According to many scholars, the Canadian Charter of Rights and Freedoms has a centralizing influence on provincial legislatures in ways that constrains their policy autonomy. The entrenchment of the Charter effectively expands the role of the federally-appointed judiciary from being an “umpire” to a central policymaking institution with powers to strike down, limit, and alter provincial legislation that fails to properly comply with the Charter’s pan-Canadian standards. The impact of the Charter is not only felt when the Court invalidates provincial legislation, but it is also apparent when bureaucratic and executive actors engage in Charter-vetting practices aimed to ensure compliance with the Charter at the policy formation stage. In this context, the judicial enforcement of rights pose significant challenges to provincial legislation that appear to conflict with the norms and standards imposed by the Charter. Indeed, scholars have devoted attention to the relationship between the Charter and provincial autonomy. However, most of these studies tend to focus on judicial behaviour. Limited empirical attention has been given to the extent to which the Charter constrains legislatures’ objectives and rights-infringing legislation. To what extent are judicial norms internalized and reflected in provincial legislation? How does the commitment to Charter rights affect legislative behaviour?

This paper assesses the Charter’s centralizing influence by examining essential services legislation enacted after the Supreme Court of Canada’s landmark ruling in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia (BC Health)*, which departed from the Supreme Court’s deferential approach in labour relations, which effectively avoided the application of the Charter to labour law matters. The Court recognized that the freedom of association under section 2(d) of the Charter protects collective bargaining rights of employees. Shortly after the Supreme Court’s decision in *BC Health*, Saskatchewan introduced

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and passed The Public Essential Services Act (PESA) regulating and limiting the collective bargaining rights of public-sector employees. Six years later, Nova Scotia became the last province in Canada to enact essential services legislation.

The landmark decision in BC Health and subsequent legislation enacted provide insights into the extent to which Supreme Court Charter decisions influence provincial public policies. The preliminary results of this paper suggest that the Supreme Court’s decision in BC Health and the Charter more generally has negligible influence on the manner by which government actors limit the collective bargaining rights of public-sector employees. This is striking since the literature often emphasize the strong role and impact of the judiciary on rights infringing legislation. While BC Health might represent a victory for proponents of greater labour protections for employees, Saskatchewan and Nova Scotia’s essential services legislation does not provide further clarity on what Charter protections actually look like in substantive policy terms. The result is that legislation limiting the collective bargaining powers of many public-sector employees operate unencumbered by the Charter, while the substance of collective bargaining rights remains uncertain and underspecified.

The first section of this paper summarizes existing attempts to explain the extent to which the impact of the Charter on provincial policies. The second section of this paper provides an overview of the Supreme Court’s decision in BC Health and identifies the relevant judicial policy prescriptions that must inform legislation governing collective bargaining processes. The third and fourth sections draw upon transcripts of legislative debates and committee hearings in Saskatchewan and Nova Scotia in order to discern whether there is any relationship between the policy prescriptions provided by the BC Health decision and the ways in which government actors consider and justify balancing the collective bargaining rights of their employees on the one hand with the policy objectives of legislation on the other. The final section of this essay will reflect on the findings from both cases and situate it within the broader scholarship that investigates the relationship between the courts and legislatures under the Charter.

**On the Effect of the Charter and Provincial Autonomy**

A major pillar of the scholarship that examines the impact of the Charter on the Canadian political landscape is its potential homogenizing impact on provincial policies. The Charter enables the federally appointed judiciary to limit the extent to which provinces are able to achieve legislative objectives that deviate from centralized norms and standards of the Charter. According to this logic, if the courts compel or limit legislative action in one province because of a Charter violation, the effects will be felt in other provinces as well. In the early years following the constitutional entrenchment of the Charter, many scholars predicted that the judicial enforcement of Charter rights produces homogenous provincial policies.

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By the mid-1990s, the Supreme Court’s expanded jurisprudence enabled scholars to draw conclusions about this proposition. Early studies suggest that concerns over the Supreme Court’s enforcement of the Charter and its centralizing impacts are exaggerated. Katherine Swinton argues that the Court’s approach to section 1 allows provincial governments to justify their legislation on grounds that it addresses the divergent needs of local populations. Janet Hiebert’s analysis of early Supreme Court decisions reinforces Swinton’s proposition, finding that the courts are “receptive to arguments that the Charter should not be interpreted in a manner that disregards federalism”. James Kelly’s analysis of Supreme Court cases on Quebec’s language and education policies confirm Hiebert’s findings that the Charter allows the province to articulate its distinct regional needs through section 1 in ways that reconciles the apparent incompatibility between the Charter and the federal commitment to regional diversity. Jeremy Clarke’s analysis of cases involving impugned provincial legislation in British Columbia and Newfoundland also show that the Supreme Court can be sensitive to provinces’ “federalist interpretations” of the Charter. In this regard, the Court allows for dissimilar applications of the Charter’s national standards through a “federalist dialogue” between provinces and the Supreme Court.

However, it would be a mistake to rely on ‘dialogue’ to explain the limits of the courts’ centralizing influence and constraints on provinces’ legislative autonomy. Peter Hogg and Alison Bushell first introduced this concept in 1997 for understanding the relationship between the judiciary and legislatures. According to their view, legislatures enjoy significant autonomy even though the Charter has expanded the scope of judicial review. ‘Dialogue’ presupposes two voices that have a meaningful policymaking role under the Charter. Hogg and his colleagues argue that while final Charter interpretation belongs to the judiciary, legislatures ultimately have the final word over policy outcomes through the implementation of Charter decisions. In this regard, counter-majoritarian concerns about the prospect of the judicial “veto” becoming a

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powerful (and centralizing) force is mitigated by the fact that legislatures retain considerable autonomy to respond under the Charter.\(^{11}\)

Despite the flood of scholarship following the publication of Hogg and Bushell’s article (Bateup 2006; Clarke 2007; Hennigar 2004; Huscroft 2009; Kelly and Murphy 2005; Macfarlane 2012; Petter 2007; Roach 2001), dialogue’s net analytical contribution remains severely limited. In analytical terms, dialogue (ironically) says very little about a lot. It is merely a metaphor, not a theory of judicial review. Indeed, it recognizes the importance of considering legislative responses to Charter cases when assessing judicial power. Empirically, it describes an overbroad scope of possible courts-legislatures interactions that purports to shape policy outcomes in ways that mitigates judicial power. However, it offers very little insight into the nature of the inter-institutional relationship. It fails to go beyond a rather obvious conclusion that when legislation conflicts with the Charter, courts and legislatures talk to one another.

The more significant question is why do these courts-legislative interactions vary? Why the courts are particularly sensitive to a “federalist dialogue” in some instances – like in Auton v. British Columbia (Attorney General) and Newfoundland (Treasury Board) v. NAPE – but not in other cases – like in Ford v. Quebec, Quebec v. Protestant School Boards, Solski v. Quebec, or Nguyen v. Quebec? Put differently, why are the courts receptive and deferential to legislatures in some cases, but ‘activist’ in others? Conversely, why do legislatures concede and comply in some cases, but defiant in others? Without this piece, dialogue, at best, describes inter-institutional interactions, but offers nothing by way of understanding the extent to which the Charter has constrained variations of provincial public policies and the causal factors underpinning provincial compliance (or non-compliance) with Supreme Court decisions.

Beyond the dialogue metaphor, even while the Supreme Court demonstrates sensitivity to distinct regional interests under the Charter, there is evidence that the Charter has engendered homogenous legislative processes. Kelly’s more recent work suggest that provincial bureaucratic and executive vetting procedures have been tailored to ensure that their legislative objectives are consistent with the Charter.\(^{12}\) In this context, the Charter does not pose a serious obstacle blocking provincial legislation – with the exception that provinces with comparatively limited resources and onerous fiscal constraints face challenges to properly vet legislation for Charter compliance. Rather, the constraints imposed by the Charter can co-exist alongside legislative objectives that reflect federal diversity. However, French-Canadian scholars in particular remain wary about the Charter’s propensity to produce homogenous legislative outcomes.\(^{13}\) Alain Gagnon and Raffaele Iacovino agree with Kelly’s premise about the significance of provincial Charter vetting procedures at the bureaucratic and executive levels, but disagree with his conclusions. They agree that the impact of the Charter is properly understood as bureaucratic and executive actors engage in Charter-vetting practices aimed to ensure compliance with the Charter at the policy formation stage.\(^{14}\) However, the very fact that bureaucratic and executive actors rely

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\(^{11}\) James B. Kelly, Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent (UBC Press, 2005).

\(^{12}\) Ibid.


on a common internalized standard of Charter evaluation before introducing legislation is itself an indication of its centralizing threat to provincial autonomy.

In sum, these findings generally support the proposition that the centralizing impact of the Supreme Court’s enforcement of the Charter does not always prevent diverse provincial outcomes – though it may induce homogenous legislative vetting processes in some cases. While scholars might disagree about the normative impact of the Charter, rights remain an important factor to consider when legislation conflicts with the Charter. Despite efforts to describe the impact of the Charter, limited empirical work has examined whether the Charter has induced varied legislative behaviour in relation to Supreme Court Charter rulings. Saskatchewan and Nova Scotia’s essential services legislation provide an opportunity to gain observable insights into provinces’ relationship to the Charter.

*The Supreme Court’s Policy Prescriptions in BC Health*

*BC Health* is a leading Supreme Court decision that recognizes protections for collective bargaining under section 2(d) of the *Charter*. The decision was particularly significant because the Court reconsidered previous labour law jurisprudence, which excluded collective bargaining from section 2(d). In *BC Health*, the Court interpreted the freedom of association under section 2(d) to mean that employees have the right to unite, to represent demands to government employers and collectively engage in negotiations and consultation processes to achieve workplace-related goals. As well, the Court recognized that section 2(d) imposes corresponding duties on government employers to engage in meaningful negotiation and consultation with employees.

One of the principal legal tests emerging from *BC Health* is the test of “substantial interference.” The Court ruled that legislative schemes that regulate collective bargaining processes are unconstitutional if they “substantially interfere with the activity of collective bargaining.” A legislative scheme amounts to substantial interference when two conditions are met: 1) The legislative measures affects the process of collective bargaining to the extent that the capacity of union members to come together and pursue collective goals in concert are affected; and 2) the legislative measures impacts the duty to negotiate and consult in good faith. Only where both conditions are met will a violation of section 2(d) be found. Furthermore, once a breach of section 2(d) is found, government’s justification of breaching that right under section 1 of the Charter must meet the minimal impairment requirement. The government must demonstrate how a particular policy solution minimally impairs rights in the pursuit of its objectives.

In this regard, the Supreme Court’s decision in *BC Health* provides guiding principles that must inform Charter compliant labour policies. However, it leaves considerable latitude for legislatures to craft legislative schemes in ways that actually minimally impairs collective bargaining rights. At what point does the impact of legislation on unions to come together and pursue collective goals become non-complaint? More specifically, what does it mean – in policy terms – protect good faith negotiations and consultations?

15 *BC Health*, para 39-41.
16 Ibid., para 89.
17 Ibid., para 19.
18 Ibid., para 92.
In December 2007, the Government of Saskatchewan introduced Bill No. 5, the Public Service Essential Services Act (PSESA) – approximately 6 months after the Supreme Court’s decision in BC Health. The stated purpose of PSESA is to ensure that essential services are in place so that a labour disruption does not “put the lives of Saskatchewan people at risk.” PSESA regulates and limits the ability of public sector employees who “perform essential services” to strike. According to section 2(c) of the Act, essential services are broadly defined as “services that are necessary to enable a public employer to prevent: danger to life, health or safety; the destruction or serious deterioration of machinery, equipment or premises; serious environmental damage; or disruption of any of the courts of Saskatchewan.” The scheme applies to all “public sector employees” and all “public employers.” Under PSESA, designated “essential service employees” are prohibited from participating in any strike action against their employer. Employees must continue with their duties of employment based on the terms and conditions of their previous collective bargaining agreement. If essential service employees refuse to carry out their duties of employment, they will be subject to a summary offence that results in an increasing fine for every day duties are refused.

According to Rob Norris, the Saskatchewan’s Minister of Labour and Employment, this is to ensure “continuity, predictability and certainty.”

PSESA requires that at least 90 days prior to the expiry of a collective bargaining agreement, the public employer and the bargaining unit must negotiate an “essential services agreement” outlining how essential public services are to be maintained in the event of a labour disruption. If both parties fail to come to an agreement, the employer can unilaterally designate which public services it considers to be essential, the classification of employees required to work and the number of employees in each of the classifications. The employer also reserves the right at any time to either increase or decrease the number of employees required to maintain essential public services.

If the bargaining unit and the employer cannot come to an agreement, PSESA provides a mechanism for review. The bargaining unit can bring the employer’s proposed list of essential services before the province’s Labour Relations Board. This process must be initiated at least 30 days prior to the expiry of the collective bargaining agreement. The Labour Relations Board has jurisdiction to review the number of employees required to work in a given classification during a strike. It is important to note that the Board does not have the authority to review

21 Ibid.
22 Ibid.
25 Supra note 23, (Hon. Rob Norris), 72.
whether any particular service is essential and therefore consider whether the classifications selected by the employer have been reasonable selected.\textsuperscript{26}

With respect to \textit{PSESA}'s constitutionality in light of the Supreme Court’s decision in \textit{BC Health}, Minister Norris testified that the decision factored into his Government’s consultation phase of \textit{PSESA}: “The BC case that has been referred to — if I’m not mistaken that was last June that that came down — certainly that helped to inform areas of our consultation.”\textsuperscript{27} However, the Minister did not go into specifics regarding the feedback the Government received through their consultation processes and which specific provisions were amended as a result:

The feedback that we received, including some of public sector unions, has helped to inform some of the amendments that you see before you. But given the imperative of the CUPE strike, given some early work that we had done, the way to move forward was to have that draft and then ensure that we had feedback — again, not all of it positive, not all of it supportive, but all of it fruitful — to help refine and strengthen the essential service legislation.\textsuperscript{28}

The Committee did not press the Minister further to elaborate on the particulars in order to differentiate provisions that were amended based on union feedback from provisions amended based on feedback from civil society. It is not clear, based on the Minister’s testimony at committee, that the government considered whether its legislative goals could be reached by less intrusive measures or the extent to which the framework presented by \textit{PSESA} does not amount to “substantial interference” with union members’ capacity to collectively bargain and encroaches good faith negotiation and consultation with employees.

Although the Minister’s testimony did not explicitly refer to the Court’s policy guidance in \textit{BC Health} with respect to good faith negotiations, his testimony assumes that \textit{PSESA} enables productive negotiations between employers and the bargaining unit, while also protecting the public from the risks associated with labour disruptions:

\textit{PSESA} is “fair and balanced on behalf of the people of Saskatchewan, guaranteeing that the right to strike, being balanced with public safety and security. That balance is in place that the parties come together to negotiate, ideally without ever going to the Labour Relations Board.”\textsuperscript{29}

However, when pressed about the specifics regarding the what the ‘balance’ between public safety and negotiations looks likes, the Minister evaded these questions repeatedly during committee. In fact, the Minister’s unwillingness or inability to clearly and directly respond to questions posed by the Committee was a recurring theme in the \textit{Hansard} record.\textsuperscript{30}

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\textsuperscript{26} \textit{BC Health}, at para 13.
\textsuperscript{27} Saskatchewan. Legislative Assembly of Saskatchewan. Standing Committee on Human Services. \textit{Hansard Verbatim Report}. 1\textsuperscript{st} sess., 26\textsuperscript{th} Legislature, Meeting No. 10, 30 April 2008. (Hon. Rob Norris), 289.
\textsuperscript{28} \textit{Ibid}.
\textsuperscript{29} Saskatchewan. Legislative Assembly of Saskatchewan. Standing Committee on Human Services. \textit{Hansard Verbatim Report}. 1\textsuperscript{st} sess., 26\textsuperscript{th} Legislature, Meeting No. 5, 17 April 2008. (Hon. Rob Norris), 141.
\textsuperscript{30} This is particularly apparent in Saskatchewan. Legislative Assembly of Saskatchewan. Standing Committee on Human Services. \textit{Hansard Verbatim Report}. 1\textsuperscript{st} sess., 26\textsuperscript{th} Legislature, Meeting No. 8, 24 April 2008.
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Nonetheless, based on the provisions, there is a clear disjuncture between policy and the Government of Saskatchewan’s rhetoric. It is uncertain how the procedures requiring public employers and the bargaining unit to negotiate an essential services agreement is balanced when the terms and conditions of the agreement are subject to the employer’s unilateral discretion. Section 6(2) of the PSESA stipulates that the employer must “advise the trade union” of the services it considers to be essential.\textsuperscript{31} If the bargaining unit does not agree with the employer’s proposed agreement, then section 9(2) of the PSESA empowers the public employer to unilaterally dictate whether and how essential services will be maintained during the labour disruption.\textsuperscript{32} Indeed, the bargaining unit is entitled to appeal to the Saskatchewan Labour Relations Board. However, the Board does not have the authority to consider whether the employer’s proposed list of essential services is reasonable and can be repealed. As such, when the employer can unilaterally designate essential services, it effectively determines which classifications of employees are able to strike. For those designated as essential, employees must continue with their duties in accordance with the terms of their previous collective bargaining agreement. In the absence of a meaningful alternative way to resolve an impasse between the bargaining unit and the employer, it is not entirely clear how PSESA provides a framework that respects the duty to negotiate and consult in good faith towards a new collective bargaining agreement.

In sum, the Minister’s testimony in committee suggests that the Government of Saskatchewan only loosely considered the Supreme Court’s decision in \textit{BC Health}. Although the Government made efforts to consult with stakeholders and constituents after PSESA was drafted, the content of the legislation does not substantively consider the guidance offered by the Supreme Court. Moreover, the committee’s line of questioning did not fully scrutinize PSESA’s Charter compatibility in light of \textit{BC Health}. Indeed, the committee was constrained by the Minister’s unwillingness or inability to elaborate on the specifics of the legislation and the policy formation process, which produced a Hansard record of generalities without articulating the Government’s understanding and particular objectives through a clause-by-clause review.

\textit{Nova Scotia: Essential Health and Community Services Act, 2014}

The Government of Nova Scotia introduced \textit{EHCSA} on April 1, 2014 in the middle of labour dispute between the province and nurses over staffing levels and patient safety and seven years after the Supreme Court’s decision in \textit{BC Health}. This was the third health care disruption in the last seven months for the province.\textsuperscript{33} The government fast-tracked the bill and passed the bill in less than four days. The bill also pre-emptively halted Nova Scotia’s nurses strike action. Similar to Saskatchewan’s essential services legislation, the stated objective of \textit{EHCSA} is to protect the health and safety of the public through ensuring that essential care will still be provided in the event of a labour disruption.\textsuperscript{34}

\textsuperscript{33} Nova Scotia. House Assembly. \textit{Hansard Assembly Debates}. 1\textsuperscript{st} sess., 62\textsuperscript{nd} General Assembly, 2 April 2014. (Premier, Stephen McNeil),1329.
\textsuperscript{34} Nova Scotia. House Assembly. \textit{Hansard Assembly Debates}. 1\textsuperscript{st} sess., 62\textsuperscript{nd} General Assembly, 4 April 2014. (Hon. Kelly Regan), 1413.
EHCSA shares many of the same elements as the Saskatchewan regime limiting the ability of public sector employees who perform essential services to strike. EHCSA broadly defines essential services under section 3(1) to include (but not limited to) employees and employers that “provide health or community services.” Under section 5, the Act orders every employer and relevant bargaining unit to enter into an essential health or community services agreement that identifies the “work functions that constitute essential health or community services; the classifications of employees and the number of employees in each classification, who are required to perform essential health or community services during a lockout or strike; and a method by which employees are assigned to perform those services.”

Under section 23 of EHCSA, employers are prohibited from authorizing, declaring or causing a lockout of employees and employees are prohibited from participating in a strike against the employer until an essential health or community services agreement is reached. Under section 24, designated essential service employees are prohibited from participating in any strike action against their employer and must continue with their duties of employment based on the terms and conditions of their previous collective bargaining agreement. If employees or employers breach the prohibition provisions of EHCSA, they will be subject to a summary offence that results in an increasing fine for every day duties are refused.

Similar to the Saskatchewan Labour Review Board, EHCSA also has review mechanisms. Where the Saskatchewan Board can only review the number of employees designated in essential services agreements, under section 15(2)(b), the Nova Scotia Board can also consider the classification of employees and the work functions identified in the agreement. In other words, the Board can consider whether the numbers, classifications and duties set out in the employer’s essential services agreement have been reasonably selected. However, the Board’s weak remedial powers mean that their judgments are not binding until the dispute is referred to an arbitrator. As such, unless both parties come to an agreement, bargaining units dissatisfied with employers’ essential services agreement cannot engage in strike action until an arbitrator rules in their favour.

During the debates, opposition parties made exactly two references to the Supreme Court and the Charter’s protection over employees’ collective bargaining rights. During the Second Reading of EHCSA, Maureen MacDonald, leader of the NDP, alluded to the Supreme Court’s recent Charter jurisprudence on section 2(b):

We should be concerned about this because in a democratic society the right to free association is a fundamental right like free speech. It is a right that is protected in the Charter of Rights and Freedoms and it’s a right that the Supreme Court of Canada has upheld, including the right to strike.

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36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
Denise Peterson-Rafuse echoes her party leader’s concerns over EHCSA’s constitutional validity during the bill’s Third Reading:

There is a Supreme Court Ruling. I’m speechless, because the fact is that what’s going to happen is we’re going to have a legal battle on our hands, so rather than look at the future and take the finances to put in to help our nurses, we’d rather give them to fancy-pants lawyers to pay for years and years of court cases – because believe me, that’s going to happen.\textsuperscript{42} Although questions about EHCSA’s Charter compliance and its relation to \textit{BC Health} were raised during the debates, the Government of Nova Scotia was not required to respond and did not disclose any legal advice received by the province’s Department of Justice and Attorney General.

Indeed, limited references to the Supreme Court’s decision in \textit{BC Health} were made during the debates. One of the major requirements when introducing legislation that affects the constitutionally protected processes of collective bargaining is that governments must engage in meaningful consultation with unions.\textsuperscript{43} NDP Leader Maureen MacDonald referred to officials from the Nova Scotia Nurses’ Union (NSNU) who appeared as witnesses before the Law Amendments Committee and testified that the Government did not consult with the union on EHCSA. MacDonald asked the Government why they chose not to consult the nurses’ union before introducing the bill. The Premier responded:

The NSNU has, in more recent time, negotiated packages well in advance, which actually lends credence to this bill, which is about negotiating this in advance and ensuring that. But we’ve had three labour disruptions in the health care sector that have left Nova Scotia patients wondering what services are going to be in place. This process will deal with it.\textsuperscript{44} Consistent with the pattern of Government responses to questions posed by opposition parties, justifications for the choice to not consult with unions were not disclosed. While it is not clear what justification the Government had for not consulting with unions, the fact that the formulation of EHCSA diverged from the policy prescriptions in \textit{BC Health} illustrates the government’s indifference to the Supreme Court’s new interpretation of section 2(b).

In sum, the legislative record on the EHCSA suggests the limited importance of the Charter and the Supreme Court’s decision in \textit{BC Health}. Similar to Saskatchewan, the Government of Nova Scotia displayed an unwillingness to engage with the specifics of legislation that regulates and limits the rights of employees.

\textit{Discussion and Conclusions}

The development of Saskatchewan and Nova Scotia’s essential services legislation poses an interesting challenge to the understanding of the judicial enforcement of the Charter as a centralizing institution. F.L. Morton argues that that the Charter has undermined the legislative

\textsuperscript{42} Nova Scotia. House Assembly. \textit{Hansard Assembly Debates}. 1\textsuperscript{st} sess., 62\textsuperscript{nd} General Assembly, 4 April 2014. (Hon. Denise Peterson-Rafuse), 1462.

\textsuperscript{43} \textit{BC Health}, at paras 93-94.

\textsuperscript{44} Nova Scotia. House Assembly. \textit{Hansard Assembly Debates}. 1\textsuperscript{st} sess., 62\textsuperscript{nd} General Assembly, 2 April 2014. (Premier, Stephen McNeil), 1329.
autonomy of the provinces by overturning provincial policy preferences. If the principal effect of the Charter is the enhanced centralizing influence of the courts, then one would reasonably predict that both Saskatchewan and Nova Scotia would exercise caution and or at the very least, engage with the norms prescribed by the Court in order to achieve their objectives in the aftermath of *BC Health*. The preliminary findings in this paper suggests that the Charter and the Court’s freedom of association jurisprudence is neither determinative nor necessary for understanding how or why Saskatchewan and Nova Scotia passed their essential services legislation. It does not appear that *BC Health* imposed significant constraints on the two remaining provinces without essential services legislation. Just as important, the lack of attention to the Supreme Court’s decision in *BC Health* means that there remains a definitional vacuum about what the Charter practically requires of collective bargaining legislation beyond the generalities of “substantial interference” and “good faith consultation and negotiations.” The absence of such clarity in both legislative schemes means that the collective bargaining rights of employees are prevented from being implemented.

It would be inadequate to conclude that Saskatchewan and Nova Scotia’s indifference to the Charter stems from their unwillingness and purposive non-compliance with the Supreme Court. It is plausible that Saskatchewan and Nova Scotia – both relatively small provinces – do not have the institutional capacity to properly vet legislation for compliance with the Charter. Indeed, this follows from James Kelly’s findings that smaller provinces’ attempts to govern with the Charter are impeded by fiscal constraints and the need to allocate limited resources. In this regard, the extent to which judicial power can have a demonstrable influence on the policy choices of government could be contingent upon the province’s capacity to scrutinize legislation through legislative rights review procedures. Further research is required in order to test this proposition.

While Saskatchewan and Nova Scotia’s collective bargaining legislation demonstrates indifference to *BC Health*, this does not mean that one can summarily dismiss the impact of judicial review. According to the counter-majoritarian objection to judicial review, the problem is not simply about unelected courts overriding the choices of democratically-elected legislatures, but also that strong courts create an environment where legislators become less inclined to devote attention to the compatibility of proposed legislation, especially if the matter is likely to be litigated and decided by the courts anyway. Mark Tushnet argues that this apathy towards the responsibility to ensure that legislation is compliant “debilitates” representative democracy. In an area of constitutional law where the courts have traditionally considered labour law as a constitutional “no go zone,” further Charter litigation is likely since both

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provinces failed to engage with the Court’s new interpretation that expands the scope of section 2(b). Further research is necessary to discern whether and to what extent another round of litigation can compel legislatures to amend their laws in ways that consider the rights implications of regulating collective bargaining processes.\footnote{Saskatchewan’s PESA was struck down in 2015. They amended their laws later in the year. Alberta also amended their ESL in 2016.}
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