of the essential service regime in the Code as a first step before coming before the Board for adjudication.⁸⁷

However, even with mediation, adjudication is still often required because of intrinsic differences between the union and employer positions. With this being the case, the Board has adopted an adjudication process for essential services designations that is quicker and more efficient than a formal Board hearing.

Adjudication Process

Since there are usually strict deadlines or threats of job action, the essential services adjudication is usually conducted in an expedited manner. This is because there is a prohibition of job action if essential services have not been designated; thus, in order to protect the union's right to strike, designations must be made quickly such that the process would not be stalled.⁸⁸ On the other hand, if job action has already begun before the essential services application,

⁸⁷ *Health Employers' Association of British Columbia*, B.C.L.R.B. No. B73/96 at para 6.

⁸⁸ *LRC*, *supra* note 7, s. 72(6).

the Board will wish to designate services in an expedited manner to prevent potential harm to the public.⁸⁹

The procedures of a designation hearing are relaxed so that procedural issues will not affect the timeliness of the decision. During the hearing, both parties present evidence on what services are essential and how they will be provided.⁹⁰ The Board will then usually select one of the positions of one of the parties – similar to final offer selection arbitration. The Board, however, still retains jurisdiction to designate any level it feels is necessary if it is not satisfied with the positions of the parties.

In determining the essential service levels, the Board will consider a multitude of factors. These include: the length of dispute, the timing of the dispute, the type of “facilities, productions and services” which the employer seeks to have designated, and the actual impact of the dispute on both the parties and the public.⁹¹ With these broad considerations, the board has the right to review and amend the designation levels that have already been agreed between the parties if it believes that the levels inadequately protects essential services.

Once services are designated, the employer and the union have several obligations to ensure that the orders are followed. For example, the employer and the union cannot restrict or limit a service that is designated,⁹² and the

⁸⁹ *Ibid*, s. 72(7).

⁹⁰ *BC Hydro*, *supra* note 81, at 11-12.

⁹¹ *Bulkley Valley*, *supra* note 63, at 12 QL.

⁹² *LRC*, *supra* note 7, s. 72(8).

working conditions for the designated employees are governed by the expired collective agreement.⁹³ The employer has the right to determine whether bargaining unit staff or excluded staff should perform the work that is designated and the employer will retain the right to give employees direction in the workplace.⁹⁴ In a sense, the employer's obligations are very similar to its obligations if job action had not occurred. The only difference is that the employer can assign management and excluded staff to perform bargaining unit work without being declared in violation of the replacement worker provisions in the *LRC* or the bargaining unit work provisions in the collective agreement.⁹⁵

Chapter 2: Ad hoc Legislation and Its Use in British Columbia

2.1 Definition and Historic Use of Ad hoc Legislation

Within the concept of essential services regulation, ad hoc legislation can be defined as temporary essential services legislation enacted by the government to “end a particular strike or a particular lock-out, either by imposing a renewal collective agreement or by providing a mechanism by which a renewal

⁹³ *Ibid*, s. 73(2).

⁹⁴ *GR Baker Memorial Hospital*, BCLRB No. B316/99.

⁹⁵ *Chantelle Management Ltd.*, BCLRB No. B345/93.

collective agreement ... [is] imposed.”⁹⁶ The use of ad hoc legislation has been very prevalent in Canadian industrial relations. Professors Adell, Grant and Ponak noted that since the 1950s, legislatures across Canada have passed over 100 pieces of ad hoc legislation to end or forestall strikes.⁹⁷ Most often, ad hoc legislation in recent years has been used to end strikes in the health care sector, with Saskatchewan,⁹⁸ Newfoundland,⁹⁹ and British Columbia¹⁰⁰ all being good examples of its application. However, ad hoc legislation has been used in other situations where the dispute’s effects on health and safety were questionable. Good examples can be seen in the federal jurisdiction, where the government has recently used ad hoc legislation to end strikes at west-coast ports,¹⁰¹ post offices,¹⁰² railways,¹⁰³ and the federal public service.¹⁰⁴

It has been argued that ad hoc legislation is sometimes required in strikes that affect health care because of its direct effect on the health of the population. For example, the disruption of nursing services does have a potential to

⁹⁶ Don Munroe, “Keynote Address” (Essential Services Designation Conference: Proceedings of the Labour Relations Board & CLAMS Conference, UBC Faculty of Commerce and Business Administration, Centre for Labour and Management Studies, 11-12 May 1995) Vancouver, BC: CLAMS 1995, at 2 [CLAMS Conference].

⁹⁷ Adell, Grant, Ponak, *supra* note 3, at 54.

⁹⁸ Please see: *Resumption of Services (Nurses-SUN) Act*, S.S. 1999, c.R-22.001.

⁹⁹ Please see: *Act to Provide for the Resumption of and Continuation of Health and Community Services*, S.N. 1999, c. H-37.2.

¹⁰⁰ Please see: *Health Care Services Continuation Act*, S.B.C. 2001, c. 26.

¹⁰¹ *West Coast Ports Operations Act*, S.C. 1995, c. 2.

¹⁰² *Postal Services Continuation Act*, S.C. 1997, c. 34.

¹⁰³ *Maintenance of Railway Operations Act*, S.C. 1995, c. 6.

¹⁰⁴ *Government Services Act*, S. C. 1999, c. 13.

immediately harm the health of the public if essential services levels are not maintained. It is however more difficult to argue that disruptions in postal services or ports can have a similar effect on the public. Therefore, it appears that politics may have an influence on why governments use ad hoc legislation to end strikes. Since most observers think that free collective bargaining requires unions and employers to have the right to strike or lockout, job action is a normal result of collective bargaining. Although job action may have negative externalities, such as deleterious effects on third parties, if governments accept the collective bargaining model they must also accept the risk of job action. As government acceptance of collective bargaining can be inferred from existence of labour relations legislation, political influence from constituents may be a possible reason why governments have embraced ad hoc legislation in certain high profile strikes.¹⁰⁵ The question therefore remains: is ad hoc legislation compatible with free collective bargaining?

In theory, the purpose of ad hoc legislation is to end a dispute which has broken down to the point where it is absolutely required to use legislation to protect the public's interests. Ad hoc legislation also serves as a threat to the parties involved in the dispute. Since it is usually enacted with little or no consultation with the affected parties, parties may be motivated to settle their disputes so that they will not be covered by unknown terms imposed by the government. However, like other forums where power is granted to individuals or

¹⁰⁵ Please see: Andrew C.L. Sims, Rodrigue Blouin, and Paula Knopf, *Seeking a Balance: Review of Part 1 of the Canada Labour Code* (Government of Canada: Hull) 1995 at 157 [Sims Report] where the authors stated that “[w]hile Parliament has an important responsibility to protect the public interest, it is susceptible to influences from particular constituencies.”

groups to unilaterally affect change in an expedited manner, there are many criticisms of ad hoc legislation because of its potential to be arbitrary, not thought out, and not conducive to good labour relations.

There is a lot of anecdotal evidence in the labour relations literature pertaining to the arbitrariness of ad hoc legislation. For example, Arbitrator Munroe recalled his experiences from a 1976 hospital strike.¹⁰⁶ He had been asked by the special mediator to write recommendations to end the strike. In doing so, he recommended that the special mediator's report should be adopted subject to approval of and amendment by the federal Anti-Inflation Board. When this proposal went to Cabinet, it was initially not accepted for reasons that Arbitrator Munroe described as very startling. He refused to rewrite his recommendations, which caused problems because the expiry of the cooling off period was about 10 hours away. Without Cabinet approval, Arbitrator Munroe had a last ditch meeting with the Premier. In that meeting his original recommendations were adopted without consultation with Cabinet. These recommendations were voted on five minutes before the expiry of the cooling off period, with only the Premier and two deputy ministers knowing that the contents were not accepted by the Cabinet. Arbitrator Munroe used this example to highlight the dangers of ad hoc legislation because of its arbitrary nature. Often, a government may be motivated more by political fear than by sound policy considerations when it is required to impose legislation quickly.¹⁰⁷ With such a

¹⁰⁶ CLAMS Conference, *supra* note 6, at 5-6.

¹⁰⁷ For further examples, please see: J. Weiler, *supra* note 10, at 106-8 and Clams Conference, *supra* note 6, p 6-7.

quick turnaround, ad hoc legislation tends to be not thought out and to have unintended labour relations consequences.

There are several examples of ad hoc legislation in British Columbia that had unintended labour relations consequences. The 1975 *Collective Bargaining Continuation Act*¹⁰⁸ was ad hoc legislation designed to stop a strike by the Teamsters in the propane industry. Since winter was coming, the government was concerned that northern residents would not have enough fuel to heat their homes. The wording of the legislation however was very broad. Instead of just targeting the propane industry, the government included forestry, pulp and paper, railway, and food merchandising industries into the scope of the act, thereby effectively ending strikes in all these other areas. Another example of legislation with poor labour relations rationale can be seen in the 1977 *Miscellaneous Statutes Amendment Act*.¹⁰⁹ There, the Minister of Education, reacting to a protracted strike by university faculty in Nelson, amended the *Universities Act* to exclude university faculty members from the *Labour Relations Code*. This was done without consultation with the Minister of Labour and had long-term labour relations consequences with no clear policy rationale.¹¹⁰

On a more theoretical note, the frequent use of ad hoc legislation may produce a “chilling” effect on collective bargaining. In the Sims Report, Commissioner Sims commented on the issue that ad hoc legislation does not

¹⁰⁸ S.B.C. 1975, c. 83.

¹⁰⁹ S.B.C. 1977, c.

¹¹⁰ CLAMS Conference, *supra* note 6, at 6.

address the underlying reasons for a labour dispute, but merely sweeps these issues under the rug such that they will fester until the next round of collective bargaining.¹¹¹ Similar to the chilling effect that occurs in compulsory interest arbitration, parties in sectors where governments frequently enact ad hoc legislation will lose their incentive to bargain. Since bargaining can be fundamentally described as a system regulated by power, the advantages that come out of a bargained agreement are the fact that the parties can come to an understanding of each other's power dynamics and negotiate an agreement that takes into consideration the opposing party's strengths. When ad hoc legislation is used, the advantages are lost.

2.2 Typical Content of Ad hoc Legislation

Historically, the contents of ad hoc legislation followed a similar pattern. Typically, governments would end a strike with a "cooling off" period and would then assign a special mediator to investigate the dispute and make recommendations. Usually, these recommendations would be adopted by the parties, thus ending the dispute. However, sometimes, these recommendations would not be accepted, thereby forcing the government to enact further legislation imposing the mediator's recommendations.¹¹²

¹¹¹ Sims Report, *supra* note 105, at 156.

¹¹² For example, in the 2001 Greater Vancouver Transit dispute, the employer did not accept the mediators recommendations thus forcing the government to enact legislation to impose the

The traditional method of imposing mediation in ad hoc legislation has been changing in the past 10 years. There appears to be a trend that suggests that governments are using ad hoc legislation to influence the outcome of new collective agreements. Professors Adell, Grant and Ponak noted that there has been an increase in the number of ad hoc statutes that require mediators or interest arbitrators to consider the economic constraints that employers face.¹¹³ Since interest arbitration is theoretically designed to replicate a settlement that would occur under free collective bargaining, this requirement can be redundant or can tilt the power balance in favour of the employer.

Perhaps a more troubling aspect of recent ad hoc legislation is the imposition of collective agreement language without any interest arbitration or mediation. For example, in the *Health Care Services Collective Agreement Act*,¹¹⁴ the British Columbia government imposed the employer's last proposal for the nurses and paramedical collective agreements. This is similar to what occurred in 1999 when the federal government imposed a settlement on the terms recommended by Treasury Board in a federal public service strike.¹¹⁵ The imposition of language based entirely on the employer's proposal has obvious detrimental effects on labour relations. It further entrenches the union view that government does not believe in free collective bargaining because it uses

recommendations into the collective agreement. *Greater Vancouver Transit Services Settlement Act*, S.B.C. 2001, c. 25.

¹¹³ Adell, Ponak and Grant, *supra* note 3, at 55 citing the *Postal Services Continuation Act*, *supra* note 102.

¹¹⁴ S.B.C. 2001, c. 26, s. 2(1)(c) and s. 3(1)(c).

¹¹⁵ *Government Services Act*, S.C. 1999, s. 7.

parliamentary sovereignty to obtain favourable terms unilaterally. The deleterious effects on labour relations can be seen recently through illegal strike activity in British Columbia by hospital employees protesting against ad hoc legislation that was imposed a year earlier.¹¹⁶

In sum, the use of ad hoc legislation adversely affects the free collective bargaining process. This problem can be seen distinctly in British Columbia's health sector. The health sector provides a very unique forum because of its highly charged political nature, long term use of the essential services model, and government's practice of using of ad hoc legislation to settle disputes.

Chapter 3: Background of Health Sector Labour Relations

3.1 Health Sector Labour Relations in Relation to Broader Public Sector Labour Relations

As in other provinces, health care represents a very large component of BC's budgetary expenditures. For example, in fiscal year 2002-2003, British Columbia's health care budget was set at \$10.4 billion.¹¹⁷ This expenditure was

¹¹⁶ On January 28, 2003, HEU members staged illegal strikes outside health care facilities. The Health Employers' Association was able to obtain an injunction through the Labour Relations Board to stop the strike: *Health Employers' Association of British Columbia on Behalf of its members, including the Fraser Health Authority and Hospital Employees' Union*, B.C.L.R.B. Letter Decision: 28 January 2003.

¹¹⁷ British Columbia Ministry of Finance, "Budget 2003 in Brief", online: British Columbia Ministry of Finance <http://www2.news.gov.bc.ca/nrm_news_releases/2003FIN0002-000167-Attachment1.htm>.

the largest expenditure item in the budget. Not surprisingly, because of both its fiscal and political significance, the regulation of health care labour relations is a very high priority for the government.

The health sector in British Columbia is one of six discrete subsectors within the public service as mandated by the *Public Sector Employers Act* (PSEA).¹¹⁸ Although direct government services are part of the public sector per se, they are not covered by the *PSEA*. The *PSEA* only covers employers within the contracted public service – or sectors that are funded significantly by government ministries. The *PSEA* came after an extensive review of human resource practices within the public service in 1992. This review was headed by Commissioner Judi Korbin who examined the practices in the health, social services, public education, post-secondary education, universities, and crown corporation sectors. Her recommendations were adopted by the legislature with the enactment of the *PSEA*. The *PSEA* created the Public Sector Employers Council (PSEC), whose mandate is to: “coordinate ... the management of labour relations policies and practices in the public sector in order to foster an efficient and effective workforce”.¹¹⁹ High level policy objectives are made by members of the council, who are ministers from each of the funding ministries and representatives from each of the sub-sectors. The work that comes out of PSEC is carried out by the PSEC Secretariat which is staffed by senior bureaucrats.

¹¹⁸ R.S.B.C. 1996, ch. 384. [*PSEA*].

¹¹⁹ *PSEC Overview*, online Public Sector Employers Council <http://www.psec.gov.bc.ca/popt/psec_overview.htm> (last accessed: 22 February 2003).

In addition to PSEC, the *PSEA* also created separate employers' associations responsible for each of the sub-sectors. Although it may appear that the *PSEA* created a massive level of bureaucracy between individual employers and the government by imposing mandatory membership in an employers' association, the individual employers' associations are varied in terms of size and function. Of the six employers' associations, only two serve as accredited bargaining agents for their employers – the associations for health employers and community social services employers.¹²⁰ The other four employers' associations are much smaller and serve a consultative and research function for their member employers.¹²¹ Specifically, each employer association is responsible for the coordination of:

1. compensation for employees who are not subject to collective agreements;
2. benefit administration;
3. human resources practices;
4. collective bargaining outcomes.¹²²

¹²⁰ As mandated by the *Health Authorities Act*, RSBC 1996, c.180 for health employers. Community social services employers are not mandated to have the Community Social Services Employers' Association as their accredited bargaining agent. However, because of the unique nature of contracted social services, the majority of the member employers elect to have the employers' association accredited as their bargaining agent. This process is done under s. 43(1) of the *LRC*. See also *PSEA*, *supra* note 118, s. 11.

¹²¹ These employers' associations can potentially be accredited to be bargaining agents under s. 43(1) of the *LRC* if their members choose to. See also *PSEA*, *supra* note 118, s. 11.

¹²² *PSEA*, *supra* note 118, s. 6(2).

Health care employers, which are designated under the *Health Care Employers Regulations*¹²³ of the *PSEA*, are represented by the Health Employers' Association of BC (HEABC).

3.2 Structure of Health Sector Labour Relations

HEABC was created in 1993 with the merger of the Health Labour Relations Association, the Continuing Care Employee Relations Association, and the Labour Relations wing of the Association of BC Private Care. The scope of the health sector can be seen with merger of these three organizations. Previously, these three organizations represented different components of the health sector that ranged from large acute care hospitals to very small private home support organizations. With the merger of the labour relations functions into HEABC, a central organization was created to apply labour relations policy consistently throughout the entire sector.

It is important to have a consistent application because the sector is vast and undefined. There are currently over 400 employers designated by the regulations as health employers and they employ over 65,000 bargaining unit FTEs. The jobs that bargaining unit employees perform are diverse in qualifications, working conditions, and job locations. For example, jobs within the sector include janitorial staff to nurses to pharmacists and job locations varied from large acute care hospitals to small community based organizations. As

¹²³ B.C. Reg. 427/94.

such, there was a proliferation of bargaining units within the sector. In large hospitals, it was common to have multiple bargaining units organized by occupation groups such as nurses, paramedicals and support staff whereas in smaller long term care facilities, it was not uncommon to have single wall to wall bargaining units.¹²⁴ In the early 1990s, there were 888 bargaining units and 38 trade unions holding bargaining unit rights in the health sector.¹²⁵ These unions ranged from large public sector unions such as the BC Government and Service Employees' Union (BCGEU) to traditional craft based unions such as the United Brotherhood of Carpenters, Joiners, and Apprentices (Carpenters). Therefore, employers and unions had to administer hundreds of individual collective agreements. This situation was alleviated with the passage of the *Health Sector Labour Relations Regulations*¹²⁶ in 1995.

The *Health Sector Labour Relations Regulations* were enacted based on the recommendations of Commissioner James Dorsey in 1995.¹²⁷ They provided the basis for subsequent amendments to the bargaining structure in the health sector, which ultimately came to rest in the *Health Authorities Act*.¹²⁸ The reason for the bargaining unit reform can be traced back to the government initiative to

¹²⁴ James E Dorsey, *B.C.'s Health Sector Collective Bargaining Restructuring: an Unfolding Story*, (1996) 5 CLELJ 85 [*Dorsey*] at 99.

¹²⁵ Health Sector Labour Relations Commission, *Reshaping B.C. Health Sector Appropriate Bargaining Units: Report and Recommendations*, (Vancouver: 1995) [*Dorsey Commission*] at 15.

¹²⁶ B.C. Reg. 329/95, as am. B.C. Reg 335/95 [*Health Sector Labour Relations Regulations*].

¹²⁷ *Dorsey Commission*, *supra* note 125.

¹²⁸ *Health Authorities Act*, R.S.B.C. 1996, ch.180. The *Health Authorities Amendment Act* S.B.C. 1997, c. 23 repealed the *Health Sector Labour Relations Regulations* and legislated five bargaining units for the entire sector.

reform the delivery of health care services.¹²⁹ The primary thrust of health care reform is toward a regionalized health care delivery model and a movement to a wellness model, where the focus of the delivery of health care services shift from large acute care hospitals to community based organizations and homecare.¹³⁰ With regionalization, service delivery would be more responsive to local needs and expensive hospital services would be transferred to more efficient community based services.¹³¹ In order to implement these changes, bargaining unit reform was required in order to:

... promote integration of health care service delivery; enable the development of consistency in terms and conditions of employment; reduce barriers to greater efficiency and effectiveness; reduce fragmentation; allow greater skill development and mobility; reduce the incidence of collective bargaining and dispute resolution; and reduce the resources devoted to the application, interpretation and administration of collective agreements.¹³²

Therefore, Commissioner Dorsey's primary recommendation was to reduce the 888 bargaining units to five: health services and support – facilities (hereinafter facilities), health services and support – communities (hereinafter communities),

¹²⁹ The Report of the British Columbia Royal Commission on Health Care and Costs, *Closer to Home*, (Victoria: Queen's Printer 1991); British Columbia, *New Directions for a Healthy British Columbia* (Victoria: Queen's Printer, 1993).

¹³⁰ For an in depth analysis of Industrial Relations issues related to the movement towards the wellness model, please see: Larry Haiven "Industrial Relations in Health Care: Regulation, Conflict and Transition to the 'Wellness Model'" in Gene Swimmer and Mark Thompson ed. *Public Sector Collective Bargaining in Canada: Beginning of the End or End of the Beginning?* (Kingston On: IRC Press, 1995).

¹³¹ *Dorsey, supra* note 124, at 88.

¹³² *Ibid.*, at 89.

nurses, paramedical professionals, and residents.¹³³ Each of these bargaining units encompasses multiple employers and multiple unions.¹³⁴

For the most part, the boundaries of each of the five bargaining units were determined by either the job type or type of service the employer provides. The three bargaining units that were determined by job type were the nurses, paramedical professionals and the residents. Of these three bargaining units, there were a few notable disputes pertaining to which jobs should be included within the paramedical and nurses unit. For example, the paramedical unit had the potential of including jobs that were already classified in the facilities unit. Subsequent to the adoption of Commissioner Dorsey's recommendations, the Board was required to set out criteria for the determination of a job that fell into

¹³³ *Health Authorities Act, supra* note 128, s. 19.4 This section has been modified in the past two years. In 2001, under the *Health Authorities Amendment Act*, S.B.C. 2001 c. 13, the communities bargaining unit was merged with the facilities bargaining unit before collective bargaining began. A possible reason for this amendment could be from the lobbying by the HEU. The HEU argued that the employees in the communities bargaining unit were underpaid even though they perform substantially similar work when compared to the employees in the facilities bargaining unit. After the BC Liberal party was elected in 2001, they reinstated the communities bargaining unit in *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, s. 21.

¹³⁴ Initially, Commissioner Dorsey recommended the reduction of the number of unions within the sector to 10. This was adopted by the government in the *Health Sector Labour Relations Regulations, supra*. In *Construction and General Workers Union Local 601 v. British Columbia (Attorney General)*, (1996), 21 B.C.L.R. (3d) 4(1996), 21 B.C.L.R. (3d) 48 [CGWU], Justice Hall ruled that Commissioner Dorsey did not have the authority to strip existing unions their bargaining units. He reasoned that the removal of the bargaining unit would be akin to the removal of proprietary rights that each affected union obtained through certification. The regulations were eventually repealed in the *Health Authorities Amendment Act, supra*, in 1997. A challenge was also launched by private for profit employers because of their inclusion within the *Regulation*. See: *Assn. of Private Care (British Columbia) v. British Columbia (Attorney General)* (1996), 133 D.L.R. (4th) 244 (B.C.S.C.). Their challenge was dismissed because the inclusion of private for profit employers was within the objectives of the commission. This case was distinguished from the challenge by the Construction and General Workers' Union because the political decision for efficiency in health care service delivery was within the purview of the commission whereas the removal of the "property rights" of the affected unions were not (*CGWU, supra*, at 52-3).

the scope of the paramedical unit.¹³⁵ The dispute that arose in the nurses bargaining unit pertained to the classification of psychiatric nurses. The British Columbia Nurses Union (BCNU) wanted the psychiatric nurses to belong to the Nurses bargaining unit and launched a raid on Union of Psychiatric Nurses when the Dorsey Commission was still in progress. This resulted in Commissioner Dorsey recommending that a vote be held to allow the psychiatric nurses to determine which bargaining unit they wanted to belong to: the Nurses or the Paramedicals.¹³⁶ The psychiatric nurses chose to belong to the paramedical unit.

The organization of bargaining units by job type presented interesting issues after its implementation. For example, in situations where smaller employers employ one nurse, the employer would have to administer a separate collective agreement that covered that one employee. This was different for the other two bargaining units in the sector. The facilities and communities bargaining units were determined by the type of services the employer provides. The facilities bargaining unit encompasses the health service and support staff employed predominantly in acute care hospitals and long term care homes, whereas the communities bargaining unit encompass home support and community service agencies. The jobs in these two bargaining units are the

¹³⁵ *Inquiry into the Paramedical Professional Bargaining Units in the Health Sector*, BCLRB No. B444/95. Please see para 59 for the criteria that Chairperson Lanyon used to determine a paramedical employee.

¹³⁶ *Dorsey*, *supra* note 124, at 102.

most diverse of the five bargaining units and range from home support workers to drug and alcohol counsellors.

The amalgamation of formerly autonomous unions into five separate bargaining units also posed several challenges to the unions. Under s. 19.9(1) of the *Health Authorities Act*, “[a] trade union certified as bargaining agent for employees in an appropriate bargaining unit must belong to an association composed of all the trade unions with certifications for appropriate bargaining units of the same description.”¹³⁷ Therefore, similar to the construction sector, unions were required to bargain as an association. The formation of bargaining associations required the member unions to agree to articles of association to regulate the relationship of the unions within the association. These regulations encompass, *inter alia*, voting rights, quorum, and representation in the bargaining table. The unions were given latitude to negotiate their own articles, but their agreed articles must be approved by the Labour Relations Board. Specifically, s. 19.9(3) of the *Health Authorities Act*, enunciates what the articles must contain:

Before the date determined by the labour relations board under subsection (2), the trade unions in each association referred to in subsection (2) (b) must agree to articles of association that

- (a) are consistent with this Act and the Code,
- (b) provide the association with the exclusive jurisdiction to bargain on behalf of the bargaining units for which the association will be certified and to conclude a single collective agreement with respect to those units,
- (c) provide the association with the right and obligation to resolve differences among its members with respect to the administration of the collective agreement referred to

¹³⁷ Similar language was present in the *Health Sector Labour Relations Regulations*, *supra* note 126, s. 13.

- in paragraph (b), including differences with respect to the right or obligation to belong to a particular trade union within the association,
- (d) include provisions with respect to ratification and other collective bargaining processes that reflect the relative membership size of trade union representation in the bargaining units within the association, while ensuring that no member or group of members of a constituent trade union is treated in a manner that is arbitrary, discriminatory or in bad faith by the association,
 - (e) provide for the future addition into the association of any other trade unions that the labour relations board may certify to represent an appropriate bargaining unit, and
 - (f) include any other provisions that the labour relations board determines may be necessary in order to ensure that the association can function as a bargaining agent and administer the collective agreement on behalf of the employees within its jurisdiction.

The most important aspect of s.19.9(3) is the requirement for proportionate representation of the unions in subsection 19.9(3)(d). This requirement is counterbalanced with language prohibiting "... arbitrary, discriminatory or bad faith..." treatment of minority unions. Therefore, all unions within the association are entitled to a voice in collective bargaining but they do not necessarily have individual representation at the bargaining table.¹³⁸ The Board recommended that a union must have a minimum threshold of employees within the bargaining unit before they are given a seat at the bargaining table. This threshold was initially recommended to be one percent of the bargaining unit

¹³⁸ *British Columbia (Health Authorities Act) Re: B.C.L.R.B. Letter Decision No. B33/98*, at para 1b. Also refer to *British Columbia (Health Authorities Act) Re: B.C.L.R.B. Letter Decision No. B58/98*, at para 18-21 for specific discussion on how quorum should be reached under s.19.9(3)(d).

and that the total number of union representatives in the bargaining team should be limited to 12 to 15 members.¹³⁹

Under this current structure, the dominant unions are those with the most employees. These unions will have the most representation at the bargaining table and the most influence in the union caucus. The following is a list of the largest unions in each of the bargaining units: the Hospital Employees' Union (HEU) in Facilities, the BC Government and Service Employees' Union (BCGEU) in Communities, the BC Nurses Union (BCNU) in Nurses, the Health Sciences Association (HSA) in Paramedical, and the Professional Association of Residents of BC (PAR-BC) in Residents.¹⁴⁰

British Columbia's health sector labour relations bargaining structure is unique because of its legislated sectoral organization, as contrasted to voluntary group bargaining in other Canadian jurisdictions. With a sectoral approach, working conditions, compensation, and human resource practices are consistently applied throughout the province. However, the sectoral approach also poses interesting challenges in the realm of collective bargaining. Under sectoral bargaining, labour disputes will affect a greater cross section of the public because strikes can potentially shut down all the health services within the province. Cognizant of this risk, the parties, and in particular HEABC, have

¹³⁹ *British Columbia (Health Authorities Act) Re: B.C.L.R.B. Letter Decision No. B33/98* at para 1b-c.

¹⁴⁰ Member unions of the Communities Bargaining Association are: BCGEU, UFCW, HEU, CUPE, PEA, IWA, CAW, HSA; Facilities Bargaining Association: HEU, BCGEU, IUOE, CSWU, IBEW, USWA, BCNU, UBCJA, UAJAP&P, IUPAT; Nurses Bargaining Association: BCNU, CLAC, HEU, HSA, IWA, UPN; Paramedical Bargaining Association: BCGEU, BCNU, CUPE, HEU, HSA, PEA; Residents Bargaining Association: PAR-BC.

become very adept at the essential services designation process. Some commentators even state that the essential services designation process is the central feature of collective bargaining.¹⁴¹

Chapter 4: Application of Essential Services Regulation in the Health Sector

4.1 Negotiation Process

Essential services designation negotiations have evolved over the past 10 years in the health sector. This evolution has occurred both in the way negotiations have been conducted and the process of implementing essential services.

In 1989, negotiations were conducted centrally between the employers' associations and the head office of the unions. This process caused many problems because the people conducting the negotiations were not aware of the specific issues pertaining to each employer. For example, one employer representative stated: "... when it comes down to how many nurses you need in [the operating room] or on the evening shift ... give me a break. I don't know that from Adam."¹⁴² The nurses union also experienced problems in the 1989 round

¹⁴¹ *Adell, Grant and Ponak, supra* note 3, at 149.

¹⁴² *Ibid.*, at 149-150.

of negotiations when it agreed to designation levels of 80% even though they later believed that a designation level of 60-70% was more appropriate.¹⁴³

Essential services negotiations were slowly decentralized in the 1992 and 1996 rounds of collective bargaining. In 1992, the parties agreed to establish a sample group of facilities where the parties would negotiate essential services locally. The negotiated levels would then be used as a guide for the other facilities that still negotiated centrally. This process still had many problems and was very time consuming. Therefore, in the 1996 and 1998 rounds of negotiations, full decentralization occurred. This proved to be more successful because 80 to 85% of the negotiations were completed without resorting to adjudication.¹⁴⁴

For the 1996 and 1998 rounds of bargaining, designation levels were reopened for every round of bargaining. This however did not occur in 2001 because of a pending strike.¹⁴⁵ The Board, instead, on an interim basis, designated the 1998 levels in facilities that did not agree to essential services levels. The Board was clear that the 1998 levels were limited to facilities that have not agreed to essential services levels. It was also clear that negotiations would continue for these facilities during the strike. The Board held:

¹⁴³ *Ibid.*, at 150.

¹⁴⁴ *Ibid.*, at 151.

¹⁴⁵ *Health Employers' Association of British Columbia (Re:)*, BCLRB No. B118/2001 [*HEABC 2001*], *aff'd Health Employers' Association of BC (Re:)*, BCLRB B125/2001 *aff'd Health Employers' Association v. British Columbia Labour Relations Board et al.* (3 April 2001), Vancouver L010876 (B.C.S.C.).

For those facilities where essential services designations are outstanding, mediation will continue

As of midnight on March 31, 2001, for those employers and facilities where essential service levels have not been agreed to, or adjudicated to final determination, an interim order will be in place on the following basis:

- (i) The essential service levels are designated as the 1998 essential service levels, plus any changes agreed upon during the negotiation/mediation process.
- (ii) In recognition of potential changes since 1998, and in these circumstances only, the Board will relax the normal application of Section 7 of the Global Order (BCLRB No. B73/96) [emergency powers] to allow the Employers, where necessary, to call in enough staff to cover essential services to prevent "immediate and serious danger to the health, safety or welfare" of the residents/patients of the facility or other British Columbians.
- (iii) New programs implemented since 1998 will be staffed, on this interim basis, at the Employer's last proposed position¹⁴⁶

This decision was contrary to the HEABC argument. HEABC argued that designation levels must be reopened every round of bargaining because of changes within the health care industry. HEABC argued that reduced budgets and increased acuity in facilities should increase the essential services levels because there was less management and excluded staff available to fill in for striking employees. The Board disagreed and ordered the 1998 levels as an interim level because of the pending job action within the sector. The Board, however, did allow the employers more flexibility to call in employees to work due to emergencies.¹⁴⁷

It appears that *HEABC 2001* is a significant decision by the board because it may indicate that the designation process has stabilized in the health

¹⁴⁶ *HEABC 2001*, *supra* note 145, at para 7.

¹⁴⁷ *Ibid*, at para 6.

sector. In recognition of the right to strike and the need for properly designated essential services, the Board compromised by designating facilities that were problematic at the previously negotiated interim levels and allowed the employer to unilaterally increase staffing levels in emergencies. However, this decision leaves many questions open. For example, there is opportunity for abuse by the employers who are bound by the 1998 levels because they can use their “emergency” power to call in employees.

The British Columbia Supreme Court, upon judicial review, explained how the employer can implement its emergency powers. The employer would be allowed to go to the strike headquarters to request additional staff only in areas where changes have occurred since 1998 or no agreement has been reached on staffing levels. The union was required to comply without debate (essentially the “work now, grieve later” rule). If the union wanted to complain about the increased levels, it would have to bring the issue in front of the Board.¹⁴⁸ Since this allowed unilateral action by the employers, the unions were concerned that it might lead to abuses of power by the employer.

On the other hand, given the state of health care funding in the province and the greater acuity of patients in the health care system, the public’s safety may be threatened if old essential services levels were implemented. Decreased funding has resulted in layoffs of management/excluded staff therefore it may be difficult to maintain essential services levels without increasing the use of bargaining unit staff. It was also argued by HEABC that the restructuring of

¹⁴⁸ *Health Employer Association v Labour Relations Board et al*, *supra* note 145, at para 33.

health care has resulted in higher acuity rates amongst patients. Essentially, patients in health care facilities are sicker now than they were in 1998, therefore, essential services levels must be increased. The Board, and subsequently the BC Supreme Court refused to hear evidence on this matter. The BC Supreme Court stated that under s. 133(5) of the *LRC*, the Board has jurisdiction to make an interim order based only on submissions, pending the resolution of the complaint. The Court however reaffirmed the Board's decision and stated that the harm that the public faced was not as great as what HEABC perceived. Instead, the Court stated that the balance of power was actually tilted in favour HEABC because:

[T]he order of March 28th actually gives considerable power to the employer. If there is any doubt, it will be resolved because the union must provide the services that the employer requires and then grieve it before the Board. I do not see that as the balance of convenience or the balance of inconvenience favouring the respondents over the petitioner.¹⁴⁹

HEABC 2001 therefore clearly highlights the challenges the parties face. It is perhaps the best example of the Board's role in trying to balance the interests of the two parties. In ordering interim essential services at the 1998 levels, it was able to protect the union's right to strike while still protecting the employer and the public's right to essential services. However, *HEABC 2001* highlights the systemic problems associated with the current essential services regime. Although the parties were able to agree to essential services levels for the majority of facilities, the Board was still required to take what the employer

¹⁴⁹ *Ibid.*, at para 42.

argued was drastic action in order to allow a strike to occur. Or as an employer consultant commented in the judicial review regarding the commitment by the unions to maintain essential services during a strike: “I do not find these statements [by the union] to be an assurance”.¹⁵⁰

4.2 Implementation of Essential Services Designations

The guidelines for how essential services designations are implemented are enunciated in a series of Board decisions known as global orders. The orders address issues that are pertinent to the health sector during a strike and form guidelines on how certain issues should be handled in the future. An example of the type of issues addressed can be seen in the 1992 round of bargaining where the BCNU argued that nurses who were designated should perform only essential duties because they would be too busy to perform all their normal duties. This argument was rejected in *Health Labour Relations Association (Re:)*,¹⁵¹ where the Industrial Relations Council stated that bargaining unit employees who are required to work under the designation orders must

¹⁵⁰ *Ibid.*, at para 43.

¹⁵¹ IRC C42/92 (QL) [*HLRA 1992*].

perform all their regular duties. Other global issues eventually were resolved in a series of Board decisions.¹⁵² These issues are as follows:

1. use of volunteers,
2. administration of the union scheduling office (strike headquarters),
3. bargaining unit employee work scheduling,
4. emergency or disaster situations,
5. access and egress through picket lines,
6. use of management/excluded employees,
7. use of nurse managers in a strike¹⁵³

The global orders in the health sector were a product of evolution and real life experiences. They were crafted to assist the parties in subsequent negotiations. As an indication of their sophistication, the health global orders have also been adopted in other sectors.¹⁵⁴ In *Community Social Services Employers' Association*¹⁵⁵ the Board stated that after many years of mediation, negotiation, adjudication, and consultation there were now virtually identical global orders that apply for the health sector. These orders are perceived to achieve a balance, in that they “foster meaningful collective bargaining with a

¹⁵² *Health Employers' Association of BC (Re:)*, BCLRB B73/96 [*HEABC B73/96*] dealt with these issues for the Facilities, Nurses' and Paramedical subsectors. *Health Employers' Association of BC (RE:)*, BCLRB B70/97 [*HEABC B70/97*] dealt with these issues for the Community Subsector.

¹⁵³ *Health Employers' Association of BC (Re:)*, BCLRB B123/96 [*HEABC B123/96*].

¹⁵⁴ For example, *Community Social Services*.

¹⁵⁵ B.C.L.R.B. No. B78/99.

view to enable the parties to achieve a realistic collective agreement while at the same time minimizing harm to the public.”¹⁵⁶

With the intent of forming a foundation for future bargaining, the Board rarely departs from the global orders unless it is presented with compelling reasons to do so.¹⁵⁷ The following are examples of how the global orders affect major essential service issues.

4.2.1 Use of Volunteers

The use of volunteers was an issue because the union feared that volunteers could be used as replacement workers in certain circumstances. The regulation of volunteers is fairly simple and was addressed in *HEABC B73/96*.¹⁵⁸ Volunteers cannot be used as replacement workers and the employer must provide the union with a list of volunteers. Also, the employer may not engage additional volunteers or assign additional duties to volunteers.

4.2.2 Administration of Union Scheduling Office (Strike Headquarters)

The strike headquarters is where the union scheduling staff resides during the job action. The reason this is required is because during the job action, the union has the responsibility to schedule bargaining unit staff to the designated

¹⁵⁶ *HEABC 73/96*, *supra* note 152, at 3-4.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, at para 42-45.

jobs. The location of the strike headquarters must be mutually agreed and the employer must pay the costs of the scheduling offices. The most common problem associated with strike headquarters is its location. The employer usually tries to negotiate the headquarter to be as close to the struck facility as possible whereas the union tries to have the headquarter situated outside the picket line. In *BC Rehabilitation Society*,¹⁵⁹ the Board determined that if it is reasonable to have a strike headquarter outside the struck facility in the form of portables, the union may request it, but the cost of the portables will be shared between the parties.

4.2.3 Bargaining Unit Employee Scheduling

One of the employer functions taken over by the unions during a job action is bargaining unit work scheduling. The union has the responsibility to ensure that the designated levels are maintained throughout the job action. This duty is quite onerous and the BCNU stated that the process took hundreds of hours of work.¹⁶⁰ Scheduling is difficult because the union must react to staffing issues such as absenteeism and tardiness. In addition to these real time issues, the union is also under certain constraints written into the global order. These include a prohibition of splitting shifts between different union members and the responsibility for forwarding information to the payroll department. The

¹⁵⁹ BCLRB B56/93.

¹⁶⁰ *Adell, Grant, and Ponak, supra* note 3, at 152.

scheduling function remained in the union's domain after the 2001 round of bargaining. As discussed above, *HEABC 2001* granted the employer greater flexibility to call in employees due to emergencies. Even with this flexibility, the employer still has to do this through the union scheduling office unless the employer cannot contact the union scheduler.

4.2.4 Emergency and Disaster Situations

During an emergency or a disaster situation, the union must schedule bargaining unit employees to work in addition to those designated as essential. If there is a dispute between the union and the employer on whether a situation is an emergency, the union member is still required to work. The global orders state that "... the parties must agree to implement an expedited process to deal with any dispute as to whether and emergency exists."¹⁶¹ It is uncertain how strict this requirement will be in the future after *HEABC 2001*. The Board and the Court have increased the flexibility for employers to increase the number of staff for facilities that were not agreed at the 2001 round, and have explicitly stated that there is a lower onus on employers to prove emergency and disaster requirements to the union. Therefore, this issue may become more contentious in future rounds of bargaining.

¹⁶¹ *HEABC B73/96, supra* note 152, at 5.

4.2.5 Access and Egress through Picket Lines

The global orders state that the union must provide unrestricted access and egress for persons designated as essential. This also covers ambulance drivers, vehicles delivering blood, oxygen, food supplies, and any other person or delivery required for the continued operation of the facility. The unions made a failed attempt to argue that this order is overbroad because it allows the employer too much access to the facility and makes the picket line ineffective. They argued that with unrestricted access, the employer may move non-essential items out of the hospital – such as dirty laundry.¹⁶² The unions argued that there should be designated points of entry into the facility and that they should have the right to inspect incoming or outgoing vehicles. The Board did not accept this argument but did grant the union the right to appoint one observer who could randomly observe the loading and unloading of any delivery vehicle once per day.

4.2.6 Use of Management and Excluded Staff

The use of management and excluded staff (M/E) is required in order for the union to have an effective strike. The unions argued that the intent of the essential services legislation is that M/E staff must work scheduled shifts within

¹⁶² *Ibid*, at para 18.

the designated areas. They argue that this is the intent of the legislation because it places greater pressure on the employer and forces the employer to stretch its resources to the limit. This argument was not accepted by the Board because it recognized that M/E staff have essential duties that are administrative and that require more flexibility.¹⁶³ These duties include the management of the facility to ensure the safety of its patients. Therefore, the Board required the employer to use its M/E staff to its “best extent possible”. The Board, however, stated that M/E staff are expected to work sixty hours per week.

4.2.7 Use of Nurse Managers during Job Action

Closely tied with the issue of M/E staff is the use of nurse managers during a job action. Since most managers will be required to perform duties that are not medically related, but a problem arises with nurse managers because they will be required to perform nursing duties. The problem, as argued by the employer, is that some nurses may not be competent in performing nursing duties. The union argued that for the employer to fulfill its obligation of using M/E staff to the “best extent possible”, it must require nurse managers to perform nursing duties.¹⁶⁴ The Board disagreed with the union and stated that the employer had the right to deploy its nurse managers the way it sees fit. A factor that the employer could consider when deploying the nurse manager to nursing

¹⁶³ *Ibid*, at para 30.

¹⁶⁴ *Adell, Grant, and Ponak, supra* note 3, at 152.

duties was whether the nurse manager felt competent after a self assessment. The union, however, has the right to appeal the employer's deployment decisions upon application to the Board.¹⁶⁵

Although the designation system is still quite time consuming and resource-intensive, it appears that it has evolved into an effective way of balancing the right to strike with the protection of health care services. This can be seen from both the evolution of the global orders pertaining to the implementation of the designation levels and the evolution of the essential services negotiation process. Even though it may appear that the elusive balance between the public interest and the right to strike has been achieved, the provincial government has, on several occasions, stripped the union's right to strike with the use of ad hoc legislation. The use of such legislation was very prevalent in the 2001 collective bargaining round in the health sector. The following is a case study of the 2001 collective bargaining round.

¹⁶⁵ *HEABC B123/96, supra* note 153, at para 6.

Chapter 5 Collective Bargaining in 2001

5.1 Bargaining Process and Issues

The collective bargaining relationship between HEABC and the unions has always been adversarial. For example, from 1970 to 1997, 86,736 person days were lost due to strikes or lockouts between the employers and nurses.¹⁶⁶ In the most recent round of negotiations in 2001, negotiations between the nurses and the paramedicals were difficult for both parties. The primary issue was wages and benefits.

The negotiations began in December 2000 but a settlement could not be reached. In April 2001, the BCNU members voted 95% for a strike. Job action began in mid-April in the form of an overtime ban. Hospital services went down to the essential service levels that were previously negotiated. The strike was bitter, with both parties employing the media as a bargaining tool. The BCNU tried to raise public sympathy because of a nursing shortage whereas HEABC tried to raise public resentment over the wage demands that the nurses put on the bargaining table.

¹⁶⁶ *Adell, Ponak, Grant, supra* note 3, at 229.

The BCNU initially proposed a wage increase of 58%,¹⁶⁷ which would have boosted the top level one nurse wage rate from \$26.50/hr to \$42.00/hr. In addition to the wage increases, the BCNU also demanded increases to the vehicle allowance, shift premiums, and LTD. The BCNU argued that these wage increases were required because of the general market shortage of nurses and that nurses were leaving BC for higher paying positions in the United States or Alberta and Ontario. The HSA also made similar demands for their membership.

The employer and the government argued that they could not agree to the nurses and paramedical bargaining demands because of major fiscal constraints. The government presented financial figures indicating that the government faced an increase of debt from \$36.4 billion to \$43.9 billion and that the government fiscal policy called for an elimination of the budget deficit in three years. The government also argued that it had been elected under a mandate to improve fiscal accountability and to reduce the public deficit; therefore, they could not agree to the union's demands.

As a result of the strike, the employer was forced to cancel over 6,000 surgeries and dozens of British Columbians were forced to leave the province for urgent medical treatment. The bargaining was hard and a final offer by the employer to the BCNU was put to a vote by the BCNU. 96% of the nurses voted to reject the offer, which ultimately led to an impasse in bargaining. Similar events also occurred within the paramedical bargaining unit.

¹⁶⁷ *News and Bulletin December 7, 2000*, Online: BC Nurses Union
<http://www.bcnu.org/Archive_folder/news_releases_and_bulletins_2000.htm#December%206,%20202000%20Nurses'%20Bargaining%20Association%20announces%20openin>.

5.2 Use of Ad hoc Legislation

The 2001 round of bargaining led to the passage of three ad hoc statutes. To address the job action, the government first enacted the *Health Care Services Continuation Act*¹⁶⁸ on June 20, 2001, which imposed a 50 day cooling off period on the parties. During this cooling off period, the parties were required to resume or commence collective bargaining and to make every reasonable effort to conclude a collective agreement. Unfortunately, no agreement was reached within this period.¹⁶⁹

The province then enacted the *Health Sector Collective Agreement Act*.¹⁷⁰ This Act ordered the unions back to work and imposed terms and conditions to the collective agreement. In general, back to work legislation is not uncommon in Canada.¹⁷¹ However, the unusual aspect of the *Health Sector Collective Agreement Act* is that it did not appoint an arbitrator or mediator to help the parties settle their issues. Instead, it imposed HEABC's last offer for issues that were not settled.¹⁷² The items where HEABC's last offer were imposed into the

¹⁶⁸ S.B.C. 2001, ch 23.

¹⁶⁹ As an indication of union resentment over the back to work legislation, the cooling off period was violated by the HSA when they initiated an illegal strike on July 20, 2001. Please see: *Health Employers' Association of British Columbia and Health Sciences Association of British Columbia*, B.C.L.R.B. Letter Decision: 20 July 2001.

¹⁷⁰ S.B.C. 2001, ch.26 [*Health Sector Collective Agreement Act*].

¹⁷¹ See: *Education Services Collective Agreement Act*, SBC 2002, ch.1; and *Greater Vancouver Transit Services Settlement Act*, SBC 2001, ch.25 for more examples within BC.

¹⁷² *Collective Agreement Act*, *supra* note 170, s. 2(1)(c) and s. 3(1)(c).

collective agreement included wages and shift scheduling – two very contentious issues in bargaining.¹⁷³ The imposition of bargaining language is a marked departure from the norm, where governments merely enact back to work legislation with mediation provisions.

A more serious departure can be seen in Bill 29, the *Health Care and Social Services Delivery Act*, which came into force on January 28, 2002.¹⁷⁴ Although *Bill 29* was not directly related to the 2001 health care strike, and thus cannot technically be construed as ad hoc legislation, it is significant because it addressed many bargaining concessions that the employers were not able to obtain in the 2001 bargaining round. *Bill 29* mostly affected the facilities and communities bargaining units.¹⁷⁵ Therefore, even though these two bargaining units had achieved a settlement in the 2001 round of bargaining, their agreements were subsequently altered. In *Bill 29*, the province re-opened all the health care collective agreements and voided the job security provisions. The union argued that the provisions the government voided were provisions that were fought over years of collective bargaining and strikes. These provisions were agreed to with the employer, and included lay off protection, bumping

¹⁷³ The wage demands ultimately imposed were a 23.5% increase over three years for the nurses and increases of 5.5-14.25% for paramedical professionals.

¹⁷⁴ SBC 2002, ch.2 [*Bill 29*].

¹⁷⁵ A possible reason for why there was an early settlement in the Community and Facility subsectors is that the Unions did not want to negotiate an agreement after a potential change of government. Both the Community and Facility subsectors were settled when the NDP were in power whereas the Nurses and Paramedical subsectors were still negotiating after the more fiscally conservative Liberals were elected. The settlement negotiated in the Community and Facility subsectors contained limited wage increases of 2%, 2%, and COLA for three years.

rights, labour force adjustment, and contracting out.¹⁷⁶ The government's rationale for voiding these provisions was predominantly financial. It argued that the provisions were overly restrictive, and that the financial state of the province compelled it to increase efficiency in the delivery of health care. Therefore, as a result of *Bill 29* the employer has an enhanced ability to contract out services like cleaning.

It is unusual for governments to re-open and openly repudiate contract provisions. Repudiation of signed collective agreements adversely affects the rights of unions to bargain freely and also indicates that the government does not see itself to be bound by the law of contracts. This is disturbing because it may indicate a failure within the system. It appears the failure centres on the issue of whether it is really possible to freely negotiate a collective agreement within the public sector because the employer has the ultimate power of parliamentary sovereignty. The advent of essential services legislation indicates that it may be possible; however, the use of ad hoc legislation undermines the essential services provisions.

The central question still remains whether the designation model has failed to remove essentiality from bargaining. There is evidence that indicates that this is the case; collective agreements are not being settled voluntarily; agreements that are settled are rewritten by legislation; there is increased use of ad hoc legislation; and the ad hoc legislation being enacted now are more interventionist than the past. A possible explanation for this may be linked to

¹⁷⁶ *Ibid*, ss.4-10.

the evolution of the strike mechanism and its relationship to the specific characteristics of health sector labour relations.

Chapter 6: Evolution of the Strike

6.1 Theory of Strikes

Strikes in general are exercises of power, where each party engages in an economic battle to obtain a better settlement. This definition mostly reflects the situation in the private sector because the parties to a strike are usually limited to the employer and the union. Key differences arise in the public sector arena, which include the lack of a profit motive by the employer and the fact that the employer provides a monopoly service. These two key differences lead to a situation where the effects of a strike are not limited to the employer and the union. Rather, the public is drawn into the dispute because of the nature of the monopoly services provided by the employer.

There is no accepted theory of the underlying cause of a strike within the private or the public sector. Professor Gunderson identifies three theories of the underlying causes of a strike: bargaining power, asymmetric information, and joint cost.¹⁷⁷ Briefly put, the bargaining power theory assumes that the rate of

¹⁷⁷ Morley Gunderson and Frank Reid "Public Sector Strikes in Canada", in Gene Swimmer and Mark Thompson ed. *Public Sector Collective Bargaining in Canada: Beginning of the End or the End of the Beginning?* (Kingston On: IRC Press, 1995) at 145-7.

strikes is affected by the parties' respective bargaining power. For example, if there is high unemployment, the union would be reluctant to strike. This theory is criticized because there may not be a direct correlation between bargaining power and the rate of strikes, since the parties adjust their wage demands according to their bargaining power.¹⁷⁸ Therefore, bargaining power may affect wage settlements more than strike rates.

The asymmetric information model originated from game theory and is premised on the notion that the purpose of a strike is to elicit information from the opposing party. Strikes and lockouts are therefore used by the parties to reveal their true bargaining positions.¹⁷⁹

Perhaps the most accepted theory of the strike is the joint-cost model, which theorizes that strikes occur if it has the lowest relative cost compared to other mechanisms available to achieve a settlement. For example, the union may not engage in a full scale strike if it can resort to alternatives such as compulsory arbitration, union/management committees, continuous bargaining after the expiry of the collective agreement, or work to rule campaigns strike.¹⁸⁰ The joint-cost model has been applied to the public sector with some modifications. Instead of relying on economic costs associated with a strike, the political costs of a strike are emphasized.¹⁸¹ Since the employer sometimes does not incur economic costs in a public sector strike, the employer may be

¹⁷⁸ *Ibid.*, at 145.

¹⁷⁹ *Ibid.*, at 146.

¹⁸⁰ *Ibid.*, at 147.

¹⁸¹ *Ibid.*, at 148.

more affected by the costs of the strike on third parties. Therefore, on a perfect application of the joint-cost model, the likelihood of a public sector strike would be affected by policies that affect the costs of a strike on third parties or the ability of third parties to influence the parties to settle.¹⁸²

6.2 *Alternative Striking Mechanisms*

In recent years, unions in the health sector have increasingly adopted alternative striking mechanisms, as opposed to traditional full scale strikes. The use of these alternative striking mechanisms has proven to be successful such that it may indicate a structural change in the entire strike model in the health sector.¹⁸³ Alternative strike mechanisms in the health sector can be explained with the joint-cost theory of strikes. In essence, the essential services designation regime has decreased the effectiveness of the strike; therefore, unions must resort to other methods to obtain a settlement. Under a full scale strike, even though essential services levels must be maintained, many union members will suffer a loss in wages. This is contrasted with alternative strike mechanisms where members do not suffer significant losses in wages but still inflict political and service costs onto the employer.

¹⁸² *Ibid.*

¹⁸³ Please see “Care is Essential: Planning For 2001” (HEABC, December 2001) [unpublished] at 1 where HEABC stated that “strike action less than pickets caused significant risk to patient/resident/client care.”

Strikes in British Columbia are regulated under s.1(1) of the *LRC* which defines strikes as:

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 slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include

- (a) a cessation of work permitted pursuant to section 63(3) [health and safety exemption], or
- (b) a cessation, refusal omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted by or under this Code¹⁸⁴

There are thus three components that are required before employee actions can be considered a strike. There must be:

1. A cessation of work or a refusal to work or to continue to work or other activity that is designed to restrict production or services;
2. These actions must be carried out by employees;
3. And these actions must be carried out in combination or under a common understanding

The definition for a strike is thus very broad and can encompass many activities that do not traditionally look like strikes. Consequently, employers have successfully argued in various labour relations boards that alternative striking mechanisms fall under the definition of a strike. For example, it has been held that a work stoppage of five minutes is a

¹⁸⁴ *LRC*, *supra* note 7, at s. 1(1).

strike despite its limited impact on production.¹⁸⁵ The following are other examples of alternative striking mechanisms that are recognized as strikes by various tribunals:

1. Work to rule and slowdown campaigns¹⁸⁶
2. Overtime bans¹⁸⁷
3. Refusal to perform certain kinds of work¹⁸⁸
4. Mass sudden “illnesses”¹⁸⁹
5. Mass resignations¹⁹⁰

As one can see, unions have been very creative in modifying the traditional strike. There are many advantages in employing an alternative strike over a traditional strike that can be explained through the joint-cost theory. With a

¹⁸⁵ *McDonnell Douglas Canada Ltd.*, O.L.R.B. Reports December 1985, at 1750.

¹⁸⁶ For example, see: *British Columbia Railway Company*, B.C.L.R.B. No. 35/76 where a strict compliance to safety standards was determined to be a strike.

¹⁸⁷ For example, see: *Canadian Pacific Forest Products limited – Gold River Logging Division – and I.W.A. Canada Local 1-85*, I.R.C. No. C127/89 where despite supervisors’ historical success in attracting employees to volunteer for overtime, supervisors were not able to attract volunteers for overtime..

¹⁸⁸ For example, see: *Canada Post Corporation*, [1983] 5 C.L.R.B.R. (N.S.) 280 (C.L.R.B.) where employees refused to charge customers fees for certain services.

¹⁸⁹ For example, see: *Canadian National Railway and Brotherhood of Locomotive Engineers, Division No. 558*, C.L.R.B.R. No. 479, 57 di 55, September 11, 1984 (CLRB) where the Board ruled that mass illnesses that begin and end suddenly and with no obvious reason was considered a strike.

¹⁹⁰ For example, see: *Board of Education for the Borough of Scarborough and the Ontario Secondary School Teachers’ Federation*, [1984] 5 C.L.R.B.R. (NS) 1 (OLRB) where the Board held that a mass resignation was actually a strike. The concept of mass resignations being defined as a strike is conceptually difficult to reconcile. The Board faces a difficult question of requiring an employee to return to work if they had voluntarily resigned from his/her position. This issue was dealt by Professor Paul Weiler in *Weyerhaeuser Canada Ltd.*, [1976] 2 CLRBR 39 (BCLRB) at 41 where he stated that the concept is similar to an overtime ban. If the employee takes steps collectively to compel the employer to make concessions in bargaining, then the action of resigning is qualitatively different from an actual resignation and would be determined to be a strike.

traditional strike, the members of the union would experience a loss in wages when they are off the job. This is not necessarily the case in an alternative strike, where it is possible that most employees still receive the majority of their wages even though they are engaging in a form of job action. This fits with the joint-cost theory because unions will employ the least costly form of job action in order to obtain their desired collective bargaining outcome.

It has also been noticed by commentators that the designation model may in itself increase the likelihood of alternative strikes. Professors Adell, Grant and Ponak have noticed that unions have adapted their tactics in jurisdictions using the designation model. Instead of launching full scale strikes, unions have resorted to alternative strike models, such as rotating strikes and partial work stoppages.¹⁹¹ Therefore, even though the strike volume in designation jurisdictions may be lower, the frequency of strikes may actually increase. The impact of these strikes may be just as effective as traditional strikes, as can be seen from the situation in health care.

Health care unions in British Columbia have followed the trend of other unions under the designation model by adopting the use of alternative strike mechanisms. These mechanisms have included overtime bans, restrictions on the use of personal vehicles, refusal to do non-nursing duties, mass resignations, and study sessions. It can be seen through Board orders during the 2001 round of bargaining that these alternative strike mechanisms were problematic for the employer. It can also be inferred from the Board orders that the unions may be

¹⁹¹ *Adell, Grant and Ponak, supra note 3, at 197.*

purposely not complying with the global order that essential employees must perform all their duties when they are at work. For example, for the one week period of April 22 to April 27, 2001, the Board issued three orders to require designated nurses to resume normal job duties.¹⁹² The most significant order that came out of the three occurred on April 27, 2001, where the Board held that a nurses shortage allowed the employer to require nurses to work overtime to meet essential services levels even if the union was engaged in an overtime ban.¹⁹³ However, in order to protect the union's right to strike, the employer must endeavour to "take alternative measures [to requiring overtime] including: scheduling nurses at regular rates, downsizing where appropriate, deploying nurses from other units, deploying managers who are designated to do BCNU bargaining unit work in accordance with the essential services plan and redeploying other qualified managers from their areas of deployment where those areas are not affected by the current job action."¹⁹⁴ The employer's requirement to search for alternative staffing arrangements imposes costs on the employer because it is required to react to staffing shortages by reallocating existing staff. It therefore must attempt to meet the staffing requirements of a facility by using a finite pool of labour without the automatic ability to increase

¹⁹² *Health Employers' Association of British Columbia and BCNU*, B.C.L.R.B. Letter Decision: 22 April 2001 where the Board, under a consent order, ordered the union to stop discouraging its members from accepting overtime; *Health Employers' Association of British Columbia and BCNU*, B.C.L.R.B. Letter Decision: 25 April 2001 where the Board ruled that a union ban of using personal vehicles constituted a strike and that the employees must perform normal duties if they are declared essential.

¹⁹³ *Health Employers' Association of British Columbia and BCNU*, B.C.L.R.B. Letter Decision: 27 April 2001 at para 4.

¹⁹⁴ *Ibid.*, at para 4(b).

staffing levels through overtime. This decision therefore recognized the union's right to use overtime bans but balances it with the interests of the employer who must endeavour to maintain essential services levels.

During the 2001 bargaining round, the employer commented on the effectiveness of the alternative striking mechanisms implemented by the BCNU. Although formal pickets were never established, the strike caused the employer to cancel 6300 surgeries and forced dozens of patients to travel out of province for urgent medical treatment.¹⁹⁵ The employer stated:

In addition to the overtime ban which has forced the cancellation of hundreds of surgeries and in addition to walking off the job to attend "study sessions", nurses are continuing their practice of refusing to perform their full range of duties. They are refusing to do such things as transfer patients, process doctor's orders and answer telephones. With the ban on the full range of duties, many nurses are performing 65-75% of their normal duties yet are receiving 100% pay.¹⁹⁶

The employer highlighted an anomaly that occurs in alternative strikes where striking employees continue to receive their wages even though they are on strike. Unlike traditional strikes where employees withdraw all their services, the use of overtime bans and the refusal to perform all employment duties effectively inflicts damage onto the employer with relatively little cost borne by the striking employees.

¹⁹⁵ 330th *Report of the Committee on Freedom of Association*, GB.286/11 (Part I), ILO, 286th Sess., (2003) at para 272.

¹⁹⁶ Health Employers' Association of British Columbia, News Release PR 2001-23, "Nurses' Negotiations: BCNU Breaks Commitment – Strike Action Escalates" (31 May 2001).

Health employers have difficulty dealing with alternative strikes because the essential nature of the services precludes the option of locking out the union. Therefore, alternative strikes may inflict more damage on the employer than on the union. The provision of health care services is highly integrated. If one bargaining unit undergoes job action, (for example nurses) all other health care services would be affected because of the interdependence of jobs. Because of the structure of health care labour relations, with five large bargaining units, and the fact that the *LRC* allows a union to initiate strike action anytime after it provides 72 hours' notice,¹⁹⁷ it is plausible that surprise alternative strike action, like a study session, will force the employer to implement strike contingency plans with little notice. Thus, the unions ultimately decide when to initiate an alternative strike and the employer may have little warning of where or when such action may occur.

Chapter 7: Analysis

7.1 Reasonableness of the use of Ad Hoc Legislation

The evidence indicates that free collective bargaining in the health sector may not be occurring because of the use of ad hoc legislation and the parties' failure to settle collective agreements voluntarily. In particular, the fact that

¹⁹⁷ *LRC, supra* note 7, s 60(3)(b)(iii).

recent ad hoc statutes in this sector were more intrusive to free collective bargaining than previous ad hoc statutes may indicate that free collective bargaining cannot exist within the health sector.

The evidence of a potential failure in free collective bargaining lies in the face of theory. Theoretically, the essential services designation system is supposed to drive settlement in the health sector because it will remove the impact of essentiality from bargaining. With the assumption that essential services will continue, the parties can exert their respective power in collective bargaining to drive a settlement, without using the public as a pawn. Also, once designations have been established, public outcry against a strike should be minimized, therefore reducing the likelihood of the government resorting to ad hoc legislation to settle disputes.¹⁹⁸ Professors Adell, Grant and Ponak indicate that this hypothesis may be supported by the lack of ad hoc legislation in jurisdictions with designation models up to 1999.¹⁹⁹

However, since 1999, there has been an increase in ad hoc legislation within jurisdictions under the designation model, as can be seen in the federal public sector dispute and the Newfoundland nurses dispute.²⁰⁰ The 2001 ad hoc legislation in British Columbia health care may be a further indication of a trend that the designation model may not necessarily protect free collective bargaining. A possible explanation for the failure of collective bargaining may lie in the

¹⁹⁸ *Adell, Grant, and Ponak, supra* note 3, at 197.

¹⁹⁹ *Ibid.*

²⁰⁰ Please see note 99 and 104.

essentiality of health care services, changes in the strike mechanism, and specific structural issues in British Columbia health care. It appears that these three factors, intertwined, may create a bargaining environment that leads to stalemates.

It is not disputed that health care is fundamentally an essential service that should be protected in some degree from work stoppages. British Columbia's adoption of the designation model has accomplished this task by maintaining essential health care services during a labour dispute. Considering the facts that the majority of essential services designation levels are mutually agreed upon by the parties, that there is a long history of negotiations between the parties, and that the Board decision in *HEABC 2001* may indicate stability in the determination of essential services levels, it may be inferred that designation levels are appropriate because they represent a compromise between the employer's interest in maintaining essential services and the unions' interest in maintaining the right to strike. On a *prima facie* analysis, it therefore appears that the current designation model may have found the "holy grail that combines the right measure of 'free collective bargaining' and essential service provision...."²⁰¹

Even though it may appear that a balance has been struck between the right to strike and the maintenance of essentiality, the designation model may have indirectly affected the likelihood of parties settling collective agreements

²⁰¹ Larry Haiven, "Industrial Relations in Health Care: Regulation, Conflict, and Transition to the Wellness Model" in G. Swimmer and M. Thompson, eds. *Public Sector Collective Bargaining: Beginning of the End or the End of the Beginning?* (Kingston On: IRC Press, Queen's University, 1995) 236 at 237.

because of its affect on the strike mechanism. The designation model may have influenced the union's tactics when it contemplates the type of strikes it wants to undertake. As can be seen in other jurisdictions and through the application of the joint-cost theory of strikes, unions may have realized that the most effective form of job action in designation regimes is through alternative strike mechanisms. Since the cost of a full scale strike may be outweighed by the requirement to meet essential service staffing levels, the unions may have determined that alternative strikes may be less costly, but just as effective in inflicting damage onto the employer. Taking nurses as an example, the 2001 round of bargaining highlighted the various alternative strike mechanisms that were employed. The BCNU implemented an overtime ban, strategically called study sessions, instructed members not to perform certain job duties, and initiated a mass resignation campaign.

The BCNU's use of alternative strike mechanisms was effective because it was able to mount a long and continuous strike with little cost to its members. The lengthening of job action is a recognized result that may occur with the designation model.²⁰² The lengthening of job action may lead to a situation where there is no incentive for the union to settle a collective agreement. Since one of the foundation reasons for strikes is that mutual pain would result in compromises, it can be viewed that the union may not experience as much pain as the employer when it undergoes an alternative strike. In the private sector, or a different part of the public sector with a lesser degree of essentiality, the

²⁰² *Adell, Grant, and Ponak, supra* note 3, at 197.

employer may be able to counter the union's alternative strike with lockouts. But, with the political sensitivity associated with health care, it may not be politically feasible for employers in the health sector to do this.

Coupled with the prospect of a long unending strike are structural concerns specific to health care. These structural concerns are relatively recent phenomena. For example, one of the major bargaining issues of 2001 was the shortage of nurses in British Columbia. The current nursing shortage is a relatively recent development within the labour market, first appearing in the late 1990s.²⁰³ The unique factor surrounding this current shortage is that it is occurring at a time when demand for hospital services has never been greater.²⁰⁴ Demand for services is amongst the non-bargaining issues that employers are also facing. The employers argue that there is an increased patient acuity rating in the health care system and that budget cuts have resulted in reductions to managerial staff, which affects the ability of the employer to maintain essential services levels during a strike. Since managerial and excluded staff are required to maintain essential service levels, it can be seen that the employer bears a disproportionate burden during an alternative strike because of these factors.

The accumulation of these three factors just mentioned – use of designation, change of strike tactics, and structural issues specific to health care – may lead to a situation where a labour dispute ends in a stalemate. Faced with a long and uncertain strike where the union has little incentive to settle, it is

²⁰³ Howard S. Berliner and Eli Ginzberg, "Why this Hospital Nursing Shortage is Different" (2002) 288(21) JAMA 2742.

²⁰⁴ *Ibid.*

arguably rational that governments may want to impose ad hoc legislation. The current conditions in health care might even be considered one of the rare times that ad hoc legislation is justified because the parties have reached an impasse such that only the legislature can end a labour dispute. Even the ILO has stated that the *Health Care Services Continuation Act*,²⁰⁵ which ordered the nurses and paramedicals back to work, was not a violation of freedom of association principles because sometimes it is necessary for governments to restrict strike activity to protect the interests of the public.²⁰⁶ Therefore, it is not particularly surprising that there has been an increase in the use of ad hoc legislation in health care because the interplay of issues yield a situation where the government may be forced to act.

7.2 Reasonableness of the Scope of Ad Hoc Legislation

Although it may be reasonable for the government to use ad hoc legislation, the scope of ad hoc legislation may not be reasonable. The historic purpose of ad hoc legislation is to cool the parties down and its traditional approach is to introduce a mediator/arbitrator to help the parties arrive at a mutually acceptable settlement.²⁰⁷ This was not the case in 2001. Instead, the

²⁰⁵ *Supra* note 168.

²⁰⁶ *330th Report of the Committee on Freedom of Association*, GB.286/11 (Part I), ILO, 286th Sess., (2003) at para 292.

²⁰⁷ *Ibid.*, where the ILO stated that “[r]estrictions on the right to strike should be accompanied by adequate, impartial and speedy compensatory procedures, such as conciliation and arbitration

government introduced what are arguably some of the most intrusive ad hoc statutes in British Columbia history. For example, *Bill 29*²⁰⁸ repealed collective agreement provisions that had been agreed to for multiple bargaining rounds, whereas the *Health Sector Collective Agreement Act*²⁰⁹ imposed a settlement in the form of the employer's last offer. This is unusual government action, and may signal a change in government policy towards the use of ad hoc statutes.

A possible reason for this shift in policy may be the fact that government was presented with an opportunity to address broader issues in health sector labour relations during the 2001 strike. That strike was prolonged by alternative strike action and government may have used this opportunity to both end the strike and to fix perceived problems associated with health care – specifically the rising costs from restrictive collective agreements. This is unusual because, under free collective bargaining, issues such as rising costs are addressed at the bargaining table. Instead, it appears that the government may have used the labour dispute as a catalyst to address broader labour relations issues. This insight is supported by the ILO. The ILO, while acknowledging the government's concern regarding the rising costs of health care, maintains that if the government intends to address broader labour relations issues, it must conduct extensive consultations with unions and employers.²¹⁰

proceedings in which the parties concerned can take part at every stage and in which the awards, once made are fully and promptly implemented.”

²⁰⁸ *Supra* note 174.

²⁰⁹ *Supra* note 170.

²¹⁰ *330th Report of the Committee on Freedom of Association*, GB.286/11 (Part I), ILO, 286th Sess., (2003) at para 302.

It is yet to be determined whether the government's actions are constitutional. However, at the date of this paper, *Bill 29* represents one of the greatest intrusions by governments into free collective bargaining in the public sector. This conclusion is supported by the recent ILO report pertaining to four ad hoc statutes and two regular statutes that were introduced by the British Columbia government in 2001.²¹¹ There the ILO Committee for Freedom of Association determined that all six statutes violated Convention No. 87 because they infringed on freedom of association. Although the ILO acknowledged that the right to strike is not absolute and that the government has the right to impose back to work legislation in some instances, the ILO determined that the statutes "violated freedom of association principles inasmuch as it did not respect the autonomy of the bargaining parties and legislatively imposed working terms and conditions, without the workers being able to submit the dispute to mutually and freely chosen independent and impartial arbitration."²¹²

7.3 Possible Solutions to Reinstate Free Collective Bargaining in Health Care

²¹¹ 330th Report of the Committee on Freedom of Association, GB.286/11 (Part I), ILO, 286th Sess., (2003) pertaining to the: *Health Care Services Continuation Act, supra*; *Health Care Services Collective Agreement Act, supra*; *Skills Development and Labour Statutes Amendment Act, supra*; *Education Services Collective Agreement Act, supra*; *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3; *Health and Social Services Delivery Improvement Act, supra*.

²¹² 330th Report of the Committee on Freedom of Association, GB.286/11 (Part I), ILO, 286th Sess., (2003) at para 294.

It appears that the problems associated with health care labour relations cannot be directly attributed to the designation model. Instead, it is the interplay of the designation model with structural factors specific to the health sector that leads to the use of ad hoc legislation. It also appears that the use of alternative strikes can be directly related to the designation model under the joint-cost theory of the strike. Thus, solutions to reinstate free collective bargaining in health care may only be limited to mitigating the effects of structural factors in health care on collective bargaining.

Structural factors, such as the nursing shortage, aggravate the effects of an alternative strike on the employer. Without this shortage, it would actually be possible for an alternative strike to drive a settlement. Essential service levels would not be as high a percentage of normal levels as they currently are, so more nurses will be forced to undertake strike action, resulting in greater monetary losses to the union membership. Also, inferentially, the management and excluded staff would not be forced to undertake as much bargaining unit duties to maintain essential service levels. In a sense, the excess pain that the employer may be feeling right now might shift somewhat to the union. Obviously, alleviating the nursing shortage may not be the most realistic short run solution to this problem.

A more pragmatic solution may be legislative amendments to the 72 hour's strike notice provision in the *LRC*.²¹³ Under this provision, once a union declares 72 hour's strike notice, it is granted *carte blanche* as to when it may

²¹³ *LRC, supra* note 7, s. 60(3)(b)(iii).

initiate strike activity. Part of the problem associated with this is that the employer bears all the costs associated with surprise strikes. For example, the union can surprise the employer by calling a “study session” at X location with little warning to the employer. The employer thus bears a disproportionate cost by having to be prepared for surprise job action anywhere in the province. Therefore, in order to better balance the pain between the parties, it may be advisable for the legislature to amend the 72 hour strike notice such that it requires the union to announce when and where they will initiate an alternative strike. A downside to this proposal may be the prolonging of a strike because the employer may be better able to react to an alternative strike. However, taking the specific structural factors present in health care, this consideration may be moot because of the recent history of long unending strikes.

This possible solution to reinvigorate free collective bargaining goes towards the balancing of pain suffered by the parties in a strike situation. It appears that this balance is required in order for governments to stop using ad hoc legislation because the current situation may result in a disproportionate burden on the employer.

Conclusion

Strikes in essential services remain one of the most difficult areas of labour relations to regulate. As can be seen from the above analysis, the British Columbia government has experimented with many approaches to best balance

the union's right to strike with the public's right to health services. It appears that a consensus has been reached in the past 20 years with the adoption of the designation model. The designation model has been hailed by scholars and practitioners one of the best solutions to the often messy competition of union rights and public rights.²¹⁴ With designation, it was hoped that the government would not have to resort to ad hoc back to work legislation to end strikes because it is generally accepted that such legislation has many negative externalities.

The designation model has been implemented in British Columbia's health sector since it was first enacted. Over the years, the parties have developed sophisticated methods in determining essential services levels and, with recent Board jurisprudence, may have actually arrived at an era where the designation of services may be more consistent and easy to predict. This positive evolution has not stopped the government from enacting ad hoc legislation recently to end health sector labour disputes.

A possible reason why ad hoc legislation may still be used by governments may be associated with anomalies within the designation model, the evolution of the strike mechanism and structural issues specific to the health sector. The designation model reduces the incentive for unions to launch a full scale strike because the damage inflicted on the employer would be muted by the essential services staffing levels. Therefore, unions have modified their strike tactics by launching alternative strikes. Alternative strikes are different from the traditional strike because the union can still inflict damage on the employer with

²¹⁴ See: *Adell, Grant, and Ponak, supra* note 3, at 200-202.

its membership experiencing less financial costs. This type of strike can thus theoretically last a very long time because the union can hold out for much longer.

The health care employer, facing such a strike, has very little recourse because it does not realistically have the right to lock out its employees. Therefore, it may bear a disproportionate cost associated with the strike. This factor has to be examined under the current structural problems that health employers face, being the shortage of nurses and paramedical professionals, reduced funding for managerial staff, and the greater acuity rate of patients in health care settings. With this interplay of factors, it may be reasonable, and foreseeable, that governments enact ad hoc legislation to end labour disputes.

However, it may be unreasonable for governments to enact broad ad hoc legislation of the sort that was enacted in 2001. For example, *Bill 29* reopened collective agreements and repealed certain provisions that have been agreed for years. Historically, ad hoc legislation only focused on the current labour dispute and provided for a mediator/arbitrator to help the parties settle. The 2001 ad hoc legislation went beyond this and may signal an attack on the free collective bargaining process within health care.

The unions affected by *Bill 29* have launched a constitutional challenge. Specifically, the unions claim that *Bill 29* violates employees' freedom of association, deprives the employees of their liberty and security of person, and violates equality rights because the statute has a disproportionate effect on

women.²¹⁵ At the date of this paper, the challenge is still going through procedural arguments. The unions have recently tried to obtain documents through discovery pertaining to communications between Cabinet and the Public Sector Employers' Council regarding the drafting of the Bill.²¹⁶

Possible solutions may exist to reinstate free collective bargaining in health care. These possible solutions all rest on the rebalancing of burdens associated with the alternative strike mechanism. From a macro perspective, free collective bargaining may be reinvigorated if the current labour shortage of nurses is alleviated. If this occurs, the employer may be able to withstand a strike longer because management and excluded staff would not be required to do as much bargaining unit work. A more practical solution, however, may lie in the amendment of the legislation. Under the current system, a union may initiate a strike anytime after it gives 72 hour notice. The problem associated with this is that the employer, bears the burden of anticipating when the union may launch a surprise strike. Without the ability to lock out, the employer is placed in a precarious situation of being reactive to surprise job action. An amendment to the *LRC* to give the employer better warning of when a strike may occur may be a practical way of reinvigorating collective bargaining and reducing the risk of ad hoc legislation in the future.

²¹⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 2(d), 7, 15(1).

²¹⁶ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2002] B.C.J. No. 2464 (QL).

Perhaps a fitting conclusion to this paper can be seen in the recent warning by the ILO to the British Columbia government over its use of ad hoc legislation. There, the ILO stated:

The committee notes that all the Acts complained of in these cases involve a legislative intervention by the Government in the bargaining process, either to put an end to a legal strike, to impose wage rates and working conditions, to circumscribe the scope of collective bargaining, or to restructure the bargaining process. Recalling that the voluntary negotiation of collective agreements, and therefore the autonomy of bargaining partners, is a fundamental aspect of freedom of association principles and that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests, *the Committee regrets that the Government felt compelled to resort to such measures and trusts that it will avoid doing so in future rounds of negotiations. The committee also points out that repeated recourse to legislative restrictions on collective bargaining can only, in the long term, prejudice and destabilize the labour relations climate if the legislator frequently intervenes to suspend or terminate the exercise of rights recognized for unions and their members. Moreover, this may have a detrimental effect on workers' interest in unionization, since members and potential members could consider it useless to join an organization the main objective of which is to represent its members in collective bargaining, if the results of bargaining are constantly cancelled by law. The Committee also hopes that, in future, full frank and meaningful consultations will be held with representative organizations in all instances where workers' rights of freedom of association and collective bargaining are at stake.*²¹⁷ [emphasis added]

In order to promote free collective bargaining in the health sector, it is thus a requirement for government to minimize its contact with the parties while taking into consideration the interests of third parties. It is a delicate balance where legislative intervention may sometimes be necessary;

²¹⁷ 330th Report of the Committee on Freedom of Association, GB.286/11 (Part I), ILO, 286th Sess., (2003) at para 304.

however, the government must resist the urge to use its legislative powers to usurp the role of the collective bargaining process.

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