CITATION: Ontario English Catholic Teachers Assoc. v. His Majesty, 2022, ONSC 6658
COURT FILE Nos.: CV-20-00-636089-0000; CV-20-636421-0000; CV-20-00636524-0000; CV-20-00636529-0000; CV-20-00637314-0000; CV-20-00638156-0000; CV-20-00646385-0000; CV-20-0084683-0000; CV-20-00653134-0000; CV-20-00653130-0000;
DATE: 20221129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION; ALEXANDRA BUSCH; AND KAREN EBANKS,	)	*Paul JJ Cavalluzzo, Adrienne Telford, Balraj Dosanjh,* Ontario English Catholic Teachers Association; Alexandra Busch; and Karen Ebanks
	)	
	)	*Susan Ursel, Karen Ensslen, Emily Home,* for Ontario Secondary School Teachers' Federation; Paul Wayling; and Melodie Gondek
Applicants	)	
	)	
AND NINE OTHER APPLICATIONS IN THE MATTER OF THE PROTECTING A SUSTAINABLE PUBLIC SECTOR FOR FUTURE GENERATIONS ACT, 2019 LISTED IN SCHEDULE 1 HERETO	)	*Howard Goldblatt, Benjamin Piper, Lise Leduc*, for The Elementary Teachers' Federation of Ontario; Association des enseignantes et des enseignants franco-ontariens; Jade Alexis Clarke; Christine Galvin; and Yves Durocher
	)	
	)	*Kate Hughes, Jan Borowy, Danielle Bisnar*, for Ontario Nurses' Association; Vicki McKenna; and Beverly Mathers
	)	
– and –	)	*Steven Barrett, Colleen Bauman; Joshua Mandryk; Melanie Anderson*, for Ontario Federation of Labour et al.
	)	
	)	*David R. Wright, Mae J. Nam, Rob Healey, Rebecca Jones*, for Ontario Public Service Employees Union; and Warren ("Smokey") Thomas; Eduardo Almeida; Sandra Cadeau; Donna Mosier; Erin Cate Smith Rice; and Heidi Steffen-Petrie
	)	
	)	*Fay Faraday, Unifor Legal Department, Anthony F. Dale, Dijana Simonovic, Jenna*

	Meguid, for Unifor; Kelly Godick; Sarah Braganza; and Kathleen Atkins
	Michael Wright, Danielle Stampley, Nora Parker, Alex St. John, for Society of United Professionals, Local 160 of the International Federation of Professional and Technical Engineers; Jo-Ann Kinnear; Cindy Roks; and Velma Francis
	Andrew Lokan, Shyama Talukda, for Power Workers' Union (Canadian Union of Public Employees, Local 1000); Andrew Clunis; and Robert Busch
	Samantha Lamb, Dina Mashayekhi, for Carleton University Academic Staff Association; and Angelo Mingarelli; Root Gorelick; and R. Gregory Franks on their own behalf, and on behalf of all of the members of the Carleton University Academic Staff Association
HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE PRESIDENT OF THE TREASURY BOARD, MINISTER OF HEALTH, MINISTER OF LONG-TERM CARE AND MINISTER OF EDUCATION, AND THE ATTORNEY GENERAL OF ONTARIO	*Rochelle Fox, S. Zachary Green, Savitri Gordian, Waleed Malik, Karison Leung, Priscila Atkison*, for the Respondents
Respondents	
	HEARD: September 12-16, 19-23, 2022

KOEHNEN J.

REASONS FOR JUDGMENT

Overview

[1] In June 2019, the Government of Ontario introduced the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*,[1] commonly known as Bill 124. For ease of reference, I will refer to it as Bill 124 or the Act in these reasons. Its most material provision limits wage increases for approximately 780,000 workers in the broader public sector to 1% per year for a three-year moderation period. I say broader public sector because the Act applies to more than just employees whose salaries are paid directly by Ontario.

[2] The Act comes into force with respect to any particular bargaining unit on the expiry of the collective agreement that was in force as of June 5, 2019, when the Act was introduced. As a result, the Act has already run its course for some bargaining units but has not yet started to apply for others.

[3] A broad range of labour organizations have challenged the constitutionality of the Act in 10 separate applications. Between them the parties filed 96 volumes of application records, 11 volumes of cross-examination transcripts plus factums, briefs of authorities and compendiums. All 10 applications were heard consecutively before me over 10 days in September 2022.

[4] The applicants argue that the Act limits the freedom of association, freedom of speech and equality rights of their members under the *Canadian Charter of Rights and Freedoms*. Ontario denies that the Act infringes on any of these rights and, in the alternative, submits that if the Act does infringe on any *Charter* rights, it is saved by s. 1 of the *Charter* as a reasonable limit that is demonstrably justified in a free and democratic society.

[5] For the reasons set out below, I find of that the Act infringes on the applicants' right to freedom of association under s 2(d) of the *Charter,* does not violate the applicants' freedom of speech or equality rights under the *Charter* and that the Act is not saved by s. 1 of the *Charter*.

[6] The Supreme Court of Canada has granted constitutional protection to collective bargaining and the right to strike as part of the freedom of association guaranteed under s. 2(d) of the *Charter*.

[7] It is well-established that *Charter* rights are to be interpreted generously and purposively. The constitutional right to collective bargaining therefore goes beyond merely the right to associate in the sense of having a right to meet together. Rather, it guarantees the right to a meaningful collective bargaining process that allows workers to meet with employers on more equal terms, to put forward the proposals they wish and to have those proposals considered and discussed in good faith.

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[1] S.O. 2019, c. 12 ("Bill 124").

[8] Supreme Court of Canada jurisprudence also holds that governments infringe on this right when a government measure "substantially interferes" with collective bargaining. State action substantially interferes with collective bargaining when, among other things, it prevents or restricts subjects from being discussed as part of the collective bargaining process.

[9] The Act prevents collective bargaining for wage increases of more than 1%. This restriction interferes with collective bargaining not only in the sense that it limits the scope of bargaining over wage increases, but also interferes with collective bargaining in a number of other ways. For example, it prevents unions from trading off salary demands against non-monetary benefits, prevents the collective bargaining process from addressing staff shortages, interferes with the usefulness of the right to strike, interferes with the independence of interest arbitration,[2] and interferes with the power balance between employer and employees I find that these detrimental effects amount to substantial interference with collective bargaining both collectively and individually.

[10] In the context of this case, the Act is not a reasonable limit on a right that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

[11] A justification under s. 1 requires the government to establish a pressing and substantial objective, a rational connection between the means and the objective, minimal impairment of the *Charter* right and that the benefit of the Act outweighs its detriment.

[12] The Supreme Court of Canada has held numerous times that budgetary considerations will not ordinarily constitute pressing and substantial objectives under s. 1.

[13] Although there is a line of cases that has upheld the constitutionality of certain wage restraint legislation, those cases are distinguishable. They almost all arise in situations where the government was facing a financial or economic crisis. The legislation at issue in those cases also set limits on wage increases at a level that was consistent with results that were achieved in free collective bargaining negotiations when the legislation was introduced. On my view of the evidence, Ontario was not facing a situation in 2019 that justified an infringement of *Charter* rights. In addition, unlike other cases that have upheld wage restraint legislation, Bill 124 sets the wage cap at a rate below that which employees were obtaining in free collective bargaining negotiations.

[14] With respect to rational connection, there is a rational connection between the objective and wages that Ontario pays directly. The Act, however, goes far beyond that. In some cases it applies to wages that are in no way connected to Ontario's budget or deficit. In others, like the university sector, it applies to wages that are only indirectly related to

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[2] A process discussed in further detail later in these reasons in which essential workers who have been denied the right to strike submit disputes they cannot resolve to arbitration.

Ontario's budget but in respect of which Ontario already has other contractual protections that control Ontario's contributions.

[15] With respect to minimal impairment, the same considerations apply as with respect to rational connection. In addition, Ontario was free in any collective bargaining negotiation to take the position that it could not pay wage increases of more than 1%. It appears that Ontario was reluctant to take that position because it could lead to strikes. As noted, the right to strike is constitutionally protected. On this theory, Ontario was imposing a statutory limit of 1% on wage increases because it feared that taking that position at the bargaining table would lead employees to exercise their constitutionally protected right to strike. That does not amount to a reasonable limit on the right to collective bargaining that can be demonstrably justified in a free and democratic society. Although inconvenient, the right to strike is a component of a free and democratic society. Strikes bring issues to the public forefront and allow their resolution to be influenced by public opinion.

[16] With respect to balancing the benefits and negative effects of the Act, in circumstances where Ontario has not provided any satisfactory explanation for why it could not limit wage increases during collective bargaining negotiations, the negative effects of the Act outweigh its benefits.

[17] I hasten to add that the court is not expressing any critical view about the fiscal policies that the government wishes to pursue. Fiscal prudence and ensuring the sustainability of public services are essential responsibilities of government. The only question before the court is whether it was appropriate to breach *Charter* rights to do so. On my reading of the jurisprudence from the Supreme Court of Canada, it was not.

[18] As a result, I declare the Act to be contrary to be void and of no effect.

I. Preliminary Matters

[19] Before turning to the specific *Charter* challenges, I address two preliminary matters: the operation of Bill 124 and the burden of proof.

A. Operation of Bill 124

[20] The Government of Ontario introduced Bill 124 on June 5, 2019. Although the Bill received royal assent on November 8, 2019, s. 9 provides that it applies retroactively to any collective agreement that was concluded since it was tabled on June 5, 2019.

[21] Section 5 of the Act provides that it applies to a wide range of employers, employees and unions in the broader public sector including the Crown in Right of Ontario, Crown agencies, school boards, universities, colleges, public hospitals, non-profit long term care homes, children's aid societies and every authority, board, commission, corporation, office or organization of persons that does not carry on its activities for profit of its members or shareholders and that received at least $1 million in funding from Ontario in 2018. The

funding need not be for salary. If the organization receives funding for any purpose, it is caught.

[22] The Act does not apply to municipalities because, as Ontario explained, they have their own taxing powers. Similarly, it does not apply to for-profit enterprises because they are subject to free-market discipline.

[23] Sections 9 and 10 create a three-year moderation period and impose a limit on salary increases of 1% during each 12-month period of moderation. The 1% limit applies to both collective agreements and arbitration awards. The moderation period begins at the end of the collective agreement in force as of June 5, 2019. As a result, many collective bargaining units have not yet been subject to the 1% limit but will be in the near future. The timing provisions can result in a broad period being covered by the Act. By way of example, the moderation period for the applicant Ontario Public Service Employees Union ("OPSEU"), ranges from 2017 to 2026. This is because certain bargaining units saw their collective agreements expire in 2017 but had not concluded a new agreement by the time the Act was introduced. Others have not yet become subject to the Act and will not so do until their collective agreements expire; some as late as 2023.

[24] Ontario says the three-year moderation was structured to avoid unilaterally amending existing collective agreements. In this way, Ontario says the Act respects collective bargaining.

[25] Section 2 defines compensation broadly to mean: "anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments".[3] As a result, any increases to employee benefit plans or pension plans would count towards the 1% salary limit. In addition, on the evidence before me, employers have taken the view that any other form of quantifiable benefit including meal allowances, parking, expense allowances for personal protective equipment, vacation time or bereavement leave is quantified as part of the overall 1% limit. By way of example, awarding employees one day of bereavement leave that they did not previously have comes to 0.38% of their annual salary.[4] Awarding three days of bereavement leave would exceed the 1% salary cap.

[26] Pursuant to s. 11, if existing plan benefits become more expensive, the increased cost of an existing plan is not factored into the 1% salary increase. If, however, benefits are added or improved, then the cost of those improvements is calculated as part of the 1% salary increase.

[27] Pursuant to s. 26, The President of the Treasury Board may in his or her sole discretion declare that a collective agreement or arbitration award is inconsistent with the Act. In

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[3] *Ibid*, s. 2 (definition of "compensation").

[4] 5 days per week x 52 weeks equals 260 days. 1 day is 0.38% of 260. While the precise calculations may differ from one workplace to another depending on the number of days worked per year, the directional point is that any benefits of this sort are quantified for the purpose of calculating the 1% cap.

such a case, the terms of employment that applied before the impugned collective agreement was concluded are reinstated[5] and "the parties shall conclude a new collective agreement that is consistent with" the Act.[6] If an arbitration award is found to be inconsistent with the Act, the earlier terms of employment are also reinstated, and the matter is remitted to the arbitrator to issue an award consistent with the Act.[7]

[28] Section 24 prohibits an employer from providing compensation before or after the applicable moderation period to compensate employees for compensation that they do not receive as a result of the 1% cap.

[29] Section 25 empowers the Management Board of Cabinet to require employers and employers' organizations to provide such information concerning collective bargaining or compensation as the Management Board considers appropriate for the purpose of ensuring compliance with the Act.

[30] There was some debate between the parties about the extent to which I should take developments that arose after the act was introduced into account in my analysis. The applicants submit that I should take post enactment developments into account, principally the increased rate of inflation and the additional stress that the COVID-19 pandemic placed upon many front-line workers. Ontario submits that I should not take the increased rate of inflation into account. Ontario does rely on certain developments that arose in light of the COVID-19 pandemic. In my view, it would not be appropriate to take the increased rate of inflation into account. That is a relatively recent phenomenon in respect of which that neither party has had an opportunity to provide evidence. It would also be assessing the constitutionality of the Act with the benefit of hindsight; a luxury Ontario did not have.

B. Burden of Proof

[31] The parties agree on the burden of proof. The applicants, as the parties alleging a *Charter* breach must prove the breach on a balance of probabilities.[8] The evidence must be cogent and prove the harm. The "evidence must amount to more than a web of instinct."[9]

[32] If the Applicants prove a *Charter* infringement, Ontario bears the burden of proof to justify that the infringement is demonstrably justified under s. 1 of the *Charter.*

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[5] See Bill 124, s. 26(5)(b).
[6] *Ibid*, s. 26(5)(c).
[7] *Ibid*, s. 26(6).
[8] See *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, at paras. 107-13.
[9] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at para. 34.

II. Does the Act Violate Section 2 (d) of the *Charter*?

A. Difference in Interpretive Approach

[33] Section 2(d) of the *Charter* provides that everyone has the right to freedom of association.

[34] In *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*,[10] the Supreme Court of Canada held that s. 2(d) provides constitutional protection for collective bargaining. In *Saskatchewan Federation of Labour v. Saskatchewan*,[11] the Supreme Court of Canada held that s. 2(d) also provides constitutional protection for the right to strike. In *Health Services,* the Supreme Court equally held that s. 2(d) is infringed if a government measure "substantially interferes" with collective bargaining.[12]

[35] What then does this mean?

[36] Ontario submits that the constitutional protection given to collective bargaining is defined narrowly. It cites extracts from certain Supreme Court of Canada decisions to the effect that constitutional protection is afforded only to the right to associate and to make collective representations. It does not guarantee a particular outcome in the collective bargaining process,[13] does not guarantee a particular model of labour relations,[14] and is conceived as a limited right to a process by which employees can come together and make collective representations to an employer.[15]

[37] Ontario argues that the Act does not in any way interfere with the right of employees to free association and does not interfere with their ability to make representations to their employers. Ontario submits that the essence of the Applicants' claim is that they want the court to guarantee an outcome of a wage increase higher than 1% when outcomes are not constitutionally protected.

[38] On my reading of the case law, Ontario takes too narrow a view of the right to freedom of association as it applies to collective bargaining. Ontario's submissions run contrary to the general approach to *Charter* interpretation, the specific purposes for which collective bargaining was given constitutional protection, and the meaning that the Supreme Court of Canada gave to "substantial interference" in collective bargaining.

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[10] 2007 SCC 27 ("*Health Services*").
[11] 2015 SCC 4, at para. 3 ("*Saskatchewan Federation of Labour*").
[12] *Health Services*, at para. 19.
[13] *Ibid*, at para. 89. See also para. 91.
[14] See *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 67 ("*Mounted Police*").
[15] See *Health Services*, at para. 91. See also paras. 19, 92, 107, 109 and 129; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, at para. 47, *per* Rothstein J. (concurring) ("*Meredith*").

i. General Interpretive Approach to *Charter* Rights

[39] It is well established that s. 2(d) of the *Charter* is to be interpreted generously and purposively having regard to both to the larger objects of the *Charter* and the purpose behind the particular associational right at issue.[16]

[40] In *Mounted Police*, the Supreme Court of Canada held that to determine whether a restriction on the right to associate violates s. 2(d), courts must look at the associational activity in question in its full context and history and that neither the text of s. 2(d) nor general principles of *Charter* interpretation support a narrow reading of freedom of association.[17]

ii. The Purpose of Collective Bargaining

[41] According to the Supreme Court of Canada, the purpose of collective bargaining is to empower weaker members of society to meet the more powerful, including the state, on more equal terms:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[18]

[42] In *Health Services*, the Supreme Court made the following additional observations about the purposes of collective bargaining:

(i) Collective bargaining enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, their work.[19]

(ii) It alleviates the historical inequality between employers and employees.[20]

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[16] See *Mounted Police*, at paras. 47, 57-59.
[17] *Ibid*, at para. 47.
[18] *Mounted Police*, at paras. 35, 57, citing *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at para. 87, *per* Dickson C.J. ("*Alberta Reference*"). See also *Mounted Police*, at para. 58.
[19] See *Health Services*, at para. 82.
[20] *Ibid*, at para 84.

(iii)It enhances democracy by allowing workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace.[21]

iii. The Meaning of Substantial Interference

[43] Ontario cites two passages from *Health Services* to support its narrower interpretation of s. 2(d) rights:

> Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity …
>
> …
>
> To amount to a breach of the s. 2(d) freedom of association, the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(d).[22]

[44] Ontario submits that it has not interfered with the "essential integrity" of collective bargaining. It says it has in no way limited associational activity and has not limited the ability of employees to band together or make representations to employers.

[45] A proper interpretation of the constitutional protection cannot stop at these isolated passages. The passages must be read in the full context of the Supreme Court of Canada's decisions to understand what is meant by "essential integrity" of the process and what is meant by "substantial interference."

[46] The Supreme Court of Canada made it clear in *Health Services* that legislative provisions that take issues off the bargaining table can amount to violations of s. 2(d) even though they do not formally limit the ability of employees to associate with each other. For example, in *Health Services* the Supreme Court stated:

> Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining …
>
> …
>
> Sections 4 to 10 of the [*Health and Social Services Delivery Improvement*] *Act* have the potential to interfere with collective

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[21] *Ibid*, at para 85.
[22] *Ibid*, at paras. 90, 129.

> bargaining in two ways: first, by invalidating existing collective agreements and consequently undermining the past bargaining processes that formed the basis for these agreements; and second, by prohibiting provisions dealing with specified matters in future collective agreements and thereby undermining future collective bargaining over those matters…
>
> We pause to reiterate briefly that the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations. While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.[23]

[47] In *Mounted Police*, the Supreme Court voiced similar sentiments:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve.
>
> …
>
> The function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests. The degree of choice required by the *Charter* is one that enables employees to have effective input into the selection of their collective goals.[24]

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[23] *Ibid*, at paras. 96, 113-14 (emphasis added).
[24] *Mounted Police*, at paras. 72, 85.

[48] These passages suggest that a government measure will interfere with collective bargaining if it:

(i) Prevents or denies meaningful discussion about working conditions.

(ii) Prohibits provisions from being dealt with in collective agreements.

(iii) Prevents employees from having their views heard in the context of a meaningful process of consultation and discussion.

(iv) Imposes arbitrary terms on collective agreements.

[49] In my view, these passages rebut Ontario's narrow interpretation of the right to collective bargaining under s 2(d). The *Charter* protects not just the right to associate but also the right to a meaningful process in which unions can put on the table those issues that are of concern to workers and have them discussed in good faith. Legislation that takes issues off the table interferes with collective bargaining.

[50] The question then becomes, when does this interference rise to the level of the "substantial interference" that the Supreme Court of Canada established as the test for a *Charter* infringement in *Health Services*.

[51] In *Health Services* the Supreme Court explained that substantial interference is more likely to be found in measures that affect matters central to the ability of the unions to achieve common goals. This requires an investigation into the nature of the affected right. In addition, the way in which the measure affects collective bargaining is equally important. Even if an issue is of central importance to collective bargaining, if the change has been made through a process of good faith consultation that directionally replicates collective bargaining, it is unlikely to have adversely affected the employees' right to collective bargaining.[25] If the effect is to seriously undercut or undermine the activities of workers joining together to pursue common goals of negotiating workplace conditions and terms of employment, then it amounts to substantial interference with collective bargaining.[26] That inquiry is contextual and specific to the facts of each case.[27]

[52] The Supreme Court then proposed that courts ask the following two questions to determine whether interference rises to the level of substantial interference:

(i) How important is the matter affected to the process of collective bargaining?

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[25] See *Health Services*, at para. 129.
[26] *Ibid*, at para. 92.
[27] *Ibid*.

(ii) How does the measure impact on the right to good faith negotiation and consultation?[28]

[53] I turn then to address those two questions.

B. The Effect on Collective Bargaining

i. The Importance of the Issue to Collective Bargaining

[54] In *Health Services,* the Supreme Court of Canada drew a connection between the importance of the issue and the capacity of union members to come together to pursue collective goals.

[55] If the interference relates to a minor matter, it is unlikely that it would affect the ability of employees to pursue goals in concert. If the interference deals with a more significant matter, the analysis may be different. As the court put it in *Health Services,* the more important the matter, the more likely that there is substantial interference with the s. 2(d) right.[29]

[56] Here, the issue concerns the imposition of a 1% cap on salary increases.

[57] As Cory J. explained in *P.I.P.S. v. Northwest Territories (Commissioner)*, "[w]ages and working conditions will always be of vital importance to an employee."[30] That comes as no surprise. The reason most people work is to earn money to survive. That often makes salary one of the most important issues in a collective bargaining negotiation.

[58] The issue of wages assumes even greater importance here because inflation was running at 2.4% when the Act was introduced and the incomes of many of the affected employees, like teachers, had not kept up with inflation over a longer period.

[59] The wage limit becomes still more important when one considers that, as set out below, demands for wage increases are often used as trade-offs to obtain improvements on issues unrelated to compensation. I am satisfied in the circumstances of this case that the issue of a 1% limit on wage increases is highly important to the ability of the applicants to engage in effective collective bargaining.

ii. How Does the Measure Affect Good Faith Negotiation and Consultation?

[60] I assess the impact of the 1% wage cap from the following perspectives:

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[28] *Ibid*, at para. 93.
[29] *Ibid*, at para. 95.
[30] [1990] 2 S.C.R. 367, at para. 69 ("*P.I.P.S.*").

a. The financial impact of the wage cap.

b. The Impact on trading salary against other issues.

c. The impact on staffing.

d. The impact on wage parity between public and private sector employees.

e. The impact on employee self-government.

f. The impact on freely negotiated agreements.

g. The impact on the right to strike.

h. The impact on interest arbitration.

i. The impact on the relationship between unions and their members.

j. The impact on the power balance between employer and employees.

[61] On my view of the evidence, there is no doubt in my mind that the affect of the Act on these various issues easily amounts to substantial interference with collective bargaining.

a. The Financial Impact of the Wage Cap

[62] Ontario submits that any limits that the Act places on wage increases does not affect collective bargaining because *Charter* protection of collective bargaining does not protect outcomes but protects only a process.

[63] While this may be true, the imposition of a 1% pay cap has a material effect on the process of collective bargaining. It has taken off the table any discussion of wage increases above 1%. That materially limits the ability of employees to put issues on the table for negotiation. If a collective goal of employees was a wage increase of more than 1%, that is no longer possible. Moreover, if one of the underlying purposes of collective bargaining is to equalize power imbalances between employees on the one hand and employers or the state on the other hand, that purpose is fundamentally undermined when the state intervenes by imposing limits on wage increases. In that latter situation, collective bargaining does not equalize power. Rather, it exacerbates inequality by allowing the state to prevent employees from having a meaningful discussion about the issue. While the *Charter* may not protect outcomes, it should also not allow the state to predetermine outcomes.

[64] The way in which the 1% cap affects negotiations is perhaps best seen by comparing the 1% cap with salary results of collective bargaining negotiations that are not subject to the Act.

[65] When Bill 124 was introduced, collective bargaining negotiations in the broader public sector resulted in overall salary increases of approximately 1.6%. After the Act was

introduced, public-sector wages that were not affected by the Act resulted in wage increases well above 1%.

[66] By way of example, the York Regional Police Association, which was excluded from the Act as a municipal police force, negotiated an annual wage increase of 2.12% over a five-year term after its collective agreement expired on December 31, 2019. Other freely negotiated wage settlements fell in a range of 1.37-2.26% for 2019, 0.93% to 2.21% for 2020, and between 1.5% to 4% for 2021.[31]

[67] Ontario's own collective bargaining expert in this application, Professor Christopher Riddell, conceded on cross-examination that "Bill 124 has significantly interfered with or constrained or limited what [would]… have been the appropriate outcome had there been free collective bargaining."[32]

[68] In an effort to demonstrate that the 1% cap reflected the common result of collective bargaining when the Act was introduced, Ontario points to situations in which collective bargaining resulted in salary increases of 1% or less. By way of example, Ontario relies on an interest arbitration involving the Victorian Order of Nurses which resulted in salary increases of .7% as of April 1, 2021, and April 1, 2022. That award notes, however, that the employer was under bankruptcy protection under the under the *Companies' Creditors Arrangement Act*[33] and had closed a number of branches. In reaching its decision, the arbitral Board concluded:

> This Board wants to be clear that there are unique circumstances leading to this award based on the financial information about the employer's operations shared with ONA. Given the unique circumstances of this case and the particular economic environment under which this collective agreement was being negotiated the Board does not intend this award to be setting any precedent, or be otherwise relevant, with respect to ONA in terms of replication.[34]

[69] In addition, Ontario points to approximately 27 freely negotiated public sector collective agreements in which wage increases were less than 1% before the Act was introduced. These must be understood in their proper context. The 27 were part of 2,574 separate bargaining units that were affected by the Act. Expressed in percentage terms, 1.05% of the public sector's collective agreements arrived at increases of less than 1% at the time

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[31] See Exhibit 3 to Affidavit of Beverly Mathers, affirmed January 14, 2021 ("Wage Increase in Ontario across different Collective Agreements" table, at para. 27); *Bradgate Arms v. United Food and Commercial Workers, Local 175*, 2022 CanLII 8995 (Ont. Arb. Bd.) (L. Steinberg), at para. 9.

[32] Cross-Examination of Christopher Riddell, held June 21, 2022, Q. 1642 (brackets in original) ("Riddell Cross, June 21"). See also QQ. 1534, 1600-2, 1702-3, 1797 and 1992; Cross-Examination of Christopher Riddell, held June 10, 2022, Q. 1439 ("Riddell Cross, June 10").

[33] R.S.C. 1985, c. C-36.

[34] *Victorian Order of Nurses v. Ontario Nurses Association*, 2021 CanLII 63762 (Ont. Arb. Bd.) (M. Wilson), at pp. 5-6.

the Act was introduced. In other words, the 27 agreements Ontario points to do not reflect what was generally available in collective bargaining.

[70] The compensation cap further limits the collective bargaining process because of the way the cap works. It does not apply to the overall payroll of an employer but applies to each individual salary. Unions will often try to adjust relative wages within a bargaining unit by increasing the wages of lower paid workers by more than those of higher paid workers. That is no longer possible if the increase for the lower paid worker is more than 1% of their salary even if the increase in the overall payroll is limited to 1%. Similarly, unions sometimes negotiate a flat rate increase for all employees, regardless of wage level. This benefits lower income employees because the flat rate increase gives them a higher percentage increase than it gives higher paid employees. That too is no longer possible if the result is a wage increase of more than 1% for the lower income employee.

[71] This places serious limitations on the ability of employees to collectively identify common goals and pursue them with their employer.

[72] Ontario submits that the Act does not interfere with collective bargaining because it allows negotiation on monetary issues within the salary cap and permits unrestricted negotiations on nonmonetary issues.

[73] The fact that the Act allows for negotiation within the 1% limit does not demonstrate an absence of substantial interference. As noted above, it is evidence of substantial interference. To use a directional analogy, it is not unlike authoritarian state claiming it permits freedom of speech provided the speech remains within the narrow limits the state allows.

[74] As concerns negotiations on nonmonetary issues, Ontario points to the ability of the Service Employees International Union ("SEIU") to negotiate a benefits package for employees at Circle of Care Senior Home Care which provided them with drug, dental and vision care for the first time in exchange for a 0% salary increase. What this analysis misses is the chilling effect of the Act. The Act's wage cap inevitably distorts the collective bargaining goals of union members. By way of example, employees at the Circle of Care bargaining unit earn an average of approximately $31,200 per year. A 1% salary increase amounts to $312 per year or $6 per week. Employees then face the choice under the Act: accept an additional $6 per week or try to negotiate benefits that cost the employer no more than $6 per week but that may be worth more than that to individual workers. Here the employees preferred health benefits. That is not to say, however, that health benefits are now a sign of successful collective bargaining. It is merely to say that given the constrained choices that the Act imposes, the employees of Circle of Care preferred health benefits to an additional $6 per week. Had employees been given the choice between larger wage increases and benefits, they may have chosen the former or they may have tried to negotiate both. The point is that the Act robbed them of that choice and robbed them of the self-determination that collective bargaining is supposed to afford.

[75] Moreover, the ability to negotiate "nonmonetary" issues is somewhat overstated given that even nonmonetary issues may be quantified for purposes of the Act. By way of example, a union that negotiated an additional vacation day for employees would be told that a one-day benefit amounts to .38% of annual compensation. The additional vacation day would therefore swallow a good part of the 1% pay increase the Act permits.

[76] Ontario next argues that the impact of the 1% salary limit is softened by the fact that it does not impede the ordinary progress of an employee up through salary grids that increase wages with experience. Any softening here is limited. The evidence indicates that 77% of teachers are at the top step of their salary grid. In addition, 44% of nurses in Ontario have between eight and 25 years of experience. There are no grid increases for nurses between eight and 25 years. After 25 years, their hourly wage increases from $47.69 to $48.53 per hour. An increase of $0.84 or 1.76% after an additional 17 years of service. At the lower end of the wage scale, grid increases are even smaller. By way of example, after one year of experience, a nurse's hourly wage increases from $33.90 per hour to $34.06, an increase of $0.16 per hour or 0.47%. When an annual increase of 1% is added, the total wage increase between first and second year is 1.47%; still well below the prevailing rate of inflation when the Act was introduced.

[77] Ontario also submits that Bill 124 does not preclude the payment of performance pay or bonuses. In a union context, performance pay and bonuses are rare. If anything, allowing performance pay and bonuses gives rise to a further perception of inequality. At Centennial College for example, while unionized employees were capped at 1%, 75 managers received performance pay increases or bonuses of more than 5%. Seventeen received more than 10%, two received 22% and two received 31%. Two managers received increases of $105,000. Those two increases alone would have provided an additional 1% salary increase to 420 employees earning $50,000 per year. This is not to say that the management employees should not have received increases or bonuses. It merely brings home the applicants' perception of the inequality of bargaining power that the Act imposes on unionized employees.

b. The Impact on Trading Salary against Other Issues

[78] The applicants filed an expert's report from Professor Richard Hebdon in which he expressed the view that the 1% salary cap prevents unions from using higher wage increases as a bargaining tool to obtain other, non-monetary benefits. As he describes it, by taking the possibility of wage increases above 1% off the table, a union's bargaining power is weakened such that it lacks the leverage to make necessary trade-offs to obtain

meaningful gains on non-monetary issues.[35] Put another way, the Act inhibits the normal bargaining trade-offs between compensation and non-compensation issues.[36]

[79] These views have been echoed by a number of senior and well-respected interest arbitrators. In *Foyer Richelieu Welland v. CUPE, Local 3606*, for example, Arbitrator Keller stated:

> The Act clearly limits, or straitjackets, the ability of the parties to engage in the normal give-and-take of collective bargaining that is key to successful negotiations.
>
> …
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> In free collective bargaining, there will be of necessity, trade-offs. That is, each party determines what their needs are and, in order to achieve those needs to the greatest extent possible must be willing to give up something in order to achieve what they consider to be important. For example, often that involves the employer 'paying' for something sought by the union in return for achieving one of its own collective bargaining aims as, for example, more flexibility in how it manages its operations. **Under the Act, those trade-offs are not possible.**[37]

[80] The views of Professor Hebdon and these arbitrators are also reflected in the experience of the applicants. A large number of the applicants' affiants have sworn affidavits attesting to the way in which the Act limited collective bargaining. By way of example, the applicant OFL filed 23 affidavits from union members. Ontario cross-examined eight of those but not on their evidence about their collective bargaining experience under the Act.

[81] By way of further example, in 2019 – 2020, the Ontario Nurses Association had identified two collective bargaining priorities as being the adjustment of full-time and part-time staffing ratios in line with longstanding expert recommendations and changes to language surrounding job security. The representative employer group, the Ontario Hospital Association declined to accommodate those wishes taking the position that with only 1% available, nothing could be negotiated or traded.

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[35] See Exhibit A to Affidavit of Robert Hebdon, affirmed February 25, 2021, at para. 18 ("Hebdon Affidavit").
[36] *Ibid*, at paras. 55, 75. See also Riddell Cross, June 21, Q. 1608 (agreeing that "to the extent that those traders will be in excess of the 1% cap, there's no traders to offer").
[37] 2020 CanLII 97972 (Ont. Arb. Bd.) (B. Keller), at p. 3 (emphasis added) ("*Foyer Richelieu*"). See also Affidavit of David Hauch, sworn January 27, 2021, at paras. 62-64 ("Hauch Affidavit"); Exhibit MM to Hauch Affidavit; Exhibit NN to Hauch Affidavit; Affidavit of Daniel Pike, sworn January 20, 2021, at para. 24; Affidavit of Susan Wurtele, sworn January 20, 2021, at para. 271, Affidavit of Darren Pacione, sworn January 21, 2021, at para. 32; Affidavit of Colleen Burke, affirmed January 6, 2021, at paras. 21, 57; Reply Affidavit of Matthew Hill, affirmed April 11, 2022, at para. 14.

[82] The Act also limited Unifor's ability to bargain terms to address long-term staffing, recruitment and retention issues in not-for-profit long-term care homes that were subject to the Act.[38] The government's own 2020 *Long-Term Care Staffing Study* found that "staffing in the long-term care sector is in crisis and needs to be urgently addressed."[39] It identified as "priority areas for action" increasing staffing, improving workload and working conditions for Personal Service Workers (PSWs), increasing wages, improving benefits, and maximizing opportunities for full-time hours.[40] The Act prevents Unifor from bargaining about these issues even as understaffing was exacerbated during the Covid 19 pandemic.[41]

[83] Finally, with respect to negotiations, the Act removed from the negotiating table any discussion between unions and Ontario of billions of dollars in tax cuts at the same time as Ontario was asking employees to limit wage increases to below the rate of inflation. Jay Porter, the Director of the Broader Public Sector Labour Relations Initiatives Branch at the Treasury Board Secretariat and Ontario's chief affiant in this proceeding, acknowledged that government revenue is something the parties "would take into account and would certainly want to understand" as part of the collective bargaining process.[42]

[84] Ontario responds to this with evidence from Professor Riddell to the effect that unions were able to negotiate non-wage benefits such as the health benefits at Circle of Care discussed above and other examples.[43] Whether these are true gains depends in part on the cost to the employer, the details of which are not before me. Moreover, the fact that unions were able to make some small gains such as access to equity data in the case of a bargaining unit at Queen's University does not mean that the compensation cap did not substantially interfere with the ability of unions to use wage increases as a bargaining chip for other benefits. It simply means that Ontario has been able to point to some limited improvements in limited areas.

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[38] See Affidavit of Katha Fortier, affirmed on March 8, 2021, at para. 65 ("Fortier Affidavit").
[39] Exhibit J to Fortier Affidavit, at p. 26.
[40] *Ibid*, at pp. 27-30, 33-36.
[41] See Affidavit of Kelly Godick, affirmed June 29, 2021, at paras. 74-90 ("Godick Affidavit").
[42] Cross-Examination of Jay Porter, held June 28, 2022, Q. 2249 ("Porter Cross, June 28").
[43] See e.g., in Ontario's factum, at para. 98, OECTA reduces secondary class size averages (although it was only a reduction from what management's initial proposal was and was still a small increase above current sizes) and the new Supports for a Student Fund; at para. 102, ONA improves health and safety language to ensure access to Personal Protective Equipment; at para. 104, CUPE, Local 3902 (which represents academic and contract faculty at the University of Toronto) obtains improved hiring criteria and better workload protections; at para. 105, three CUPE locals representing union members that work at Queen's University obtain equity data; at para. 111, OPSEU obtains improved seniority calculations for fixed-term employees, job security language, and equity related gains; at para. 113; The Society obtains new contract terms related to redeployment, improved work-from-home language and repatriation of work from a third-party contractor to Ontario Power Generation; at para. 114, PWU obtains improved employment security provisions and improved access to vacancies for PWU members.

[85] Nor did Ontario lead any contrary evidence about collective bargaining from employers or government officials from sectors affected by the Act to contradict the evidence of the applicants.

[86] The reduction in negotiating power that the Act has brought about prevents employees from having their views heard in the context of a meaningful process of consultation that could lead to an improvement of working conditions.

c. Impact on Staffing

[87] The Act coincided with a serious long-term recruitment and retention crisis in the health care, home care, hospital, and long-term care sectors.

[88] The extent of the staffing crisis in long-term care homes was recognized by Ontario's own Long-Term Care COVID-19 Commission, which confirmed the long-standing recruitment and retention challenges in long-term care homes, and which recommended improved compensation as key to addressing the staffing crisis in that sector.[44]

[89] The Act has prevented employers and unions from negotiating solutions to address this crisis even though the government's own study linked the staffing crisis to compensation.

[90] The inability to address staffing issues directly affects the working conditions of the remaining employees. This is graphically demonstrated through the affidavit of Kelly Godick.

[91] Ms. Godick works as a personal support worker ("PSW") at a long-term care facility in Thunder Bay. The home at which she works as a variety of care floors. Some are for elderly residents. Some are locked units for residents with dementia and aggressive behaviours. Roughly 10% of the population is between age 20 and 50 who come to the facility after catastrophic accidents and brain injuries. They are physically more difficult to care for because they are more physically fit, larger and stronger than older residents. This poses particular challenges when they are aggressive.

[92] Of 600 members in the bargaining unit at Ms. Godick's facility, 390 are part-time. Her employer provides no short-term or long-term disability benefits to any of the bargaining unit members beyond a maximum of 18 sick days per year. The facility has a chronic shortage of PSWs. Its ordinary ratio is one PSW for each 10 or 11 residents. Staff shortages mean that the ratio is often 1 to 16 residents. There are times when the ratio becomes 1 to 32. The facility had 40 part-time PSW positions they could not fill in June 2021. Since 2018 there have never been fewer than 35 PSW vacancies. At the same time,

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[44] See Exhibit J to Fortier Affidavit ("Ontario Long-Term Care Staffing Study Advisory Group, *Long-Term Care Staffing Study* (July 30, 2020)"); Exhibit G to Hauch Affidavit ("Interim Report, Ontario's Long-Term Care Covid-19 Commission, October 22, 2020").

21% of its full-time Registered Practical Nursing positions were vacant and 18 of its 26 part-time registered practical nursing positions (69.2%) were vacant.

[93] These shortages mean that existing staff must work even harder on a given shift than they would ordinarily do. They do so for no extra pay.

[94] Short staffing takes a toll on the mental and physical health of employees. Given the increased physical workload, employees are more prone to injury when working short staffed. Many residents have no family or friends. Staff provides their only social interaction. When staff are too busy to do so, the mental and physical health of residents deteriorates.

[95] For many residents, the only luxury they have is a weekly bath. In cases of under staffing, even that most basic need cannot be accommodated and must be replaced with quick localized washing in bed. Patients die regularly. When approaching death, they often seek the comfort of an employee. The employee has a stark emotional choice: Tell the dying patient they have no time for them; or deny other patients basic care.

[96] It is left to overworked, frontline, low-wage, employees to witness the deterioration in their patients' condition because staff shortages render employees unable to provide residents with the level of care they require. It is for the same employees to live with the disappointment of patients who cannot receive something as basic as a weekly bath. It is for the same employees to deny a dying patient the comfort of another human being as their lives end. Employees live with this day in day out. They break down in tears. They exhaust themselves. They burnout. They leave for less stressful jobs thereby further exacerbating the vicious cycle of short staffing.

[97] Wages are not high. In Thunder Bay where Ms. Godick works the hourly wage for PSWs is in the $21/22 range. Ms. Godick has had employees breakdown before her because of the shame they feel in having to access food banks while working as hard as they do in circumstances as traumatic as they are.

[98] Ms. Godick was not cross-examined on her affidavit.

[99] An additional complication is the prevalence of part-time or casual work. Employers prefer part-time or casual employees because they are paid less, do not receive benefits, and do not receive pensions. This creates additional barriers for PSW's to move up the salary grid. While it takes a full-time employee only two years to reach the highest pay grade based on 1800 hours per year, it takes part-time employees longer. Not only because they work part-time but because the 1800 hours must be accumulated in a single workplace. Thus, although many long-term care home workers have multiple part-time positions in different homes, it is only their hours in a particular home that count towards upward wage movement at that particular home.

[100] In the long-term care sector, 65% of jobs are part-time. In extreme cases, bargaining units have two to four times as many part-time as full-time employees even though workers want

and need full-time work.[45] In the hospital sector, less than 50% of CUPE employees are full time. Approximately 30% to 40% of the part-time workers have more than one job to make ends meet. In the nursing sector, 45% of nurses are less than full-time. Thirty percent are part-time and 15% are casual. Many parttime employees hold two or more jobs to make ends meet.

[101] The often traumatic conditions under which employees in the healthcare sector work leads working conditions caused by staffing issues to be a significant priority. These are key collective bargaining issues. Given staff shortages, the collective bargaining power of employees would generally be increased in a way that would enable them to improve wages, ameliorate staff shortages and improve working conditions. The 1% salary cap has taken that power away from employees.

d. Impact on Public and Private Sector Wage Parity

[102] In the long-term care sector, the Act has disrupted long-standing bargaining relationships and patterns.

[103] In the long-term care sector, not for profit, for profit and municipal long-term care homes have negotiated as a sector and have looked to each other's awards to maintain relative wage parity across the sector for the past 30 years. Since the Act took effect, the portion of the long-term care sector covered by the Act and the portion not covered by the act have begun to bargain separately. Disparities between wages in homes covered by the Act and those not covered by it have now begun to arise.

[104] After the Act was introduced, municipal and for-profit home employees negotiated wage increases of 1.5% to 2% per year.[46] This is significant because the evidence before me is that:

(i) Wage settlements in not for profit and for profit/municipal homes have tended to track each other.

(ii) The work in all three categories of homes is identical.

(iii) All three categories of homes receive identical provincial funding in the form of a fee per patient per day.[47]

It is therefore highly probable that in the absence of the Act, wage settlements at not-for-profit homes would have tracked those of municipal and for-profit homes.

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[45] See Fortier Affidavit, at paras. 38, 88 and 108; Affidavit of Kathleen Atkins, affirmed June 29, 2021 (71% part-time and casual workers, calculated from table at para. 12) ("Atkins Affidavit"); Godick Affidavit, at para. 10.
[46] See Hauch Affidavit, at paras. 55-57; Affidavit of Ricardo McKenzie, affirmed January 22, 2021, at paras. 74-84; Reply Affidavit of David Hauch, sworn April 13, 2022, at para. 25.
[47] Although the fee may differ based on the level of care the patient requires.

[105] Similar trends have emerged in the nursing sector. Wages for nurses have historically followed a pattern whereby private and publicly employed nurses are paid the same wage. In most cases, interest arbitrators in the public sector followed the results of agreements achieved through collective bargaining in non-public agreements and vice versa. Bill 124 has led arbitrators in non-public agreements to depart from the principle of parity because the results of interest arbitration in the public sector no longer reflect those of freely negotiated agreements or independent decisions by interest arbitrators.

[106] As Arbitrator Kaplan noted in *Regional Municipality of Niagara Homes for the Aged v. ONA*:

> The difference, however, is that Bill 124 interferes with free collective bargaining by imposing a 1% total compensation cap: the rightness or wrongness of that is for others to decide. But we cannot accept the invitation to impose a statutorily mandated settlement in the face of incontrovertible evidence of an actual free collective bargaining settlement that would have otherwise almost certainly applied – the one voluntarily agreed to with the central hospital comparator group, and the one that the arbitrator in the Participating Hospitals & ONA case said he would have awarded, which would then have been followed here.
>
> Our main mission is to replicate free collective bargaining not to impose an economic outcome on employees who were deliberately excluded from provincial wage restraint legislation. As the nurses here were excluded from Bill 124, it would not be appropriate to sweep them in by mechanistically concluding that they should be required to follow a legislatively mandated central award, especially in light of the evidence of an applicable free collective bargaining result. Put another way, it is quite correct that the nurses covered by this award consistently follow central hospital outcomes, but it would be a complete triumph of form over substance, and would, as the Association argues, be the exact opposite of replicating free collective bargaining, to impose upon the affected nurses a result mandated by a statute that does not apply to them in face of actual evidence of the results of free collective bargaining that would have otherwise governed their compensation.[48]

[107] Fragmenting bargaining units into public and private sector units interferes with the unions' ability to choose who bargains together.

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[48] 2020 CanLII 83199 (Ont. Arb. Bd.) (W. Kaplan), at pp. 6-7.

e. Impact on Self - Government

[108] Unions tend to develop their bargaining positions based on a democratic solicitation of their members views on issues of concern. Unions prioritize their negotiating positions based on those results. Bill 124 prevents the unions from advocating for those measures beyond the 1% limit. This undermines the self-government that the Supreme Court of Canada has identified as one purpose of collective bargaining.[49]

f. Impact on Freely Negotiated Agreements

[109] As noted, the Act gives the Treasury Board Secretariat the power to override collective agreements that have been freely agreed to. The Treasury Board has done so.

[110] On June 14, 2019, the SEIU concluded a collective agreement with Mariann Homes that provided for increases of between 2% and 6.4% in its first year, subsequent increases of 1.4%, 1.6% and 1.75% per year, improved bereavement leave, two additional sick days, and doubled employer pension contributions. The union and the employer submitted a joint request to be exempted from the Act. The President of Treasury Board rejected the joint request. A subsequent request for reconsideration was also denied. As a result, the union and employer had no choice but to comply with the 1% wage and overall compensation increase limits even though neither thought it was in their interest to do so and even though the collective agreement would not have required any additional money from Ontario.

[111] The Treasury Board Secretariat has used this power on six occasions involving the Ontario Nurses Association with respect to collective agreements entered into both before and after the Act received royal assent.

[112] In *Health Services*, the Supreme Court of Canada held that laws that unilaterally nullify significant negotiated terms in existing collective agreements substantially interfere with collective bargaining.[50]

g. Impact on the Right to Strike

[113] Ontario submits that the Act does not affect the right to strike because s. 4 says "nothing in this Act affects the right to engage in a lawful strike or lockout." The applicants submit that the Act has effectively limited their right to strike because it is impractical to strike over non-monetary benefits.

[114] In response, Ontario points to a list of the strike actions that certain unions have taken, notwithstanding the Act. For example, before the pandemic, Ontario English Catholic Teachers Association ("OECTA") and the Ontario Secondary School Teachers Federation ("OSSTF") engaged in escalating work to rule action and walk outs. The fact that there are a few examples of work to rule campaigns or one day walk outs (although one union

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[49] See *Health Services*, at paras. 81-82.
[50] *Ibid*, at para. 96.

engaged in a two-week strike) does not necessarily mean that the Act does not substantially interfere with the right to strike.

[115] This question must be approached with a degree of practicality. During a strike, employees are not paid. Consequently, the issue over which employees strike must have sufficient economic importance to them to warrant not being paid. As noted, the Act's 1% salary is costed out against non-wage benefits. One percent amounts to approximately 2.6 days of pay.[51] As a result, if employees strike for 2.6 days, they have exhausted the financial benefit associated with any gain from the strike. That provides a substantial disincentive to strike.

[116] In *Saskatchewan Federation of Labour*, the Supreme Court of Canada recognized the right to strike as being constitutionally protected under s. 2(d) of the *Charter*. In doing so it made the following observations:

(i) The right to strike is an "indispensable component" of meaningful collective bargaining.[52]

(ii) The possibility of a strike allows workers to negotiate with their employers on terms of approximate equality without which "bargaining risks being inconsequential — a dead letter".[53]

(iii) The right to strike is the "powerhouse" of collective bargaining.[54]

(iv) The ability to strike allows workers "to refuse to work under imposed terms and conditions." "This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives."[55]

[117] The Act, in effect, imposes the financial terms and conditions under which the applicants must work. It says you must work for an annual wage increase of no more than 1% and makes striking to obtain more futile. That, in the words of the Supreme Court of Canada, removes from employees the "powerhouse" of collective bargaining and the one tool they have that allows them to refuse to work under imposed terms and conditions. While employees may technically retain the right to strike, it has been rendered financially meaningless because the total benefit that they can receive by striking is a wage increase of 1% or an increase of benefits equal to 1% of wages; a benefit that is exhausted after 2.6 days of striking.

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[51] One week of paid equals 1.92% of salary. One day therefore equals .384%. 2.6 days at .384% comes to 1%.
[52] *Saskatchewan Federation of Labour*, at para. 3.
[53] *Ibid*, at para 55.
[54] *Ibid*.
[55] *Ibid*, at para. 54.

[118] Although Ontario could have taken the position in any collective bargaining negotiation that it would not pay any more than 1% in salary increases, Jay Porter explained during his cross-examination that if the government did so, this "could have impacted service delivery and ultimately could have impacted the sustainability of public services" because that position could have led to "labour disruptions."[56] In other words, it could have led to strikes or work-to-rule by teachers, something that was described by the Supreme Court in *Saskatchewan Federation of Labour* as an "indispensable component" of meaningful collective bargaining.[57] Although Ontario denies that it was trying to render strikes futile, the effect of Mr. Porter's evidence is to the contrary. The advantage of legislation capping salaries at 1% meant that Ontario could avoid the "labour disruptions" that might arise if Ontario took a hard-line position during collective bargaining.

[119] Depriving workers of the right to strike, either explicitly or implicitly, amounts to substantial interference with collective bargaining.

[120] Ontario notes that Dr. Hebdon also provided an expert's report in *Manitoba Federation of Labour et al v. The Government of Manitoba*,[58] and that the Manitoba Court of Appeal rejected his opinion that strikes would, in all likelihood, be "futile" under the Manitoba legislation. In doing so the Court noted that Manitoba's legislation, like Ontario's, gave the Treasury Board the ability to exempt individual collective agreements from its scope.[59] The Court then noted that nothing precluded a union from striking to compel the Treasury Board to grant an exemption.[60] That, however, is not a possibility in Ontario. Numerous Labour Relations Board panels have held that a strike to obtain a right that one is not legally entitled to is an illegal strike that can be prohibited by the Board and that can result in heavy fines against the union and the union representatives who instigated the strike.[61]

[121] In response to a question from the bench, Ontario's counsel advised that in Ontario's view, the Act does not prohibit people from striking to earn more than 1%. Although I am grateful to counsel for seeking that clarification during the course of argument, there remain several limitations to it. First, Ontario is not the employer of a large number of the employees caught by the Act. The employers are school boards, hospitals, care homes, universities and so on. Those entities are not bound by the government's position and could invoke well-established *Labour Relations Act* principles that would hold such strikes to be illegal.

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[56] Porter Cross, June 28, QQ. 2034-2035.
[57] *Saskatchewan Federation of Labour*, at paras. 3, 55.
[58] 2021 MBCA 85 ("*Manitoba Federation of Labour*").
[59] *Ibid*, at para. 101.
[60] *Ibid*, at para. 103.
[61] See e.g. *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A., ss. 100, 102-109 ("*Labour Relations Act*"); *Croven Ltd. v. U.A.W., Local 1090*, [1977] O.L.R.B. Rep. 162 (specifically considering wage restraint legislation, at paras. 6-7); *U.S.W.A., Local 9011 v. Radio Shack*, [1985] O.L.R.B. Rep. 1789, at para. 36*; G.C.I.U., Local 34-M v. Southam Inc.*, [2000] Alta. L.R.B.R. 177, at paras. 55, 56 and 58; *Otis Elevator Co. v. I.U.E.C.*, 35 D.L.R. (3d) 566 (B.C. C.A.), at paras.40-42.

[122] Second, OSSTF notes that this late breaking concession from Ontario must be considered in light of the applicants' requests for information about how to obtain an exemption. No applicant was ever advised that they could strike to obtain an exemption or that they could strike for a salary increase of more than 1%.

h. Impact on Interest Arbitration

[123] Certain "essential workers" do not have the right to strike. Their work is considered too important to risk interruption. If they are not able to reach a collective agreement with their employers, the dispute is subject to a regime of binding interest arbitration.

[124] Interest arbitration is conducted by three-person Boards consisting of an employer representative, a union representative and an independent chair. The independent chairs are chosen from a relatively small body of experienced, respected labour arbitrators.

[125] The principle underlying interest arbitration is replication. That is to say, interest arbitrators try to replicate the results achieved in freely negotiated collective agreements. They do so using objective criteria such as collective bargaining results in similar sectors and by having regard to the market forces and economic realities that would have driven the parties to a collective agreement.[62]

[126] In *Saskatchewan Federation of Labour*, the Supreme Court of Canada affirmed that legislative prohibitions on the freedom to strike must be accompanied by a dispute resolution by a third party. The purpose of doing so was to ensure that "the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers."[63] It further noted that, to be an effective and constitutional alternative to the right to strike, interest arbitration must be a meaningful process that replicates free collective bargaining.[64]

[127] The right to strike of nurses and other health care workers was removed in 1965 after a particularly contentious labour dispute. Approximately 90% of the ONA's 68,000 nurse members do not have the right to strike. Their labour regime is governed by the *Hospital Labour Disputes Arbitration Act*[65] which creates a process of interest arbitration to resolve disputes if collective bargaining fails.[66] Section 9(1.1) of the *Hospital Labour Disputes Arbitration Act* provides that the board of arbitration shall take into consideration all factors they consider relevant including the following criteria:

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[62] See *University of Toronto (Governing Council) and University of Toronto Faculty Assn. (Re.)* (2006), 148 L.A.C. (4th) 193 (Ont. Arb. Bd.), at para. 17, *per* Winkler R.S.J. (as he then was).
[63] *Saskatchewan Federation of Labour*, at para. 94, citing *Alberta Reference*, at para. 116.
[64] See *Saskatchewan Federation of Labour*, at paras. 92-96.
[65] R.S.O. 1990, c. H.14, ss. 9(1.1), 10 and 11.
[66] See *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 (for a useful summary of the evolution of the development of interest arbitration in the nursing sector, at paras. 52-62).

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

[128] Sections 10 and 11 of the Act bind interest arbitrators and subject their awards to rollbacks by the Treasury Board Secretariat.

[129] In effect, the Act prohibits arbitrators from considering the factors they are statutorily mandated to apply by s. 9(1.1) of the *Hospital Labour Disputes Arbitration Act.* By way of example, factor five above requires interest arbitrators in hospital arbitrations to take into account an employer's ability to attract and retain qualified employees. During a time of labour shortages, that would translate into increased wages. A series of interest arbitrators has held that they would have awarded wage increases of more than 1% but for the application of the Act.[67]

[130] As Arbitrator Gedalof put it:

> What is readily apparent in reviewing the parties' economic proposals, however, is the extent to which the application of Bill 124 is a threshold issue that limits to a very significant degree what it is even possible for this board to consider in this round. Arguments about ability to pay, impact on services, the state of and future prospects for the Ontario economy, whether comparisons to more generous settlements are or are not appropriate, and whether or not

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[67] See *Mon Sheong Home for the Aged v. Ontario Nurses' Association*, 2020 CanLII 8770 (Ont. Arb. Bd.) (E. A. Gedalof) ("but for the application of Bill 124 we would award across the board increases of 1.4% and 1.75% for the two years of this contract", at para. 24); *Participating Hospitals (Ontario Hospital Association) v. Ontario Nurses' Association*, 2020 CanLII 38651 (Ont. Arb. Bd.) (J. Stout) ("Under normal circumstances, applying replication, we would have awarded a wage increase of at least 1.75% to keep nurses in line with other hospital employees who already settled their collective agreements for this period of time. However, we are constrained by the application of Bill 124 and we can only award a 1% salary increase for each twelve month period of the moderation period", at para. 33); *Résidence Saint-Louis c. Syndicat canadien de la fonction publique, section locale 3189*, 2020 CanLII 33859 (Ont. Arb. Bd.) (C. Schmidt) ("Nous notons que, n'eût été l'application de la Loi 124, ce Conseil d'arbitrage ordonnerait des augmentations salariales qui correspondent aux tendances établies dans les sentences arbitrales et les règlements de ce secteur, soit de 1,4 %, 1,4 % et 1,5 %.", at para. 4).

> it is necessary to improve monetary terms in order to attract and retain nurses, all become academic if the most that can be done is to award 1% increases, which increases are not opposed by the Hospitals.
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> …
>
> To put it bluntly, therefore, when it comes to the application of Bill 124 in this proceeding, the parties' and **this Board's hands are tied**.
>
> …
>
> Even highly normative and modest improvements to health and welfare benefits—commonly awarded by past boards of interest arbitration between these parties—are beyond the scope of our jurisdiction under Bill 124.[68]

[131] Other arbitration boards have expressed similar views:

(i) The **Act "clearly limits, or straitjackets"** the ability of the arbitration board to "'negotiate' … trade-offs during the course of its consideration of the submissions of the parties".[69]

(ii) The Board was **"subject to the dictates of Bill 124,"** which "profoundly limited" the Board's jurisdiction over monetary issues.[70]

(iii) The Act constrains the ability of arbitration boards to apply longstanding criteria and normative principles of interest arbitration (most significantly replication and comparability).[71]

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[68] *Participating Hospitals v. Ontario Nurses Association*, 2021 CanLII 88531 (Ont. Arb. Bd.) (E. A. Gedalof), at paras. 20, 23 and 39 (emphasis added).
[69] *Foyer Richelieu*, at pp. 3-4, *per* Arbitrator Keller (emphasis added).
[70] *Shepherd Village Inc. v. Service Employees International Union Local 1 Canada*, 2020 CanLII 51703 (Ont. Arb. Bd.) (D. Randall), at pp. 2-3 (emphasis added).
[71] See *Participating Charitable Nursing Homes v. Ontario Nurses' Association*, 2021 CanLII 106877 (Ont. Arb. Bd.) (J. Stout), at para. 12 ("*Participating Charitable Nursing Homes*"); *F.J. Davey Home v. Canadian Union of Public Employees, Local 4685-00*, 2021 CanLII 10816 (Ont. Arb. Bd.) (J. Stout), at paras. 25-26 ("*F.J. Davey Home*"); *Broadview Foundation (Chester Village) v. Canadian Union of Public Employees, Local 3224*, 2021 CanLII 11850 (Ont. Arb. Bd.) (R. Goodfellow) ("*Broadview Foundation*"); *Glebe Centre v. Canadian Union of Public Employees, local 3302 - 00*, 2021 CanLII 36600 (B. Keller) (Ont. Arb. Bd.) ("*Glebe Centre*"); *Mon Sheong Richmond Hill Long-term Care Centre v. Service Employees International Union Local 1 Canada*, 2020 CanLII 40950 (Ont. Arb. Bd.) (D. Randall), at p. 2 ("*Mon Sheong RH*").

[132] Many arbitrators have remained seized of their awards and have retained jurisdiction to revisit the awards if this application is successful.[72]

[133] One consideration in assessing the constitutionality of limits on interest arbitration is whether it redresses the loss of balance caused by removal of the right to strike.[73] As Firestone J. noted in *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*:

> An outcome dictated by unilateral legislative action, and uninformed by any union consultation or input, is not a resolution to a bargaining impasse; it is the legislative abolition of a bargaining impasse, something quite different. The resolution of an impasse surely requires that the parties at loggerheads have their voices heard and have some input in the decision that solves the impasse. A resolution to an impasse that takes no heed of the parties is an entirely artificial one[74]

[134] Professor Riddell denies in his report that the Act threatens arbitrator independence. He concedes that it may limit arbitral discretion but maintains that arbitrators retain the ability to make unconstrained, independent determinations on a wide range of terms and conditions of employment. In my view this misses the point. The issue is not the distinction between independence or discretion, or whether arbitrators retain the ability to make determinations in other areas. The issue is whether the Bill amounts to substantial interference with collective bargaining.

[135] Professor Riddell agreed in cross-examination that if arbitrator independence is measured in terms of their ability to award the wage increase they see fit, then the Act limits their independence.[75] As noted earlier, wages are matters of "vital importance" to employees.[76]

[136] Ontario submits that interest arbitration is not constitutionally protected under s. 2(d). It cites the Supreme Court of Canada's language in *Saskatchewan Federation of Labour* to the effect that "alternative dispute resolution mechanisms are generally not associational in nature"[77] and the Court's observation that this was why Dickson C.J. addressed arbitration mechanisms in the *Alberta Reference* case in his s. 1 analysis and not as part of his s. 2(d) analysis.

[137] In *Alberta Reference*, however, Dickson CJ noted:

> Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. "Given that without some

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[72] See e.g., *Participating Charitable Nursing Homes*, at para. 14; F.J. Davey Home, at para. 35; Broadview Foundation, at p. 2; *Glebe Centre*, at p.10; *Mon Sheong RH*, at pp. 5-6.
[73] 2016 ONSC 418, at para. 212.
[74] *Ibid*.
[75] Riddell Cross, June 21, Q. 1726.
[76] *P.I.P.S.*, at para. 69.
[77] *Saskatchewan Federation of Labour*, at para. 60.

> binding mechanism for dispute resolution, meaningful collective bargaining is very unlikely, it seems more reasonable to ensure that the scope of arbitrability is as wide as the scope of bargainability if the bargaining process is to work at all."[78]

[138] Ontario submits further that while the concept of replication in interest arbitration may be important, it is not constitutionally protected either. Ontario says all that is required is that arbitration be impartial and effective.

[139] It is difficult to see how arbitration can be impartial or effective if the government imposes limitations on wages that are lower than what the arbitrators say they would have awarded had the Act not constrained them. In this context the arbitral awards do not reflect the fruits of impartial decision-making but that of state fiat.

[140] Ontario then refers to *Gordon v. Canada (Attorney General)*,[79] where the Ontario Court of Appeal also noted that interest arbitration may not be subject to the same constitutional protection as the right to strike. However, the Court in *Gordon* concluded its analysis on this point by pointing out that the object of interest arbitration was to replicate collective bargaining and that since the compensation limits imposed by the legislation in *Gordon* reflected the results of collective bargaining, imposing the same limit on arbitration awards would have arbitral awards replicate collective bargaining.[80] As noted earlier, however, the Act's 1% limit does not reflect freely negotiated collective bargaining results either when it was introduced or since.

h. Impact on the Relationship Between Unions and Their Members

[141] Bill 124 and the way in which Ontario has acted under it, has undermined the relationship between unions and their members.

[142] By way of example, after nurses achieved only a 1% salary increase, members of the nurses' union, the Ontario Nurses Association ("ONA) were enraged. They did not blame the government for the 1% limit but blamed the ONA. Facebook groups entitled Ontario Nurses for a Protest and ONA Nurses for Change grew to over 21,000 members. Posts on these groups were highly critical of the ONA and blamed its leadership for the 1% pay cap. They circulated media articles about the generous wage and benefit increases to municipal police and firefighters accompanied by calls to replace ONA President, Vicki McKenna with a "male President" and a "male union" which they believed would allow them to achieve increases similar to those obtained by municipal police forces and firefighters.

[143] A consultant hired by the ONA to examine the divisions within the union noted that divisions of this nature weaken the ability of the ONA "to frame the public and political

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[78] *Alberta Reference*, at para. 123 (citations omitted).
[79] 2016 ONCA 625 ("*Gordon*").
[80] *Ibid*, at paras. 136-39.

discourse" on issues of concern consume organizational resources and, in the longer term, destabilize the union and its influence.

[144] Ontario answers by pointing to a number of pandemic related pay measures for some, but not all, front-line staff in hospitals, long-term care homes and correctional facilities as evidence of flexibility under the Act to support its constitutionality. Although these pandemic pay programs ended in August 2020, Ontario introduced further wage enhancements for certain employees in October 2020 and made those enhancements permanent in April 2022.

[145] Far from improving the Act's constitutionality, these measures are evidence of even further substantial interference with collective bargaining. Pandemic pay benefits were introduced without consulting the unions. They were presented as evidence of generosity and benevolence by Ontario. Wage increases of that nature would ordinarily be the product of collective bargaining. Here Ontario created a system where collective bargaining could produce only 1% increases. The government's "generosity" led to additional pay benefits outside of the collective bargaining process.

[146] As the Ontario Labour Relations Board noted in *Teamsters Canada Rail Conference, Division 660 v. Bombardier Transportation Canada Inc*.,

> The starting point for the Board's analysis in this case is where an employer provides an incentive payment to employees, outside of the collective agreement, without the consent of the exclusive bargaining agent, the union's representational authority is presumed to be eroded or compromised.[81]

[147] The whole collective bargaining regime presupposes that wages and other benefits are to be negotiated between the employer and the representatives of the collective bargaining unit. Among other things, this allows employees to decide through democratic means, how financial and other benefits should be divided amongst members in a collective bargaining unit. By unilaterally deciding which employees received the financial benefit, Ontario deprived collective bargaining units of this fundamental right of self-determination and imposed arbitrary terms on them.

[148] At some point, providing benefits to employees outside of the collective bargaining process would understandably lead union members to ask what purpose collective bargaining serves if employees can get more outside of the collective bargaining process than within it. This substantially undermines the purpose of collective bargaining. Whether intended or not, in the long term this tends towards behaviour commonly referred to as union busting. That quite obviously substantially interferes with collective bargaining.

j. Impact on Power Balance Between Employer and Employees

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[81] 2018 CanLII 36714 (Ont. L.R. Bd.) (D. Ross), at para. 21.

[149] In *Canada (Procureur général) c. Syndicat canadien de la fonction publique, s. locale 675*, the Quebec Court of Appeal held that:

> In this case, it can be said that this interference has a unique flavour, as it takes place in the context of the State's relations with its unionized employees. A real dialogue between the parties cannot be achieved or sustained if the shadow of the legislator looms large behind the government purporting to discuss working conditions with its union counterparts, or if promises made at the bargaining table are too frequently withdrawn or neutralized elsewhere. In other words, the State cannot make a habit of giving with one hand (the government's) and taking with the other (the legislator's); otherwise, bargaining risks becoming an artificial process.[82]

[150] Jay Porter admitted during cross-examination that the commencement of education sector bargaining was "a key consideration with respect to the timing of the legislation."[83] This suggests that the "shadow of the legislator" was intended to "loom large" in collective bargaining negotiations. The government was using its legislative power to avoid real collective bargaining and to tilt the balance of power in favour of the government.

[151] It has been held that legislation that renders collective bargaining "effectively feckless" amounts to substantial interference with the right to collectively bargain.[84] It is difficult to see how there can be an effective collective bargaining system when the employer has been given the trump card of compensation increases lower than the rate of inflation and lower than freely bargained agreements.

[152] The impact of the salary cap is even more acute here in the context of overall labour shortage in Ontario. A shortage that is particularly acute in the healthcare and long-term care sectors. As already noted, labour shortages would ordinarily give workers greater bargaining power. The Act removes that power.

[153] The effect of Bill 124 was immediate. It led employers to withdraw offers of wage increases above 1% that had already been made in negotiations that were in progress when the Bill was introduced. In other cases, the government set aside collective bargaining agreements reached before the Bill took effect thereby requiring employees to bargain from scratch with considerably less leverage.

[154] There can be no doubt that the imposition of a 1% salary cap interferes in the balance of power between employers and employees when bargaining about salaries. Given the importance of salaries in collective bargaining, the 2.4% rate of inflation in 2019 and the

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[82] 2016 QCCA 163, at para. 40 ("*Syndicat canadien*").
[83] Porter Cross, June 28, Q. 2165.
[84] *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, at para. 284 ("*BC Teachers' Federation* (BCCA)").

fact that going rate increases were 1.6%, that interference is substantial. The Act skews the collective bargaining process materially in favour of the employer.

[155] Ontario points to the decision of the British Columbia Court of Appeal in *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, where the Court disagreed with the union's articulation of the substantial interference test as being whether the legislation disrupts the balance between employer and employees.[85] The court did not, however, disagree with the concept that disrupting the balance of power could result in substantial interference. It simply reiterated the test as being that of substantial interference and not that of an imbalance of power.

[156] Imbalance of power remains a factor that courts have and continue to examine when determining whether there has been substantial interference with collective bargaining.

[157] The Supreme Court of Canada recognized this in *Mounted Police* when it said:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.[86]

[158] In *Gordon*, the Court of Appeal noted:

> Meaningful collective bargaining maintains a balance of bargaining power, or "equilibrium", between unions and employers.
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> …
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> Labour relations legislation and s. 2(d) of the *Charter* both aim to establish and preserve the balance of power between the employer and unions.
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> …

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[85] 2016 BCCA 156, at para. 90 ("*Dockyard Trades*").
[86] *Mounted Police*, at para. 72.

> As noted, following the 2015 labour trilogy, the right to strike is protected by s. 2(d) of the *Charter* because it functions to maintain the balance of bargaining power between employers and employees.[87]

[159] On my view of the evidence, an analysis of the foregoing factors demonstrates that the Act has substantially interfered with collective bargaining.

iii. Union Communications

[160] Ontario submits that the continued effectiveness of collective bargaining under the Act is demonstrated by a string of communications from unions to their members highlighting the improvements the unions obtained in agreements negotiated under the Act. In my view this does not represent a fair contextual reading of the statements in question.

[161] The unions were legally obligated to "sell" the collective agreements to their membership. To do otherwise would amount to bad faith bargaining. The unions' comments were made in the context of what was possible to achieve given the constraints that the Act placed upon collective bargaining. Many of the communications note that the Act complicated the bargaining process, negatively impacted collective bargaining, created challenges for collective bargaining or limited the unions' margin of manoeuvre. The improvements of which the unions spoke must also be viewed in the context of the employers' initial bargaining position which was often to revoke benefits that workers had successfully negotiated for the past. In that context, preserving the status quo was a "win." The applicants referred to this as being forced to bargain themselves out of a hole. In the absence of legislation that capped salary increases at 1%, that strategy would not have been nearly as successful as it was for employers. The communications tend to focus on pushing back on employers' requests for concessions. Moreover, many of the communications note that the collective agreements contained an escape clause that reopen the agreements if the Act is found to be unconstitutional. That is not a provision one would find in a collective agreement that unions thought was fair.

[162] Recall here also that the test is whether the Act substantially interferes with collective bargaining, not whether some unions managed to obtain some sort of improvement on non-monetary issues. The test is not whether collective bargaining has been reduced to a completely useless exercise. Any improvements the unions obtained must be weighed against the significance of the limitation on wage increases and the ability of the unions to have obtained further improvements in the absence of wage constraints.

iv. Experts on Collective Bargaining

[163] The parties introduced evidence from two experts on collective bargaining: Robert Hebdon for the applicants and Christopher Riddell for the respondents. Each side vigorously

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[87] *Gordon*, at paras. 39, 97 and 135.

criticized the reliability of the other side's expert. That requires me to assess the reliance I place on each report. Both are highly qualified experts in their fields.

[164] Robert Hebdon has focused his entire career on labour relations. He has taught/teaches on the topic at Cornell University, University of Manitoba and McGill University. He has acted as a labour arbitrator for five years, has a long list of journal articles books, and chapters in books that focus on labour relations.

[165] Ontario submits that the evidence of Professor Hebdon should be rejected because he worked for OPSEU for 24 years and has testified only on behalf of labour unions. Ontario notes that Professor Hebdon gave evidence in the *Manitoba Federation of Labour* case similar to the evidence he gave in this case and that the Manitoba Court of Appeal found no *Charter* infringement. I will address that case later in these reasons but note for the moment that the first instance judge in Manitoba Federation of Labour accepted Professor Hebdon's evidence. I would prefer to base my assessment of both experts on the quality and reliability of their evidence in this proceeding, not on what they have done or how they have been received by others in the past.

[166] Christopher Riddell is equally qualified. He has a PhD. in labour relations, and has taught courses on collective bargaining at Cornell, Queens and Waterloo. He too has published numerous articles in refereed journals and has received a variety of research grants. In recent years his emphasis appears to have switched more to economics and statistics than pure labour relations.

[167] The principal issue on which Professors Hebdon and Riddell provided evidence was the degree to which a cap on wage increases limits a union's ability to negotiate on non-monetary issues. Hebdon says it does. Riddell says it does not. Both also testified more generally on the extent to which the Act substantially interferes with collective bargaining. Again, Hebdon says it does. Riddell says it does not.

[168] I prefer the evidence of Professor Hebdon to that of Professor Riddell.

[169] Professor Hebdon's evidence about the limits that the compensation cap placed on the ability to negotiate on nonmonetary issues coincides with the evidence of numerous fact witnesses. Professor Riddell did not review the affidavits of fact witnesses although he had copies of them. In addition, Professor Riddell appeared to be unclear about the scope of the Act and was not aware until his cross-examination that Ontario Power Generation was covered by the Act even though its wages are in no way funded by Ontario.[88]

[170] Professor Hebdon's evidence also coincides more closely with common sense. If a union has the ability to demand unlimited wage increases, the union can surrender its wage

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[88] See Riddell Cross, June 10, QQ. 1416-17.

demands in exchange for concessions on nonmonetary issues. A limit on wage increases of 1%, seriously hampers the leverage a union has in this regard.

[171] Professor Riddell's evidence to the contrary is based on what he referred to as his personal experience at the University of Waterloo where he teaches. On cross-examination Professor Riddell admitted that his personal experience consisted of reading information that the union circulated to its members and to the public. In response to Professor Riddell's report, the Ontario Federation of Labour filed a report of Professor Bryan Tolson who was the chief negotiator for the Faculty Association at the University of Waterloo. According to Professor Tolson, the Act prevented any meaningful collective bargaining at the University of Waterloo. Ontario did not cross-examine Professor Tolson on his report.

[172] More significantly, Professor Riddell fairly conceded on numerous occasions in cross-examination that the Act constrained collective bargaining. For example, he agreed that:

(i) The Act is "clearly a serious restraint" on a memorandum of understanding at the University of Waterloo which provides that the starting point of any collective bargaining negotiation on compensation is the annual change in the Canadian Consumer Price Index.

(ii) The Act imposes a significant constraint on the unions' ability to bargain for cost-of-living increases when inflation is over 1%.

(iii) The goal of interest arbitration is replication. A 1% cap imposes limits on the ability to achieve replication in both negotiations and interest arbitration if comparator wages have increased by more than 1%.

(iv) The design of the legislation contains an imbalance between employers and employees.

(v) Costing non compensation issues under the Act as part of the 1% pay cap imposes constraints on collective bargaining.

v. Exemption Process

[173] Ontario points to the ability to apply for an exemption from the Act as further evidence that the Act is balanced and does not infringe the *Charter*. There has been one exemption granted under the Act. The evidence does not disclose the details of that exemption aside from a one-page letter granting it. All other exemptions have been rejected even when they were joint submissions from employer and union and even when the employer required the exemption to discourage staff from leaving for better paying positions in the private sector.

[174] The exemption process has also entailed lengthy delays. Unifor notes that it has filed a request for an exemption that has remained unanswered after two years.

[175] During collective bargaining negotiations with OSSTF, Ontario refused to discuss the exemption process. It refused to provide OSSTF with information about how the exemption process would work or what criteria would be taken into account in considering exemptions. A discretionary exemption process in which the criteria relevant to an exemption are not disclosed is of limited value when assessing compliance with the *Charter*.

C. Consultation

[176] Certain applicants take the position that Ontario had a duty to consult with them before passing the Act. Ontario and certain other applicants disagree with that position.

[177] The weight of the case law establishes that the Crown has no constitutional obligation under s. 2(d) to consult with unions or their members when it develops policies or legislation concerning compensation limits.[89]

[178] That said, the case law does appear to suggest that consultations can provide constitutional protection for potential breaches of s. 2(d) if the consultation meets certain requirements. As an alternative to its primary submission that the Act does not violate s. 2(d), Ontario submits that, if there were an element of the statute that could breach the *Charter*, any such breaches are saved because the government engaged in good faith consultations before passing the Act. For the reasons set out below, I am unable to accept this submission.

i. When Do Consultations Provide Constitutional Protection?

[179] In *Health Services,* the Supreme Court noted that legislators are not obliged to consult with affected parties before passing legislation but that it might be useful to consider whether the government did so as part of the Court's minimal impairment analysis under s. 1 of the *Charter* because consultation may indicate whether the government considered a range of other options.[90]

[180] In *BC Teachers' Federation*, Donald J.A. in his dissenting reasons suggested that consultation before legislation could be seen as a replacement for traditional collective bargaining and could result in a finding that freedom of association was not breached if the consultation was a truly meaningful substitute for collective bargaining.[91] On further appeal, the Supreme Court of Canada, in brief reasons, allowed the appeal agreeing "substantially" with the dissenting reasons of Donald J.A.[92]

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[89] See *Health Services*, at paras 157, 179; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. 124; *Gordon*, at paras. 106-13; *Dockyard Trades*, at para 57; *Manitoba Federation of Labour*, at para. 92.
[90] See *Health Services*, at para. 157.
[91] See *BC Teachers' Federation* (BCCA), at paras. 289-91.
[92] *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49, at para 1.

[181] According to Donald J.A., pre-legislative consultations can be a substitute for collective bargaining if the discussions give a union the opportunity to meaningfully influence the changes, by bargaining on terms of approximate equality, in a good faith consultation process.[93]

[182] A good faith consultation is one in which: the employees have the right to make collective representations to the employer and have those representations considered in good faith;[94] the parties engage in meaningful dialogue where positions are explained, and the parties honestly strive to find a middle ground;[95] and where parties provide information necessary to enable the other to understand their position and respond to it.[96]

ii. The Consultation Process Here

[183] The applicants challenge the validity of the consultations because it appears that the government was working on draft legislation while the consultations were ongoing. I do not find anything amiss in that. Governments and other large organizations will often have to work on several tracks simultaneously to provide timely responses to the challenges they face.

[184] That said, the consultations that Ontario conducted do not meet the test for consultations that would save the Act from being found constitutionally invalid. While the consultations may have been consistent with consultations that a government might conduct before passing ordinary course legislation, they were not a substitute for collective bargaining.

[185] The consultation here was not one that was designed to reach any agreement with any of the applicants. This was clear from the outset of the process. Past consultations on labour relations issues had taken a very different route. For example, when Ontario consulted the OSSTF on hiring practices in the past, it circulated a consultation paper that set out in some detail, the issues and sub issues that the government was considering, the status of those issues and the proposed changes. The consultation occurred over four months. Here, the consultation involved approximately 780,000 employees over a much broader sector of the public service. The consultations occurred over four weeks beginning in mid-April 2019 and were not preceded by the circulation of any consultation paper. Instead, Ontario circulated the following questions:

> 1. Elements of collective agreements could help or hinder our overall ability to achieve sustainable levels of compensation growth; and collective agreement provisions that work well in one sector

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[93] See *BC Teachers' Federation* (BCCA), at paras. 287, 291.
[94] *Ibid*, at para. 286.
[95] *Ibid*, at para. 348.
[96] See *OPSEU v. Ontario*, 2016 ONSC 2197, at paras. 137-38.

> may have unintended consequences in another. **Are there any aspects of the collective agreement(s) in your organization(s) that affect the ability to manage overall compensation costs?**
>
> 2. Potential opportunities to manage compensation growth could take different forms, for example, growth-sharing or gains-sharing, as identified in the September 2018 line-by-line review of government spending. **Are there any tools to manage compensation costs that you believe the government should consider?**
>
> 3. While no decisions have been yet made, the government is considering legislated caps on allowable compensation increases that can be negotiated in collective bargaining or imposed in binding arbitration. We wish to engage with you in good faith consultations on this option and invite your feedback. **What are your thoughts on this approach?**
>
> 4. Many different approaches to managing compensation growth and overseeing collective bargaining are in place in other jurisdictions, including other Canadian provinces. **Are there any tools applied in other jurisdictions which you think would work in Ontario? If so, what is the proposal and how would it work?**
> (Emphasis in original)

[186] The questions were not capable of producing any agreement with any union. The only product of that consultation could be either a set of further consultations based on the preliminary reactions to these questions or legislation that the government would unilaterally impose. None of the internal government timelines contemplated further consultations.

[187] Internal government documents contemplated the introduction of legislation "if necessary" shortly after the end of the scheduled consultations. In my view, the words "if necessary" were added to provide political protection in the event the documents were producible in any subsequent constitutional challenge. Legislation was the only possible outcome because the questions were not designed to reach an agreement on anything.

[188] If the consultations were intended to result in any sort of agreement, one might have expected Ontario to set out a proposal. None was ever presented during the consultations even though the President of Treasury Board had directed staff to explore caps of 1% to 2% as early as February 2019.

[189] The manner in which the consultations were carried out could not lead to agreement on anything either. The consultations were not led by government officials from the Treasury

Board Secretariat or any other relevant ministry with whom unions could bargain. Rather, they were led by an external lawyer hired by Ontario. The external lawyer held separate meetings with employer and employee groups. It is difficult to see how unions and employers could be expected to agree on anything if they were not speaking with each other.

[190] The consultations consisted of the external counsel reading from a prepared script and providing nonresponsive answers to questions. By way of example, the most obvious response to question number three which solicited opinions about potential legislated caps was what sort of caps the government had in mind. If the government was considering caps of 10% when inflation was running at 2.4%, speedy agreement was likely possible. Understandably one of the first questions the applicants asked in their consultations was: "What is the Government's definition of modest, reasonable and sustainable compensation?"

[191] Instead of advising that the government was considering caps of between 1% and 2% as the Minister had directed in February 2019, the government's answer consisted of a series of numbers dealing with the current deficit, net debt and the growth of its debt to GDP ratio. No information about the range of proposed caps was provided. Nor did the government explain who would be included in any wage caps, the period of moderation or any other parameters that were important to Ontario. In other cases, the unions were directed to the 2019 budget, a 400-page document that nowhere mentions wage caps of 1%. Mr. Porter admitted on cross-examination that expecting unions to find that figure in the budget would be like asking parties to "find a needle in a haystack."[97]

[192] Mr. Porter agreed on cross-examination that the consultation process that preceded Bill 124 was not intended to replicate or replace collective bargaining.[98] Indeed it was deliberately set up to separate employers and employees and to create an environment separate from the collective bargaining process so that parties could put forward ideas to moderate compensation growth without prejudice to future bargaining positions.[99]

[193] The unsuitability of the consultations as a substitute for collective bargaining is perhaps best demonstrated by the involvement of the applicant Society of United Professionals. It represents professional engineers, scientists, economists, auditors and others employed by Ontario Power Generation Inc. ("OPG"), the Independent Electricity System Operator ("IESO") and the Ontario Energy Board ("OEB").

[194] The Society and four other bargaining agents were invited for a 60-minute consultation with Ontario's external counsel. That allowed for 12 minutes of consultation for each of the five bargaining agents. The Society explained to the external counsel how the OPG, the IESO and the OEB were self funding and did not contribute to the province's debt.

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[97] Porter Cross, June 28, Q. 1960.
[98] See Cross-Examination of Jay Porter, held June 17, 2022, Q. 906 ("Porter Cross, June 17").
[99] *Ibid*, Q. 966.

External counsel could not explain how compensation in those organizations contributed to the provincial debt or deficit. The Society was then advised that electricity costs were of concern to the government and the organizations were ultimately included within the ambit of the legislation. Mr. Porter admitted in cross-examination that electricity costs were not part of the consultation process.

[195] As Lederer J. characterized a similar process before the introduction of an earlier piece of wage restraint legislation in 2012, "[w]hat seems apparent with hindsight is that Ontario was attempting to manage the process to the end it desired."[100]

[196] In that earlier decision, Lederer J. also characterized the government's failure to provide savings target breakdowns by individual school board, as a fundamental flaw in the "consultation" process.[101] So it is here. The government's failure to provide any information about the sort of wage limits it was considering made any agreement on the point impossible unless one expected all public sector unions in Ontario to come to the consultations ready to volunteer, out of the blue, limitations on wage increases that were less than half of the rate of inflation at the time.

[197] Ontario notes that it invited the applicants to a second consultation after the Act was introduced to which none of the applicants responded. That somewhat overstates the "invitation." As reproduced in Ontario's materials, the invitation is a mass email from "TBS Consultations" announcing the legislation and inviting stakeholders "to provide feedback on this proposed approach via" a general email address. It was not an offer to meet and discuss issues with any of the applicants.

[198] In these circumstances, the consultations Ontario conducted may have been in line with the sort of consultations a government might conduct before passing legislation that does not infringe on *Charter* rights to collective bargaining, but they did not entail the exchange of information, explanation of positions or relatively equal bargaining power that is necessary to make consultations a substitute for collective bargaining.

D. PREVIOUS EXPENDITURE RESTRAINT DECISIONS

[199] Ontario relies on a series of cases that have upheld wage restraint legislation in other contexts; principally *Meredith*, *Dockyard Trades*, *Gordon*, and *Manitoba Federation of Labour*. It submits that the Act is indistinguishable from the legislation that was upheld in those other cases.

[200] In *Meredith*, for example, the Supreme Court of Canada addressed the limitations on collective bargaining that the federal *Expenditure Restraint Act*,[102] ("ERA") imposed. The ERA was enacted in the wake of the international financial crisis of 2008. It limited salary

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[100] *OPSEU v. Ontario*, at para. 30.
[101] *Ibid*, at paras. 25, 35.
[102] S.C. 2009, c. 2, s. 393.

increases in the federal public sector to 1.5% for the years 2008 – 2010 inclusive. The Court held that this did not substantially interfere with collective bargaining.

[201] There are, however, significant distinguishing features between *Meredith* and other cases that upheld the ERA like *Dockyard Trades* and *Gordon*.

[202] First, *Meredith* and other ERA cases all noted that the wage cap it imposed "was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes."[103]

[203] By the time the ERA was enacted, the large majority of unionized federal employees had already reached collective bargaining agreements for the period the ERA covered that were consistent with the wage limits in the ERA. A minority of unions had not. These cases note that the legislation mirrored the results of free collective bargaining by the largest public service bargaining units.[104] In *Gordon,* for example, the Ontario Court of Appeal noted that it was difficult to imagine "that continuation of an unfettered bargaining process for the remaining minority would have produced significantly different outcomes, given that the settlement with the majority of the public service drove the determination of the wage increase caps."[105]

[204] The evidence before me is that the wage caps the Act imposes are less than the prevailing going rate in either the public or private sector in 2019.

[205] The ERA cases also note that the legislation permitted negotiation on nonmonetary clauses which have a pecuniary effect[106] such as working hours, vacations, leave, employment security, terms affecting work organization, staffing, assignments, and transfers.

[206] The evidence before me is that the Act monetizes many such benefits and includes them in the calculation of the 1% salary cap.

[207] Second, there was no evidence in the ERA cases that the salary cap was behind the rate of inflation and thereby deprived employees of the right to negotiate compensation increases to keep up with increases in the cost of living.

[208] Third, the ERA was introduced in the context of a world-wide financial crisis that led banks to fail, lending markets to freeze and forced governments around the world to provide massive injections of liquidity into the financial system and take substantial ownership interests in banks, insurance companies, automobile manufacturers and other businesses to prevent the world economy from collapsing. The ERA cases considered the financial crisis

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[103] *Meredith*, at para. 28. See also *Syndicat canadien*, at paras. 50-51; *Gordon*, at paras. 126-131, 139; *Dockyard Trades*, at para. 93.
[104] See e.g., *Gordon* at para. 126.
[105] *Ibid*, at para. 128.
[106] See *Meredith*, at para. 29; *Syndicat canadien*, at para. 55; *Gordon*, at para 163.

when determining whether the legislation substantially interfered with collective bargaining.[107] For example, in *Dockyard Trades*, the British Columbia Court of Appeal stated:

> In my view, the authorities indicate that the appropriate inquiry is a holistic, contextual, or blended one. The question of **substantial interference should be approached contextually, taking into account the nature of the matter subject to the interference, the effect of the interference, and the context or exigent circumstances in which the interference occurred**. If, on an assessment of all of those factors, it can be said that the interference was "substantial", then s. 2(d) is infringed.[108]

[209] The court revisited that theme at paras. 92 and 93 stating: "[i]n my view, the lengths and depth of the negotiations and consultations prior to the ERA's enactment was adequate, given the looming fiscal crisis… These findings are critical. Fiscal and economic context cannot be ignored."

[210] Ontario submits that any financial circumstances that led to the legislation should be considered in the s. 1 analysis and not when considering whether there was a breach of s. 2(d). While I generally agree, I can also understand why the British Columbia Court of Appeal took the 2008 financial crisis into account when determining whether there was a breach of s. 2(d). The fundamental question to ask when determining whether there was a breach of s. 2(d) is whether the legislation amounted to substantial interference with collective bargaining. One measure of substantial interference is to compare what the legislation provides with what was available in free collective bargaining. An international financial crisis that threatens the viability of banks, insurance companies and large-scale manufacturers across the world to the extent that governments were obliged to make huge equity injections into these businesses to keep them afloat has a bearing on what sort of salary increases would have been available through collective bargaining. In that sense, the financial circumstances that led to the legislation are also relevant to an infringement of s. 2(d).

[211] The Ontario Court of Appeal took a similar approach in *Gordon*, although the court also took the financial crisis into account in its s. 1 analysis. When assessing collective bargaining negotiations that occurred just before the ERA was passed, the court noted:

> Both sides were constrained by the economic crisis and the effect it would have on public opinion. How would a strike for higher wages be received publicly in a falling economy with increasing unemployment, especially given the job security public servants enjoy over their counterparts in the private sector?

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[107] See *Dockyard Trades*, at paras. 83, 92; *Gordon*, at paras. 99-101, 123-24, 172, 176 and 184-91.
[108] *Dockyard Trades*, at para. 83 (emphasis added).

…

> In short, the bargaining record, as carefully and extensively laid out by the application judge, shows sophisticated and experienced bargaining parties making the best of a bad situation and coming to reasonable settlements in the pre-ERA period. The bargaining units freely negotiated with eyes wide open to the global economic crisis and to their right of access to all the available options in collective bargaining.[109]

[212] I consider the financial situation of Ontario in the course of the s. 1 analysis, not the s. 2 (d) analysis. I simply note here that there was no financial crisis in Ontario when the Act was passed.

[213] Fourth, the ERA cases note that the government spent some time negotiating with unions before imposing legislative restraints. The negotiations were true collective bargaining negotiations aimed at reaching collective agreements. By way of example, in *Dockyard Trades*, the judge of first instance noted that the government negotiated as close to the maximum possible time given the financial crisis it faced; the government chose a "negotiate first, legislate second" approach; and that government negotiators made five different attempts to restart negotiations before passing legislation.[110]

[214] Ontario relies heavily on the decision of the Manitoba Court of Appeal in *Manitoba Federation of Labour.* That case dealt not with the ERA but with provincial wage restraint legislation that was introduced in 2017 and which capped wage increases over four years at 0%, 0%, .75% and 1%.

[215] Ontario points out that in *Manitoba Federation of Labour*, the court had before it similar evidence from Dr. Hebdon to the effect that the legislation at issue there fundamentally altered a union's ability to bargain because, once wage limits are pre-determined, the union loses its leverage to trade-off wages for other concessions. The trial judge accepted this evidence and concluded that the legislation substantially interfered with collective bargaining.

[216] The Court of Appeal reversed the trial judge's holding:

> The problem with the trial judge's conclusion is that it runs contrary to *Meredith* and the three appellate court decisions. The trial judge concluded that the "removal of monetary issues from the bargaining table" substantially interfered with the collective bargaining process. This conclusion is diametrically opposed to the

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[109] *Gordon*, at paras. 99, 101.
[110] See *Dockyard Trades*, at para. 92.

> jurisprudence which holds that legislation similar to the PSSA, which includes broad-based, time-limited wage restraint legislation, had not "substantially impaired the collective pursuit of the workplace goals."[111]

[217] Ontario asks me to apply the same reasoning here. Doing so would, in my view, ignore the Supreme Court of Canada and appellate jurisprudence to the effect that the decision in each case is contextual and fact-based.[112] As I understand those cases, it would be a legal error to conclude that there was no substantial interference in this case simply because some other cases involving different legislation and different factual contexts had found there to be no substantial interference. On the record before me, I am satisfied that the Act does substantially interfere with the process of collective bargaining.

[218] After the oral hearing of this matter concluded, Ontario advised me that the Supreme Court of Canada had refused to grant leave to appeal from the Manitoba Court of Appeal decision. I do not draw from that that the Supreme Court of Canada agreed with the Manitoba Court of Appeal in this respect. There are many considerations that factor into whether leave to appeal is granted. The Supreme Court of Canada has noted on many occasions that it is not a court of error correction. As a result, the fact that leave to appeal is refused cannot be taken as agreement with the Court of Appeal decision. In speaking about the principles relating to granting leave to appeal, Sopinka J. explained:

> The general principles are as follows. We are not a court of error and the fact that a court of appeal reached the wrong result is in itself insufficient. This is still the case if the court of appeal has misapplied or not followed a judgment of this Court. On the other hand, if a misinterpretation of one of our judgments becomes an epidemic in the courts below, then we may want to set the record straight.
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> …
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> Third, if the law is settled, we usually don't grant leave because a court of appeal has failed to follow it unless this becomes an epidemic. Then we might have to take another case in order to remind the courts below that their obligation is to follow the law. Another example where we may get into a matter shortly after we have decided it is where the courts below are misapplying or misinterpreting our decision and things have gotten out of control.
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> …

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[111] *Manitoba Federation of Labour*, at para. 100.
[112] See *Health Services*, at para. 92; *Meredith*, at paras. 40-42; *Mounted Police*, at paras. 47, 93; *Dockyard Trades*, at para. 83.

> Fourth, if we have dealt with the issue recently and further issues arise out of our judgment in the application of the matter that we have decided, we don't immediately rush in to decide all subsidiary issues. We like to see what the courts below are doing with our decision, how they are applying it.[113]

[219] As a result of the foregoing, I conclude that prior cases dealing with wage restraint legislation are relevant to consider in that they establish general principles to follow but the results in those cases do not predetermine the result in this case.

III. Freedom of Speech

[220] Certain applicants also submit that the Act restrains freedom of speech protected under s. 2(b) of the *Charter*.

[221] In support of this submission, they note that the Supreme Court of Canada has long recognized the importance of freedom of expression to organized labour, where the freedom of employees to express themselves, including through strike activity, becomes an essential component of labour relations.[114]

[222] The applicants who raise the freedom of speech issue submit that the legislated 1% wage cap renders expression through strike action or interest arbitration futile.[115] They argue that the expressive force of a strike lies in the ability of workers to enlist public support in order to exert pressure on the employer in the event of a bargaining impasse.[116]

[223] Although the *Charter* guarantees of freedom of speech, it does not guarantee the effectiveness of the speech. As the Supreme Court of Canada noted in *Toronto (City) v. Ontario (Attorney General)*,

> In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message,

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[113] D. Lynn Watt *et al.*, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters Canada, 2022), at Part 4—Supreme Court Rules, *Sopinka, The Supreme Court of Canada*, online: Westlaw Canada Texts and Annotations <nextcanada.westlaw.com/Document/Ib0202a022cfb4cede0440021280d79ee/View/FullText.html>. See also *Important information about seeking leave to appeal to the Supreme Court of Canada* (2022), at *3. What is the mandate of the Supreme Court of Canada?,* online: Supreme Court of Canada <scc-csc.ca/unrep-nonrep/app-dem/important-eng.aspx>.

[114] See *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 25 ("*KMart*"); *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at paras. 25, 33-35; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, at paras. 29-33.

[115] See Affidavit of Scott Travers, sworn January 29, 2021, at para. 15.

[116] See *KMart*, at para. 25.

> or that campaign materials otherwise retain their usefulness throughout the campaign.[117]

[224] In my view, the Act does not restrain freedom of expression. Unions remain free to express whatever views they want about both the Act and the government that enacted it. They are free to communicate, protest and take whatever steps they believe would be effective to force the government to withdraw the legislation or have the government voted out of office. While the Act may make their speech less effective insofar as it occurs within the context of collective bargaining, it does not restrain the ability to speak, nor does it render less effective any political action the unions may wish to take.

[225] It strikes me that the constitutional right at issue is better analysed through the framework of freedom of association where the Supreme Court of Canada has made it clear that any government measure that substantially interferes with collective bargaining constitutes a violation of freedom of association. The expressive force of a strike to which the applicants refer is more closely related to the freedom of association and the ability to bargain collectively than it is to freedom of speech.

IV. Section 15 Equality Argument

[226] The applicants submit that the Act also violates equality rights under s. 15 of the *Charter* because the Act disproportionately targets women and racialized women in particular.

[227] Section 15 of the *Charter* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[228] The applicants characterize this as an adverse impact case because the law is neutral on its face but has a stronger adverse impact on women and racialized women than on other groups.

[229] In *Health Services*, the Supreme Court of Canada found that a British Colombia statute breached s. 2(d) of the *Charter* by invalidating provisions of collective agreements, precluding meaningful collective bargaining on a number of specific issues and voiding any collective agreement inconsistent with it. The court, however, refused to find that the statute breached s. 15 of the *Charter* noting:

> **The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are.** Nor does the evidence disclose that the Act reflects the stereotypical application of group or

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[117] 2021 SCC 34, at para. 39.

> personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.[118]

The applicants submit that the Supreme Court of Canada changed the approach applicable to adverse impact cases in *Fraser v. Canada (Attorney General)*,[119] in a way that overrules this aspect of *Health Services*. I do not read *Fraser* in the same way. In my view, *Fraser* applies the same analysis to the situation as *Health Services* did.

[230] In *Fraser,* the court set out the following test for infringement of equality rights under s. 15:

> (a) Does the law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground, including by having an adverse impact on members of a protected group?
>
> (b) If so, does it impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including historical disadvantage?[120]

[231] In my view, the applicants' s. 15 argument falls on the first branch of the test in *Fraser*. The Act does not draw a distinction, either on its face or in its impact, based on a protected ground. It draws a distinction based on the identity of one's employer. The Act does not affect women in the public sector any differently than it affects men in the public sector.

[232] The applicants say adverse impact arises because the public-sector is predominantly female. If that alone were enough for a s. 15 claim, one could never have any law or regulation about the public-sector without being discriminatory.

[233] As already noted, the Act affects over 780,000 employees. A group that large inevitably includes a broad range of employees who are male, female, straight, LGBTQ+, members of visible minorities, ethnic majorities, religious minorities, Indigenous and non-Indigenous persons. Public-sector employees work in job classes that are predominantly female, like nursing; predominantly racialized like Personal Service Workers; and predominantly male like OPP officers or engineers. The Act applies equally to all of them.

[234] The Act distinguishes between employers, not occupations. It applies to certain employers (that is to say those within the broader provincial public-sector) but not to others (such as municipalities and for-profit long-term care homes). There is no evidence that workplaces

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[118] *Health Services*, at para. 165 (emphasis added).
[119] 2020 SCC 28, at para. 50.
[120] *Ibid*, at para. 27.

covered by the Act are more female-predominant or racialized than similar workplaces that are not covered by it, such as municipal employees or for-profit long-term care homes. There is no evidence about wages of men and women in sectors covered by the Act compared to those in similar sectors not covered by it.

[235] Moreover, the *Pay Equity Act*[121] applies throughout the public sector. It is intended to redress systemic gender discrimination[122] and is unaffected by the Act. The applicants submit that the *Pay Equity Act* is overly limited in its scope and does not protect against the inequities of which the applicants complain. The general adequacy or inadequacy of the *Pay Equity Act* is, however, beyond the scope of this application.

[236] This is not a case like *Fraser*,[123] *Griggs v. Duke Power Co.*[124] or *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[125] which concerned adverse impact discrimination in situations in which virtually all employees who were adversely affected by a facially neutral law were members of a disadvantaged group. All men in the public service are affected by the Act in the same measure as all women are. Although the Act may impact lower wage earners more significantly than higher wage earners, I have not been taken to any cases that would apply section 15 to protect individuals based on their income level.

[237] The applicants point out the Act carves out male-dominated occupations such as municipal firefighters. While that is the case, it also carves out female dominated occupations like municipal librarians or municipal nurses. Again, the basis of distinction is not the job but the employer.

[238] The applicants submit that looking for a basis of distinction reverts back to older law calling for the identification of a comparator group which has since been overruled in favour of the approach articulated in *Fraser*. On my reading of *Fraser* that submission goes too far. The test in *Fraser* speaks of drawing a distinction based on an enumerated or analogous ground.[126] The court stated that "[f]or over 30 years, the s. 15 inquiry has involved identifying the presence, persistence and pervasiveness of disadvantage, based on enumerated or analogous grounds."[127]

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[121] R.S.O. 1990, c. P.7.
[122] See *Ontario Nurses' Association v. Participating Nursing Homes*, 2021 ONCA 148, at paras. 1, 12; *Pay Equity Act*, s. 4(1).
[123] Where pension rules disadvantaged women who went on reduced hours for child-care reasons but did not disadvantage officers who were suspended for disciplinary reasons. Although the pension rules were facially neutral, almost all persons who reduced hours for child-care were women.
[124] 401 U.S. 424 (1971) (United States Supreme Court case regarding educational and standardized testing requirements that disproportionately disqualified African American job applicants), cited in *Fraser*, at paras. 32-34.
[125] [1999] 3 S.C.R. 3 (requirements for forest firefighters that disqualified most women job applicants, at para. 11).
[126] See *Fraser*, at para. 27.
[127] *Ibid*, at para. 136.

[239] *Fraser* continued to apply that principle by noting that the disadvantages of the policy at issue there were felt almost exclusively by women.

[240] The expert reports of both sides on the equality issue demonstrate that the workforce continues to be heavily gender segregated.

[241] The evidence on behalf of the applicants is that:

a. Ontario's labour market is segregated by sex such that women and men largely work in different industries and occupations doing different jobs in different workplaces. This pattern by which women predominate in health care, social service and education work has remained largely unchanged for decades.[128]

b. Sex segregation of the labour market is accompanied by systemic sex discrimination that devalues the skills, effort, responsibility and working conditions of women's work which results in lower pay relative to male-dominated work of similar value.[129]

c. Women's care work is even more intensely devalued and underpaid because it is associated with women's traditional unpaid work in the home and assumed to be what women do naturally rather than being skilled work (often referred to as the "care penalty").[130]

d. Women's care work is done disproportionately by racialized women.[131]

e. While burdened by the care penalty, female-dominated work in the social services sector is also devalued by a second gendered dynamic: the "charitable sector penalty". Historically, churches and other organizations provided social services in the form of charity, mainly by women delivering services without pay. Though this work is now formalized in the broader public sector, norms rooted in the sector's charitable history continue to suppress women's pay.[132]

[242] That evidence was not seriously contested by the Crown. I accept that evidence. It demonstrates that, despite the efforts made over the past few decades, we still have far to go as a society to ensure true equality between genders and races. But it does not change

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[128] See Expert Report of Dr. Pat Armstrong, dated January 19, 2021, at paras. 7-8, 34-55 ("Armstrong Report"). See also Affidavit of Kaylie Tiessen, affirmed April 9, 2021, at paras. 41-42 ("Tiessen Affidavit").
[129] See Armstrong Report, at paras. 37-43. See also Exhibit A to Tiessen Affidavit, at pp. 26-28; Affidavit of Sarah Braganza, affirmed June 28, 2021, at paras. 45-46, 53-56.
[130] See Armstrong Report, at paras. 6, 73-78. See also Exhibit A to Tiessen Affidavit, at pp. 50-54; Godick Affidavit, at paras. 20-46, 51-52.
[131] See Armstrong Report, at paras. 9, 56-63. See also Tiessen Affidavit, at paras. 31-34, 58-65, and Exhibit A; Atkins Affidavit, at paras. 27-30; Godick Affidavit, at para. 39.
[132] See Tiessen Affidavit, at paras. 43-49, 60.

the fact that the Act creates distinctions based on the employer, not occupation, gender or race.

[243] A number of applicants also asked me to find that s. 28 of the *Charter* amounted to a notwithstanding clause that supersedes any other notwithstanding provision in the *Charter*. Section 28 provides that "[n]otwithstanding anything else in the *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

[244] In light of the fact that I have dismissed the equality claim under s. 15, it is not necessary to address the interpretation of s. 28.

[245] On November 24, 2022, counsel for Ontario drew to my attention the case of *R. v. Sharma*[133] which addresses the analytical approach to take when addressing s. 15 of the *Charter*. I have reviewed that decision. It has no effect on the outcome of my analysis and in my view is substantially in line with the analysis set out above. I have therefore not asked for any submissions on *Sharma* nor has any party requested the opportunity to make submissions.

IV Section 1 Analysis

[246] Ontario submits that, if there are any *Charter* violations, they are saved by s. 1 which provides that "[t]he *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[247] The ultimate question under s. 1 is whether the *Charter* infringement can be demonstrably justified in a free and democratic society. That by necessity requires the court to balance the objective that the *Charter* infringement seeks to achieve against the degree of the infringement of the *Charter* right. The answer in any one case is highly context dependent. In one set of circumstances a certain degree of infringement may be quite acceptable. In another, the infringement may be entirely unacceptable.

[248] A government relying on s. 1 bears the onus of demonstrating its applicability. To do so, the government must demonstrate that:

A. The objective of the measure is pressing and substantial.

B. There is a rational connection between the object and measures taken to achieve it.

C. The measure taken minimally impairs the *Charter* right.

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[133] *R. v. Sharma*, 2022 SCC 39 (CanLII),

D. The benefits achieved by the measure outweigh the negative impact on *Charter* rights.[134]

[249] In assessing these four aspects of the s. 1 test, courts are required to show a degree of deference to the legislator in recognition of the different roles of the legislative and judicial branches of government.

[250] Ontario notes that the Act is motivated by a concern for the prudent management of the Province's public finances, optimal levels of taxation, the impact of compensation on the Province's debt and deficit, provincial workforce planning (including the desire to avoid involuntary layoffs), and the provision and protection of sustainable levels of public services.

[251] Ontario submits that this case falls at the high end of judicial deference. The issues at play are far removed from the institutional competence of the court. Judges cannot and should not determine optimal levels of taxation or spending through the litigation process. These are classic political issues on "which elections are won and lost."[135]

[252] As the Supreme Court of Canada cautioned in *Vriend v. Alberta*, "courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches."[136] The role of courts "is to protect against incursions on fundamental values, not to second guess policy decisions" because legislatures must be given reasonable room to manoeuvre when they struggle with questions of social policy and conflicting social pressures.[137]

[253] Even greater deference is owed when dealing with complex fiscal and economic balancing.[138] The courts are also required to recognize the symbolic leadership role of government. As Dickson C.J. put it:

> Many government initiatives, especially in the economic sphere, necessarily involve a large inspirational or psychological component which must not be undervalued. The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference

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[134] See *Frank v. Canada (Attorney General)*, 2019 SCC 1, at para. 38 ("*Frank* (SCC)").
[135] Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, loose-leaf, 5th ed. suppl. (Toronto: Thomson Reuters Canada Ltd., 2022), at para. 47:12.
[136] [1998] 1 S.C.R. 493, at para. 136.
[137] *R. v. Chouhan*, 2021 SCC 26, at paras. 132-33.
[138] See *PSAC v. Canada*, [1987] 1 SCR 424, at paras. 29, 34 and 39-40. See also *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home et al. and two other applications* (1983), 44 O.R. (2d) 392 (Div. Ct.) (upholding provincial compensation restraints under s. 1), rev'd (1984) 48 O.R. (2d) 225 (C.A.), cited in *PSAC v. Canada* (with approval on this point, at paras. 41-43), *per* Dickson C.J. (dissenting in part); *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at paras. 67-73; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, at paras. 83-84 ("*N.A.P.E.*"); *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, at paras. 267, 279.

> as is reasonably possible with the rights and freedoms guaranteed by the *Charter*.[139]

[254] At the same time, the section 1 requires governments to demonstrate that the limit on the right is reasonable and that it is *demonstrably* justified. The court undertakes both of those analyses in the context of a commitment to uphold rights and in the context of a free and democratic society.[140]

[255] With these principles mind I turn to the four elements of the s. 1 test.

A. Pressing and Substantial Objective

[256] Ontario submits that the objective of the impugned law is to moderate the rate of growth of compensation increases for public sector employees so as to manage the Province's finances in a responsible manner and to protect the sustainability of public services.[141] Ontario submits that this is a pressing and substantial objective under s. 1 of the *Charter*.

i. Defining the Objective

[257] Before turning to the pressing and substantial nature of the objective, I address the definition of the objective itself. It strikes me that Ontario's statement of its objective conflates the means of achieving an objective with the objective itself. The responsible management of Ontario's finances and the protection of sustainable public services is an objective which may be capable of meeting the pressing and substantial need test. The moderation of public-sector wages strikes me more as a means to achieve responsible financial management than as an objective in itself. To determine whether moderating wages amounts to a pressing and substantial need, one must understand why the wage increases are being moderated.

[258] This is more than academic parsing. The definition of the objective may have an effect on the remaining three branches of the test. By way of example, there would clearly be a rational connection between the Act's limitation of wage increases to 1% and the objective of moderating wages. If the means and the objective are one of the same, the means would always be rationally connected to the objective.

[259] As the Supreme Court of Canada has explained, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective."[142]

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[139] *PSAC v. Canada*, at para. 36.
[140] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at p. 135-136.
[141] See Bill 124, Preamble, s. 1.
[142] *KMart*, at para. 59.

For purposes of the s. 1 analysis, I define the objective as the responsible management of Ontario's finances and the protection of sustainable public services.

ii. Legal Principles

[260] There was considerable disagreement between the parties about the extent to which the court should inquire into the pressing and substantial nature of the objective that Ontario asserts. The differences appear to arise out of two contrasting lines of cases from the Supreme Court of Canada.

[261] Ontario describes the test as a low bar and points out that few *Charter* cases fail because of the government's inability to demonstrate a pressing and substantial objective. Ontario submits that refusing to find a substantial and pressing objective here would involve the court at the policy level in that the court would have to evaluate the importance of government policy. Ontario says it need not show any urgency associated with the objective. It need only show a valid government purpose.

[262] Ontario relies on cases like *Harper v. Canada (Attorney General)*, where the Supreme Court of Canada said that the government need not prove a pressing and substantial objective but merely assert one.[143] If this is correct, and the mere assertion of an objective without any need to evaluate the objective or the context in which it arises, I would agree that the need to manage finances responsibly and sustain public services is a substantial and pressing objective.

[263] There are, however, a number of Supreme Court of Canada cases, both before and after *Harper*, which suggest that financial and budgetary considerations should be treated as suspect because governments are always subject to budgetary tensions. Treating something as suspect, implicitly requires evaluation.

[264] In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, the Supreme Court noted:

> The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*.[144]

[265] In *N.A.P.E.*, Binnie J. said:

> The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of

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[143] 2004 SCC 33, at paras. 25-26.

[144] [2003] 2 SCR 504, at para. 109, citing *Ref re Remuneration of Judges of the Prov. Court of P. E. I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, at para. 281; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709.

> *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are always budgetary constraints and there are always other pressing government priorities.[145]

[266] In *Health Services*, the court affirmed that:

> To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.* and *Martin,* indicating that "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints.[146]

[267] Most recently in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* the Supreme Court of Canada reaffirmed its view that budgetary objectives are generally not pressing and substantial stating:

> In my view, the courts below erred in ruling that "the fair and rational allocation of limited public funds" is a pressing and substantial objective in the case at bar. Public funds are limited by definition. Every government allocates its funds among its various programs on the basis of certain scales, and as fairly as possible. If merely adding the words "fair and rational" to the word "allocation" sufficed to transform the allocation of public funds into a pressing and substantial objective, it would be disconcertingly easy for any government to intrude on fundamental rights. I cannot accept such a result. The fair and rational allocation of limited public funds represents the daily business of government. The mission of a government is to manage a limited budget in order to address needs that are, for their part, unlimited. This is not a pressing and substantial objective that can justify an infringement of rights and freedoms. Treating this role as such an objective would lead society down a slippery slope and would risk watering down the scope of the *Charter*.[147]

[268] Returning for a moment to *Harper* and its statement that the government need not prove a pressing and substantial objective but only assert one, I note that *Harper* was a case dealing with spending limits on electoral advertising by third parties. It did not involve any budgetary considerations as a justification for breaching *Charter* rights. The Supreme Court of Canada cases cited above would appear to make it clear that when the government

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[145] *N.A.P.E.*, at para. 72.
[146] *Health Services*, at para. 147.
[147] 2020 SCC 13, at para. 153.

invokes budgetary restraint as a reason for infringing *Charter* rights, the court is called upon to engage in some sort of evaluation of the assertion.

[269] That said, there are a number of cases in which budgetary considerations have amounted to pressing and substantial objectives under section 1. Those case have, however, involved some sort of financial emergency like the international financial crisis of 2008 in *Meredith*, *Dockyard Trades* and *Gordon* or the "severe financial crisis" that Newfoundland suffered in *N.A.P.E.* In the latter case, federal transfer payments that constituted 45% of Newfoundland's revenues had been cut by $130 million, the provincial debt had been downgraded to B grade which resulted in much less of the debt market being available to Newfoundland and resulted in higher interest payments, the government had already closed 360 acute care hospital beds, frozen per capita student grants, made government wide reductions in operating budgets, reduced or eliminated a range of programs, laid off 1,300 permanent and 350 part-time positions, eliminated 500 vacant positions and terminated Medicare coverage for a number of treatments.

[270] In *N.A.P.E.*, the court noted, at para. 64, that while budgetary considerations in and of themselves cannot normally be invoked as freestanding pressing and substantial objectives, at some point a financial crisis can attain dimensions where "elected governments must be accorded a significant scope to take remedial measures even if the measures taken have an adverse effect on a *Charter* right". Whether an economic situation is sufficiently serious to justify overriding a *Charter* right depends on the gravity of the situation at hand.[148] In *Gordon,* for example the Court of Appeal refers to the 2008 financial collapse as a "crisis" 50 times and reminds us that where the reason for the infringing measure is a "national emergency",[149] that context must be kept in mind *throughout* the *Charter* analysis.

[271] All these cases suggest some level of urgency. A level of urgency is also implicit in the pressing and substantial moniker the test as been given. The *Oxford Dictionary of English* defines "pressing" as "requiring quick or immediate action or attention."[150] It defines "substantial" as "of considerable importance, size or worth".[151]

[272] I do not think it advisable to try to define with even more adjectives what constitutes a pressing and substantial objective but say only as the Supreme Court of Canada did in *Conseil scolaire* that it requires more than the day-to-day business of government.

[273] The question then becomes whether the financial situation of Ontario in 2019 was sufficiently serious to justify infringing on the applicants' constitutionally protected right to collective bargaining.

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[148] See *PSAC v. Canada*, at para. 30.
[149] See *Gordon*, at para. 198.
[150] Michael Proffitt, Philip Durkin & Edmund Weiner, eds, *Oxford English Dictionary* (London: Oxford University Press, 2022) sub verbo "pressing".
[151] *Ibid*, sub verbo "substantial".

iii. Evidence of a Pressing and Substantial Objective

[274] Shortly after its election in June 2018, the Ontario government appointed an Independent Financial Commission of Inquiry which delivered its report on August 30, 2018. After implementing changes in accounting practices, the Commission changed the fiscal statement for 2017/18 from a surplus of $0.6 billion to a deficit of $3.7 billion and revised the projected deficit for 2018/19 from $6.7 billion to $15 billion. This prompted the need to control the growth of government expenditure and led to the Act.

[275] Ontario relies primarily on the expert's report of Dr. David Dodge in support of its submission that the financial situation of Ontario in 2019 justified overriding s. 2(d). Dr. Dodge's credentials are undoubted. He holds a PhD in economics and is a tenured professor of economics. He has held senior positions dealing with fiscal and macroeconomic policy. He acted as Governor of the Bank of Canada between 2001-2008, as federal Deputy Minister of Health between 1998-2001, and as federal Deputy Minister of Finance between 1992-1997. The Applicants did not cross-examine Dr. Dodge on his report.

[276] Dr. Dodge points to the following challenges in Ontario's fiscal situation in 2019: Its economic growth would be lower than the growth for government services. Without adjustments this would lead to continuing, growing deficits which may reduce the scope of available fiscal stimulus to respond to changes in the business cycle when needed. A higher debt to GDP ratio also results in higher borrowing costs and further limits the government's scope of fiscal intervention when needed. Unless controlled, the situation would at some point become unsustainable.

[277] In 2018-19 Ontario's net debt to GDP ratio was projected to be 40.7%. In Dr. Dodge's view it should be brought below 40% and remain there.

[278] Dr. Dodge also warns of the possibility of rising interest rates increasing Ontario's debt service cost to revenue ratio. The Supreme Court of Canada has recognized that governments can act in the present with a view to prevent future deterioration to justify infringing measures under s. 1.[152] In Dr. Dodge's view, the ratio of debt service costs to revenues "should be significantly less than 10%."[153] In 2019 that ratio was 8%. Ontario's projections had it rising to 9% in 2027. The most recent evidence before the court is that the debt cost to revenue ratio is 7.4% for the year 2020-21 with projections for subsequent years through to 2025 varying between 7.5% and 7.6%.

[279] Dr. Dodge's report also describes ensuring fiscal sustainability as a "herculean challenge for the Ontario government" and that "compensation restraint constituted a critical element of any fiscal consolidation strategy."[154]

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[152] See *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ("*Hutterian Brethren*").
[153] Affidavit of David A. Dodge, sworn August 12, 2021, at para. 61 ("Dodge Affidavit, August 12").
[154] *Ibid*, at para. 72.

iv. The Limitations on the Evidence

[280] Dr. Dodge does not claim that Ontario faced a "severe fiscal crisis" like the one that justified the measures discussed in *N.A.P.E.*,[155] let alone an international economic crisis like the one that prompted the ERA in 2008/9.[156] Rather, he points to the potential for the cost of debt to rise at some future unspecified point.[157] That certainly calls for prudent management. Does it call for the breach of *Charter* rights? Dr. Dodge merely advocates for fiscal prudence. While fiscal prudence is a laudable and responsible objective for any government, it can as a result, be used to breach *Charter* rights at any time.

[281] While Dr. Dodge refers to Ontario's debt to GDP and debt cost to revenue ratios, he does not compare Ontario's ratios in this regard to those of other jurisdictions apart from a brief reference to Quebec and its weaker ratios without Quebec having suffered any apparent detriment.

[282] In assessing Ontario's position, I cannot not be blind to certain not uncommon political scenarios. It is not uncommon for a new government to disclose with surprise and disappointment that the fiscal situation left by the previous administration was far worse than imagined. This is usually accompanied by a new, more negative assessment of the fiscal situation. When actual results are disclosed in subsequent years, the deficits turn out to be smaller than originally forecast. A positive change which the government of the day attributes to its responsible fiscal management and not to overly negative assessments or projections.

[283] While I am not saying that this is what occurred here, the facts do disclose that shortly after the Act was introduced, the Ministry of Finance revealed that the deficit was in fact $7.4 billion, not $14.5 billion and the debt to GDP ratio was 40%. It appears that most of the difference had to do with the reversal of the way in which the Financial Commission of Inquiry had accounted for pension liabilities and assets. Dr. Dodge agreed that it would not be unreasonable for the government to reverse the accounting treatment of those assets and liabilities. Since 2019 government revenue has also been 5 to 6% higher than predicted in 2019. The Commission also spoke of the long term goal of restoring the Province's AAA credit rating. The rating had been reduced in in 2012.

[284] In addition, Ontario points to a report from EY which it commissioned in July 2018 to conduct a line-by-line review of government expenses. EY noted that although the government had full control over compensation with direct employees and significant control over compensation in consolidated sectors such as hospitals, school boards and colleges, it had "very little" control over negotiations in the remainder of the broader public sector. It noted that while the government could exercise direct control over the broader public sector, this would take time. I was not taken to any breakdown of the comparative

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[155] *N.A.P.E.*, at para. 59.
[156] See *Meredith,* at paras. 8-9.
[157] See Dodge Affidavit, August 12, at paras. 56-59.

size of sectors over which the government exercised full control or considerable control as opposed to those where it exercised less control. Nor was I the taken to any explanation of how much time it would take to exert greater control over the broader public sector and what risks that timeline posed for Ontario. The lack of that evidence is significant given that the Act appears to apply to control compensation and sectors that in no way affect government expenditure or debt.[158]

[285] The applicants point out that, at the same time as the Act was imposed, the government pursued a course of large tax cuts. According to the Financial Accountability Office of Ontario, an agency of the Government of Ontario mandated to provide independent financial advice and analysis about Ontario's finances, in 2019 the government announced tax cuts of $4.3 billion in 2019; $4.1 billion in 2020; $5.7 billion in 2021, $7 billion in 2022 and $3.8 billion in 2023.[159] In addition, it notes that there was a further $9.9 billion of unannounced cuts embedded into government projections.[160]

[286] Jay Porter estimates the cost savings achieved by the 1% pay cap at $400 million per year.

[287] The applicants further note that the government then eliminated $ 1billion per year in revenue from vehicle license plate stickers and, in 2022, refunded to drivers any monies they had paid for license plate stickers between March 1, 2020 and March 1, 2022.

[288] I hasten to add that I am not suggesting that the government has somehow acted improperly in imposing wage restraint at the same time as it as provided tax cuts or license plate sticker refunds. I recognize that governments may have to pursue policies that may seem inconsistent on the surface such as simultaneous budgetary restraint and economic stimulus. I am also mindful of the warning of the Court of Appeal in *Gordon* that judges ought not to see themselves as finance ministers.[161]

[289] Ontario has not, however, explained why it was necessary to infringe on constitutional rights to impose wage constraint at the same time as it was providing tax cuts or license plate sticker refunds that were more than 10 times larger than the savings obtained from wage restraint measures. The closest to an explanation in the record is a statement in Dr Dodge's report to the effect that certain "unannounced revenue-reducing measures **appear** to have been aimed primarily at increasing the North America-wide competitiveness of Ontario's business taxation to induce increased investment in Ontario."[162]

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[158] See for example the discussion on energy sector employees in the section on rational connection below.
[159] See Affidavit of Sheila Block, sworn April 14, 2022 (Table 4, at para. 83, citing Financial Accountability Office of Ontario, *Economics and Budget Outlook: Assessing Ontario's Medium Term Budget Plan*, by Nicholas Rhodes *et al.* (Toronto: FAO, Fall 2018), at p. 16; Financial Accountability Office of Ontario, *Economics and Budget Outlook: Assessing Ontario's Medium Term Budget Plan*, by Jay Park *et al.* (Toronto: FAO, Fall 2019), at p. 12).
[160] *Ibid*.
[161] See *Gordon*, at para. 224.
[162] Dodge Affidavit, August 12, at para. 52 (emphasis added).

[290] Dr. Dodge adds that he has no precise definition of those revenue cutting measures and provides no evaluation of them.

[291] If tax competition with other jurisdictions is indeed the reason for tax cuts, the people whose *Charter* rights have been breached are entitled to a cogent explanation from the government about why it was necessary to breach their *Charter* rights to achieve tax competition. An assumption in an expert's report does not suffice. That cogent explanation should set out how Ontario's tax rates compare to what Ontario sees as its competitors, why the tax cuts are necessary, and what they aim to achieve.

[292] Those explanations are critical for four reasons. First, because courts conduct the s. 1 inquiry in the context of a commitment to uphold *Charter* rights.[163] Second, because s. 1 requires that any limitations on *Charter* rights be reasonable. That is to say it must be rationally explained, not merely asserted. Third, because s. 1 requires that any limitations on *Charter* rights be "demonstrably" justified. This requires governments to demonstrate why the infringement is necessary. *Charter* rights should not be violated simply because a government find it more convenient to pursue a particular policy by breaching *Charter* rights rather than complying with them. Fourth, the beneficiaries of *Charter* rights are often politically vulnerable or unpopular. There are segments of the public that are hostile to unions and feel that their power should be reduced. That could provide a political motivation to do just that. Without requiring governments to explain with some degree of cogency why *Charter* rights must be infringed, it is too easy for governments to breach the *Charter* rights of the vulnerable or the politically unpopular under the guise of fiscal prudence.

[293] The business of government ought ordinarily to be pursued within the confines of the *Charter*. Breaching a *Charter* right should require something more than a simple preference to proceed in a particular way for political convenience. It should require some level of explanation for why it is necessary to breach the *Charter* right. If governments act in a manner that is inconsistent with their explanation for why a *Charter* breach is needed, they should at least be required to explain the inconsistency. If no explanation is required, governments are free at any time to breach *Charter* rights on economic grounds. Requiring these explanations does not have judges acting as finance ministers. It has finance ministers acting in compliance with constitutional requirements. Judicial deference is owed to cogent explanations that justify *Charter* infringements. Deference is not owed to simple assertions.

[294] As noted earlier, in *Conseil scolaire* the Supreme Court of Canada rejected the "fair and rational allocation of limited government funds" as a pressing and substantial objective. Similarly, here, adding the word "responsible" to managing public finances or "sustainable" to delivering public services does not transform those tasks into pressing or substantial objectives under s. 1. Managing finances responsibly to ensure the sustainability of public services is the daily business of government. Here, as in *Conseil*

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[163] *Oakes* at p. 135-136.

scolaire, the mission of a government is to manage limited resources to address unlimited needs. Dr. Dodge describes this as a "herculean" challenge. That adjective changes nothing. Although that task of managing public resources and public expectations is inevitably extraordinarily challenging, it has been the core task of government since the advent of widespread social programs. As of 2019, Ontario had experienced and was continuing to experience a long period of growth after its emergence from the world financial crisis. Although Ontario may have experienced deficits, the management of deficits is a perennial political issue in Canada.

[295] In addition to Dr. Dodge's evidence, Ontario has also filed reports from Kimberly Henderson and Robert Lee Downey. Both are former senior civil servants in British Columbia. Both say that wage restraint legislation is necessary in the public sector because collective bargaining is not as effective in the public sector as it is in the private sector. They say unions do not face the same pressure in the public sector because they know their employer will never be bankrupted by a strike. This they say, changes the balance of power. In addition, they say public sector unions are not willing to negotiate financial concessions for fear that other unions will manage to avoid the government's restraint agenda. Finally they say interest arbitration is undesirable because governments are reluctant to put their financial future into the hands of a third party.

[296] My difficulty with those opinions is that they seem to take issue with the concept of collective bargaining and interest arbitration more generally. I am bound by Supreme Court of Canada decisions that guarantee a constitutional right to collective bargaining and that require that abolishing the right to strike must, in effect, be replaced with interest arbitration. Moreover, the view that wage restraint cannot be negotiated in the public service contradicts the evidence of Ontario's collective bargaining expert in this proceeding.

[297] This brings me back to the point that although managing public resources in a way to sustain public services can amount to a pressing and substantial objective in appropriate circumstances, Ontario has not, on my view of the evidence, demonstrated that the economic conditions in 2019 were of a sufficiently critical nature to warrant infringing on the constitutionally protected right to collective bargaining.

[298] In the event I am incorrect on this assessment, I consider below the remaining branches of the s. 1 test.

B. Rational Connection

[299] The second branch of the s. 1 analysis requires the government to demonstrate that there is a causal connection between the limit on the right and the intended objective.[164] The government need not do so with scientific proof. It is sufficient if "it is reasonable to

[164] See *Frank* (SCC), at para. 59.

suppose that" the impugned measure may further the objective, not that it will actually do so."[165] This aspect of the test has been described as "not particularly onerous."[166] The rational connection step requires the measure not to be arbitrary, unfair or based on irrational considerations. As long as the challenged measure "can be said to further in a general way an important government aim" it will not be seen as irrational.[167]

[300] The hallmarks of rational connection in an impugned measure are "care of design" and a "lack of arbitrariness".[168]

[301] Compensation represents roughly half of the Province's expenditures.[169] Moderating the rate compensation increases is therefore logically related to the responsible management of the Province's finances and the protection of the sustainability of public services insofar as it concerns wages that Ontario pays for directly. The Act, however, goes well beyond wages for which Ontario pays directly.

i. The Electricity Sector

[302] On the record before me, there is no rational connection between the government's objective and wages at OPG, the OEB or the IESO, to all of whom the Act applies.

[303] OPG is a for-profit corporation operated pursuant to the *Electricity Act, 1998*.[170] It is responsible for generating and selling electricity. OPG's revenue comes primarily from the sale of electricity. OPG's operations do not contribute to Ontario's debt. In 2019, OPG earned $1.143 billion. It is in no way a drag on provincial coffers.

[304] The OEB regulates the rates that OPG charges for most of the electricity it generates.

[305] Even if OPG were to earn increased profits as a result of savings on labour costs, that money would not necessarily make its way into provincial coffers. The OEB regulates the rate of return that OPG is permitted to earn. OPG is already earning above the permitted rate of return. It will be for the OEB to decide what is done with excess rates of return. This can include creating a variance account to hold excess funds that could then be used to credit customers with future rate adjustments.

[306] The OEB is a corporation without share capital that is continued under the *Ontario Energy Board Act, 1998*[171] and the *Electricity Act, 1998*. The OEB regulates and licenses natural gas and electricity utilities in Ontario and sets electricity rates. The OEB derives its revenues through licensing fees and penalty charges to licensees. It is not funded by the

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[165] *Hutterian Brethren*, at para. 48.
[166] *Mounted Police*, at para. 143.
[167] *Canada v. Taylor*, [1990] 3 S.C.R. 892, at para. 56.
[168] *Ibid*. See also *OPSEU v. Ontario*, at paras. 247-48.
[169] See Affidavit of Jay Porter, affirmed March 4, 2021, at para. 33.
[170] S.O. 1998, c. 15, Sch. A.
[171] S.O. 1998, c. 15, Sch. B.

Province. The OEB's revenues exceeded its costs for the fiscal years 2016 to 2019. Lower compensation costs at the OEB do not lead to increased revenues in the Province's budget or decreases in the provincial debt.

[307] The IESO coordinates and integrates Ontario's electricity system. It monitors energy needs in real time, balances supply and demand and directs the flow of electricity across Ontario's transmission lines. It is not funded by the Province. It is funded by fees charged to customers for usage, smart metering, program revenues, and application fees. The OEB sets the rates that the IESO charges. Ontario does not intervene in the determination of rates. The IESO and intervenors provide information on employee costs during rate hearings; if the OEB concludes these costs are too high it will refuse the IESO's rate proposal. Lower compensation costs at the IESO do not lead to increased revenues in the Province's budget.

[308] Although Ontario had this information about OPG, the OEB and IESO as a result of the consultation process, it nevertheless included employees of all three organizations within the Act's scope and, in addition, amended s. 190 of the *Labour Relations Act*[172] to specifically include unionized employees of all three entities.

[309] Although at some point in the consultation process Ontario purported to take the position that it was concerned about electricity rates, the Act's preamble does not refer to any aspect of the electricity system as one of its purposes.[173] Mr. Porter, whose affidavit is cited in support of the concern about electricity rates, acknowledged on cross-examination that:

(i) The consultations with bargaining agents from the energy sector were not about electricity costs.[174]

(ii) A report prepared by Ernst & Young in 2018, which examined and made recommendations about government expenditures, and which laid the groundwork for the 2019 Budget, had nothing to say about the electricity sector.[175]

(iii) There was no government expenditure involved in OPG, the OEB or the IESO.[176]

[310] Neither Dr. Dodge nor any other government deponent speaks of electricity costs as being an issue.

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[172] See *Labour Relations Act*, s. 190.
[173] See Bill 124, Preamble, s. 1.
[174] See Cross-Examination of Jay Porter, held June 15, 2022, QQ. 43-45.
[175] See Porter Cross, June 17, Q. 1263.
[176] *Ibid*, Q. 1262.

[311] For purposes of a constitutional challenge, the object of the legislation is determined by the intent at the time the legislation was drafted and enacted.[177] The government is not permitted to shift the purpose of the legislation in response to litigation.[178] Any shift in the purpose of the Act to control electricity rates is therefore impermissible.

[312] Given that Ontario does not fund compensation of employees at OPG, the OEB or the IESO, there is no rational connection between their inclusion in the Act and the responsible management of Ontario's finances or the sustainability of its public services.

ii. Carleton University Academic Staff Association

[313] The Carleton University Academic Staff Association ("CUASA") submits that there is no rational connection between Ontario's objective and salaries paid at Carleton University.

[314] Carleton was established under the *Carleton University Act, 1952* to operate as an autonomous not-for-profit corporation. Under that statute, Carleton has complete autonomy to set its own budget, acquire property, borrow, and invest funds it does not immediately need. Any budget surplus remains with Carleton and is not paid to the provincial government.

[315] Ontario generally provides funding that covers between 30-35% of Carleton's overall budget. Carleton obtains the remainder of its budget from tuition fees, donations, public-private partnerships, and grants from other sources. Across Ontario, the province provides funding for approximately 23% of university operating budgets.

[316] Government funding is provided pursuant to a Strategic Mandate Agreement ("SMA") that Ontario enters into with each university. The terms of the SMAs vary from one university to another. The SMA sets the maximum amount of funding Ontario will provide to Carleton per year. Whether Carleton receives all, or only part of, that funding depends on Carleton's ability to meet certain criteria that are negotiated between the government and the University, and which are set out in the SMA.

[317] Carleton's current SMA covers the period between 2020-2025. Under it, Carleton's ability to obtain funding depends on its ability to deliver university graduates with the skills required to meet Ontario's labour market. There is no mention of, and there are no metrics geared towards, the university's overall budget. The SMA does not allow Carleton to request additional funding from the government if it runs a deficit. Carleton does not run deficits. Carleton and CUASA have always negotiated collective agreements, including compensation, that fit within Carleton's operating budget.

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[177] See *Big M Drug Mart*, at para. 91.
[178] *Ibid*, at paras. 89-91. See also *Frank v. Canada (Attorney General)*, 2015 ONCA 536, at para. 166, *per* Laskin J.A. (dissenting), rev'd *Frank* (SCC).

[318] In the circumstances, it is difficult to discern a rational connection between the Act's objectives and salaries paid to CUASA members. Current funding to Carleton is locked in until 2025 pursuant to the existing SMA. I was not taken to any evidence to suggest that that the preceding SMA that governed in 2019 was materially different. Even potential indirect concerns such as the University increasing tuition fees to compensate for higher salaries would seem to be unfounded because Ontario says in its factum that it exercises control over tuition fees.

iii. Long Term Care

[319] The applicants submit that there is no rational connection between the Act's objective of prudent fiscal management and salary limitations on long-term care workers because the government does not pay the salaries of long-term work care workers. Instead, the government pays care homes a fee per day per patient. The size of the fee may vary according to the level of care the patient needs based on the acuity category they fall into. The fee that a long-term care home receives per patient is the same for patients in care homes whose wages are covered by the Act as it is for care homes not covered by the Act.

[320] The government's responsibility for wages in the long-term care sector is therefore only indirect in the sense that increased wages could lead care homes to demand higher daily fees for each patient under their care. However, only 24% of Ontario's long-term care homes are covered by the Act. To the extent that uncontrolled higher wages in the remaining long-term care homes lead to demands for increases in the daily patient fee, the Act does nothing to limit those demands.

[321] This makes the rational connection between the objective of controlling government expenditure in the long-term care sector somewhat remote.

[322] On my view the evidence, there is a rational connection between Ontario's objective and the salaries of employees it pays directly. There is no rational connection between the objective and workers in the energy sector or the university sector. Any rational connection between the objective and the long-term care sector is at best remote.

C. Minimal Impairment

[323] At the minimal impairment stage, the government must demonstrate that the measure at issue impairs the *Charter* right as little as reasonably possible to achieve the legislative objective.[179]

[324] The Supreme Court of Canada has explained that minimal impairment requires the measure to have been carefully tailored so that rights are impaired no more than necessary.[180] Courts must accord some leeway to the legislator and keep in mind that just because the parties or the court can think of a solution that impairs the right less than the measure in question does not mean that the government has failed to demonstrate minimal impairment.[181] If, however, the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.[182]

[325] At the same time, a less drastic measure that impairs the right more minimally need not satisfy the objective to exactly the same extent or degree as the impugned measure: "[i]n other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage."[183]

[326] In *Frank*, the Supreme Court of Canada found that a federal law that removed the right to vote from Canadian citizens after they had been living abroad for 5 years failed the minimum impairment test because the government could not demonstrate why the 5 year time limit was chosen and because the legislation was overinclusive on a number of fronts.[184]

[327] Here, Ontario has failed to explain why it could not have pursued voluntary wage restraint. In any collective bargaining negotiation with public sector employees, Ontario could have taken the position that it was not able to pay for more than a 1% wage increase.

[328] Ontario had achieved voluntary wage restraint in the past. Professor Riddell gave many examples throughout his report of negative wage settlements that had been voluntarily agreed to in the public sector. Professor Riddell agreed that it would be desirable to at least try to obtain voluntary restraints through collective bargaining.[185]

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[179] See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160 ("*RJR-MacDonald*").
[180] *Ibid*.
[181] See *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 43 ("*JTI-Macdonald Corp*.").
[182] See *RJR-MacDonald*, at para. 160.
[183] *Hutterian Brethren*, at para. 55.
[184] See *Frank* (SCC), at paras. 67-68.
[185] See Riddell Cross, June 21, Q. 2272.

[329] In circumstances where Ontario was the direct employer, it would have been very easy for Ontario to take the position that nothing more than 1% was available. Even where Ontario was not the direct employer it had effective mechanisms to impose the same result.

[330] By way of example, teachers are not employed directly by Ontario but are employed by local school boards. Since 2014, collective bargaining in the education sector has been regulated by the *School Boards Collective Bargaining Act, 2014* ("SBCBA").[186] It mandates, collective bargaining on central and local levels. Central bargaining is mandated for all compensation issues. Central bargaining occurs between representatives of employees on the one hand, the designated employer representative of all school boards on the other *and* the Crown. The Crown is required to be at the table during any negotiations about compensation and must agree to any compensation provisions in any collective agreement. Jay Porter agreed that Ontario could have enforced compensation restraint at the bargaining table under this legislation by refusing to agree to any settlement that was out of line with its fiscal goals.

[331] Although taking the position that wage increases of no more than 1% were available might may have led to strikes, Ontario has not explained why it had to avoid those strikes by legislating a cap on wage increases. While I understand that it might be more convenient to avoid the stress and pressure of collective bargaining and potential strikes, that is not, without more, a reason for infringing a *Charter* right.

[332] Although Ontario is not at the bargaining table with respect to university salaries, it has not explained why the funding arrangements it has under its SMA with each Ontario university would not protect it against liability for wage increases. If there were a residual concern that wage increases could lead to demands for increased funding, Ontario has not explained why it could not have pursued other measures that would not have substantially interfered with collective bargaining such as freezing or limiting increases in university funding.

[333] This is an issue of particular relevance in the context of minimal impairment because of the governance regime that affects universities in Ontario. The Divisional Court set out the history of and the reason for that regime in *Canadian Federation of Students v. Ontario*.[187] In that case, the Divisional Court explained that after a series of scandals involving government interference in universities, the government of Ontario set up the Flavelle Commission to examine and report back on the appropriate governance structure for universities. The Flavelle Commission reported back in 1906. The thrust of its report was that there was widespread consensus across North America that the governance of universities should be separated from political power.[188] Its recommendations were largely adopted into Ontario law and have governed the relationship between the province and its universities ever since.[189] The essential principles of that relationship are that each

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[186] S.O. 2014, c. 5.
[187] 2019 ONSC 6658 ("*Canadian Federation of Students*").
[188] *Ibid*, at para. 38.
[189] *Ibid*, at para. 44.

university is established by a separate statute[190] which gives the governing councils and senates of each university wide-ranging power over all aspects of university governance and operations.[191] There is no statutory authority to allow government interference in the affairs of a university.[192]

[334] The Act not only substantially interferes with collective bargaining but it materially interferes with the statutory autonomy of universities that has been a cornerstone of university governance for over 100 years. The absence of any explanation for this interference suggests a lack of care in the design of the Act.

[335] The lack of care of design in the Act is also evident in its inclusion of employees of OPG, IESO and the OEB. As noted earlier, Ontario has failed to explain how it contributes to the wages of those organizations directly or indirectly.

[336] Ontario nevertheless had a means of imposing wage restraint without interfering with collective bargaining even in the energy sector. As the shareholder of OPG, it could have insisted on wage increases of no more than 1% within the collective bargaining process. Mr. Porter agreed on cross-examination that Ontario could have done so.[193]

[337] Similarly, in the long-term care sector, Ontario has not explained why it could not freeze or limit any increases to the daily patient fee it pays to long-term care homes if that was in fact its concern. I appreciate that many of these alternative measures may have created political difficulties for a government. The fact that it may be more politically convenient to infringe on a *Charter* right than to refuse additional funding to long-term care homes or universities does not, however, justify the infringement. If political convenience were the test, it would be far too easy to infringe on *Charter* rights on a regular basis.

D. Balancing Salutary and Deleterious Effects

[338] The fourth branch of the s. 1 analysis focuses on the effects of the measure. It requires the court to determine whether the infringement of the *Charter* right can be justified in a free and democratic society by weighing the benefits of the measure against its negative effects.[194] The real world always requires trade-offs and compromises. The question is whether the trade-offs here were a proportionate or disproportionate choice. As the Supreme Court of Canada described it in *JTI-Macdonald Corp.*,

> The final question is whether there is proportionality between the effects of the measure that limits the right and the law's objective. This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought

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[190] Except for Queen's University which is governed by Royal Charter.
[191] See *Canadian Federation of Students*, at para. 43.
[192] *Ibid*, at para. 8.
[193] See Porter Cross, June 17, QQ. 1274-77.
[194] See *Frank* (SCC), at para. 76.

> to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?[195]

[339] It is in this fourth branch of the s.1 analysis that "most of the heavy conceptual lifting and balancing" is done.[196] Proportionality is what s. 1 is all about:

> It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms." In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective.[197]

[340] This balancing requires a fact based, contextual approach because the infringement of a *Charter* right may be justified in one context, but not in another.[198]

[341] As part of its proportionality argument, Ontario relies on Professor Riddell's comment that public-sector wages are higher than private-sector wages. He refers to this as the public-sector premium. Bringing public-sector wages in line with private-sector wages is, Ontario submits, a valuable and proportionate social goal. I am unable to accept that submission for three reasons.

[342] First, the data on which this assertion is based is fairly old as Professor Riddell acknowledges in his report. The assertion is based primarily on a study conducted in 1979 and secondarily on a paper published in 2000 which uses data collected between 1986 and 1990. Professor Riddell acknowledges in his report that there is little recent evidence on the public-private earnings gap.

[343] Second, there are large sectors of the public service where the evidence discloses that there is no wage gap. Professor Riddell acknowledges, for example, that there is no public-sector wage premium in the educational sector where wages in both sectors have been relatively comparable for the last 25 years. The evidence before me also disclosed that public and private sector wages in nursing and long-term care have tracked each other for

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[195] *JTI-Macdonald Corp.*, at para. 45.
[196] *Hutterian Brethren*, at para. 149.
[197] *R. v. K.R.J.*, 2016 SCC 31, at para. 79.
[198] See *RJR-MacDonald*, at para. 132; *Health Services*, at para. 139; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at para. 13.

approximately 30 years. If anything, the Act may be leading to a premium in the private sector.

[344] Third, Professor Riddell acknowledged that at least part of any pay gap between the public and private sectors is attributable to unionization. Professor Riddell acknowledges that unionized employees generally earn more than comparable non-unionized employees. He also notes that the public-sector is substantially more unionized than the private sector. His figures indicate that 78% of the public-sector is unionized while only 16% of the private sector is.

[345] In this light, the desire to eliminate alleged differences between public and private sector wages is an attempt to reverse the benefits of collective bargaining. In effect, the government is using its desire to undo the benefits of the *Charter* right to collective bargaining as a justification to infringe on that very right.

[346] On the facts of this case, balancing the salutary and deleterious effects also raises some of the same issues that were discussed when considering the pressing and substantial objective aspect of the s. 1 test. A fact-based, contextual approach makes the alleged urgency of the government objective relevant. An infringement may well be justified if it arises in a true emergency that requires radical intervention to safeguard the public interest. The breach may not be justified if it arises in routine administration that the government of the day would prefer to pursue by infringing Charter rights instead of observing them.

[347] Here, the objective was to moderate compensation to manage government expenditure in a responsible way. This strikes me as a day-to-day government duty that does not call for the breach of *Charter* rights absent unusual circumstances. If responsible fiscal management justified limiting collective bargaining in an ordinary, unremarkable environment, it would mark the end of collective bargaining in the public sector.

[348] Whatever view I have on the proper balancing of advantages and disadvantages of the Act, has nothing to do with the advisability of the government's fiscal policies. I accept that fiscal prudence is essential. That, however, is not the question before me. The question before me is whether the circumstances surrounding the government's preferred fiscal policies warrant infringing on a *Charter* right. In my view, they do not.

[349] As already noted, here the benefit of the Act is to save approximately $400 million per year. As noted earlier, that same $400 million could be saved through collective bargaining by refusing increases of more than 1%. Ontario has failed to explain why it could not take this approach.

[350] Had Ontario taken a hard-line approach in collective bargaining, the question of wage restraint would then have worked itself out in the collective bargaining process, perhaps involving a series of strikes to push for higher wage increases. Both unions and government would have to fight that issue out in the court of public opinion. The development of public opinion in this manner is a cornerstone of a free and democratic society. It puts the issue on the front page. The government has ample resources and

communication tools at its disposal in any such contest. While there was no evidence before me on the point, I think it is fair to assume that the government's resources in this regard considerably exceed those of unions. The government is fully able to explain to the public why it is necessary for them to hold wages at 1%. Unions are then able to communicate to the public why they feel the government is contradicting itself by holding down wage increases to save $400 million while providing billions of dollars in tax cuts. That issue will then be for public opinion to decide. By removing wage increases of more than 1% from the bargaining table, the government took away from unions a key tool they have to pressure employers into paying higher wages.

[351] In legislating that issue off the table, the government has not only interfered with collective bargaining but has also hampered the development of public consensus on the issue. It is fair to say that the passage of Bill 124 was much lower on the public's radar than a public sector strike would be.

[352] In addition, if the government did not want to assume the risk of strikes, it has not explained why the tax cuts it imposed could not have been reduced by $400 million and thereby protected the *Charter* rights of 780,000 employees. Again, I hasten to add that I am not saying that the government cannot implement wage restraint and tax cuts in the full amount it desires. I say only that when balancing the salutary and deleterious effects of the Act, I see a serious violation of the applicants' *Charter* rights to save approximately $400 million per year. At the same time, the applicants point to tax cuts of over 10 times that amount. In the absence of any explanation from Ontario for that apparent inconsistency or the absence of an explanation for why the tax cuts could not have been a bit smaller and thereby maintain the applicants' *Charter* rights, the benefit of the Act does not appear to outweigh its detrimental effect.

[353] If governments are permitted to infringe on *Charter* rights in times of relative growth and prosperity, in the absence of any present or imminent fiscal urgency without explaining the need to breach *Charter* rights or the need to pursue inconsistent policies, it would be far too easy for governments to infringe on *Charter* rights merely by asserting the need for fiscal prudence.

[354] While it might be appropriate to infringe on a *Charter* right when faced with a serious fiscal challenge, it is not appropriate to do so as part of the day-to-day management of government affairs.

[355] Ontario responds that allowing the government leeway to do that is the essence of democracy. If the government made election promises to cut taxes, it should be permitted to do so. I fully agree. But an election promises to cut taxes does not necessarily give the government the right to breach *Charter* rights to achieve what appeared to be routine policy preferences rather than urgent societal needs.

V. REMEDY

[356] All applicants have requested that I declare the Act to be unconstitutional and that I defer the specific remedy to a later hearing.

[357] Sections 32 and 34 of the Act purport to preclude any action against the Crown arising out of the Act or any repeal of any provisions of the act. Section 34 provides:

> Despite any other Act or law, no person is entitled to be compensated for any loss or damages, including loss of revenues, loss of profit or loss of expected earnings or denial or reduction of compensation that would otherwise have been payable to any person, arising from anything referred to in subs. 32 (1).[199]

[358] A right is only as meaningful as the remedy provided for a breach.[200] As the Supreme Court of Canada noted in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,

> In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.[201]

[359] Section 24(1) of the *Charter* expressly guarantees "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied" the right to bring applications to seek "such remedy as the court considers appropriate and just in the circumstances". It is courts who are tasked with protecting *Charter* rights, determining whether legislative action violates those rights, and crafting remedies to address any infringements.[202] Legislatures are not the ones to determine which *Charter* rights are enforceable through the courts, nor are they the ones to determine appropriate remedies for a *Charter* breach.[203]

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[199] Bill 124, s. 34.
[200] See *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 25 ("*Doucet-Boudreau*").
[201] 2014 SCC 59, at para. 40 (citations omitted) ("*Trial Lawyers*").
[202] See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 53; *Doucet-Boudreau*, at paras. 36-37; *Ontario (Attorney General) v. G*, 2020 SCC 38, at paras. 95-99.
[203] See *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at paras. 49-51 ("*Quebec Reference*"); *Doucet-Boudreau*, at paras. 45-51.

[360] Although governments may insulate themselves from liability for policy decisions, complete Crown immunity is "intolerable" in a society governed by the rule of law.[204] Legislation that seeks to preclude individuals from challenging state action in court effectively treats the government as above the law.[205] Such legislation is inconsistent with Canada's constitutional structure.[206]

[361] To the extent that ss. 32 and 34 of the Act purport to preclude any remedy for the breach of *Charter* rights that ensued as a result of the Act, they too are constitutionally invalid. The precise scope of any remedy available to the applicants is something to be reserved to the remedy trial. Any limitations on those remedies should be based on principles and legal provisions apart from ss. 32 and 34 of the Act.

Conclusion

[362] As a result of the foregoing, I have found the Act to be contrary to section 2(d) of the *Charter*, and not justified under s. 1 of the *Charter*.

[363] Given that the entire purpose of the act is to implement the 1% limitation on wage increases in the broader public sector, there is no purpose served in reviewing the Act section by section. While it may be possible that some sections, standing entirely in isolation from each other do not violate any *Charter* rights, those sections have no purpose apart from enforcing the overall wage limitation that the Act imposes. As a result, I declare the Act to be void and of no effect.

[364] All parties have requested that I defer the consideration of any remedy as a result of the Act having been in effect since June of 2019 to a further hearing. I remain seized of the matter to address the issue of remedy and any other ancillary issues arising from these reasons.

[365] Finally, I would like to thank all counsel for their extraordinary effort in this matter. The written and oral submissions of all parties were of exemplary calibre as was the approach of counsel to each other and the court.

Digitally signed by Markus Koehnen
Date: 2022.11.29 13:46:46 -05'00'

Koehnen J.

Released: November 29, 2022

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[204] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 76; *Francis v. Ontario*, 2021 ONCA 197, at para. 123, citing *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at para. 16. See also *Francis v. Ontario*, at paras. 124-28.
[205] See *Trial Lawyers*, at para. 40; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at paras. 59-60.
[206] See *Quebec Reference*, at paras. 49-51; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at para. 45; *Trial Lawyers*, at para. 40; *Re Manitoba Language Rights*, at paras. 59-60.

SCHEDULE 1

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File Nos. CV-20-00636524-0000

B E T W E E N :

ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION,
PAUL WAYLING and MELODIE GONDEK

Applicants

- and –

HIS MAJESTY THE KING IN RIGHT OF ONTARIO
AS REPRESENTED BY THE PRESIDENT OF THE TREASURY BOARD, THE
MINISTER OF EDUCATION, AND THE ATTORNEY GENERAL OF ONTARIO

Respondents

AND

Court File No.: CV-20-00636524-0000

THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO,
ASSOCIATION DES ENSEIGNANTES ET ENSEIGNANTS FRANCO-ONTARIENS, JADE
ALEXIS CLARKE, CHRISTINE GALVIN AND YVES DUROCHER

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO
AS REPRESENTED BY ATTORNEY GENERAL OF ONTARIO, THE PRESIDENT
OF THE TREASURY BOARD, AND THE MINISTER OF EDUCATION

Respondents

AND

Court File No. CV-20-00636529-0000

B E T W E E N:

ONTARIO NURSES' ASSOCIATION VICKI MCKENNA AND BEVERLY MATHERS

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO, THE PRESIDENT OF THE TREASURY BOARD, MINISTER OF HEALTH AND MINISTER OF LONG-TERM CARE

Respondents

AND

Court File No.: CV-20-00637314-0000

B E T W E E N :

ONTARIO FEDERATION OF LABOUR, CANADIAN UNION OF PUBLIC EMPLOYEES, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA, ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS, ASSOCIATION OF PROFESSORS OF THE UNIVERSITY OF OTTAWA, BRESCIA UNIVERSITY FACULTY ASSOCIATION, BROCK UNIVERSITY FACULTY ASSOCIATION, FACULTY ASSOCIATION OF THE UNIVERSITY OF WATERLOO, HURON UNIVERSITY COLLEGE FACULTY ASSOCIATION, KING'S UNIVERSITY COLLEGE FACULTY ASSOCIATION, LAKEHEAD UNIVERSITY FACULTY ASSOCIATION, LAURENTIAN UNIVERSITY FACULTY ASSOCIATION, MCMASTER UNIVERSITY ACADEMIC LIBRARIANS' ASSOCIATION, MCMASTER UNIVERSITY FACULTY ASSOCIATION, NIPISSING UNIVERSITY FACULTY ASSOCIATION, ONTARIO COLLEGE OF ART AND DESIGN FACULTY ASSOCIATION, QUEEN'S UNIVERSITY FACULTY ASSOCIATION, RENISON ASSOCIATION OF ACADEMIC STAFF, RYERSON FACULTY ASSOCIATION, ST. JEROME'S UNIVERSITY ACADEMIC STAFF ASSOCIATION, TRENT UNIVERSITY FACULTY ASSOCIATION, UNIVERSITY OF ONTARIO INSTITUTE OF TECHNOLOGY FACULTY ASSOCIATION, UNIVERSITY OF TORONTO FACULTY ASSOCIATION, UNIVERSITY OF WESTERN ONTARIO FACULTY ASSOCIATION, ~~WILFRED~~ WILFRID LAURIER UNIVERSITY FACULTY ASSOCIATION, WINDSOR UNIVERSITY FACULTY

ASSOCIATION, YORK UNIVERSITY FACULTY ASSOCIATION, ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, PUBLIC SERVICE ALLIANCE OF CANADA, SOCIETY OF UNITED PROFESSIONALS LOCAL 160 OF THE INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AMALGAMATED TRANSIT UNION LOCAL 1587, CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 636, WORKERS UNITED CANADA COUNCIL, PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, UNITED FOOD AND COMMERCIAL WORKERS LOCAL 175, ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS FRANCO-ONTARIENS UNITÉ 203 – CENTRE PSYCHOSOCIAL, ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS FRANCO-ONTARIENS, UNITÉ 103 – PAPSP (PERSONNEL ADMINISTRATIF, PROFESSIONNEL ET DE SOUTIEN PÉDAGOGIQUE, EDUCATIONAL ASSISTANTS ASSOCIATION, HALTON DISTRICT EDUCATIONAL ASSISTANTS ASSOCIATION, DUFFERIN-PEEL EDUCATION RESOURCE WORKERS' ASSOCIATION, ASSOCIATION OF PROFESSIONAL STUDENT SERVICES PERSONNEL, UNITE HERE LOCAL 272, SERVICE EMPLOYEES' INTERNATIONAL UNION LOCAL 2, CANADIAN MEDIA GUILD, LOCAL 30213 OF THE NEWSPAPER GUILD/COMMUNICATIONS WORKERS OF AMERICA, RON BABIN, STEPHANIE BANGARTH, CARMEN BARNWELL, ROCKLYN BEST-PIERCE, PAMELA BONIFERRO, ANDREW BRAKE, NEIL BROOKS, NATASHA BROUILLETTE, DANIEL G. BROWN, COLLEEN BURKE, MITCHELL CHAMPAGNE, ~~JOHN CIRIELLO~~, FABRICE COLIN, CLAIRE COPP, WILLIAM CORNET, ALLYSON CULLEN, GAUTAM DAS, RYAN DEVITT, TIMOTHY EDNEY, MELISSA ELLIS, KIMBERLY ELLIS-HALE, PEDRAM KARIMIPOUR FARD, CARRIE GERDES, ALISON GRIGGS, MYRON GROOVER, ELKAFI HASSINI, ELIZABETH HANSON, JEAN-DANIEL JACOB, MELISSA JEAN, BETTY JONES, NADIA KERR, NATHAN KOZUSKANICH, SAHVER KUZUCUOGLU, MIN SOOK LEE, RICHARD LEHMAN, DAVID LENGYEL, KRISTINA LLEWELLYN, SUSAN LUCEK, ELIZABETH MACDOUGALL-SHACKLETON, TERRY MALEY, MEREDITH MARTIN, BRANDI MATTHIAS, STEPHANIE MCKNIGHT, LUCIE MÉNARD, DAVID MONOD, DAVID R. NEWHOUSE, KIMBERLY NUGENT, LISA PATTISON, LOUIS PELLETIER, TOM POCRNICK, KEVIN PORTER, WANDA REID, PAULINE RICKARD, LOIS ROSS, LORNA ROURKE, ALLAN ROWE, ELLEN SIMMONS, COLLEEN DIETRICH SISSON, RYAN STUDINSKI, ALBERTO TONERO, ARI JOHAN VANGEEST, JOY WAKEFIELD, JUDY WATSON, MICHELLE WEBBER, DON WILSON, PETER ZIMMERMAN, and TEREZIA ZORIC, on their own behalf and on behalf of all other employees in bargaining units affected by this Application (the "OFL Coalition")

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondents

Court File No. CV-20-00638156-0000

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION and WARREN ("SMOKEY") THOMAS, EDUARDO ALMEIDA, SANDRA CADEAU, DONNA MOSIER, ERIN CATE SMITH RICE, and HEIDI STEFFEN-PETRIE

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondent

AND

Court File No.: CV-20-00646385-0000

B E T W E E N:

UNIFOR, KELLY GODICK, SARAH BRAGANZA AND KATHLEEN ATKINS

Applicants

-and-

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondent

AND

Court File No. CV-20-00653134-0000

B E T W E E N:

SOCIETY OF UNITED PROFESSIONALS, LOCAL 160 OF THE INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, JO-ANN KINNEAR, CINDY ROKS and ~~VELMA FRANCIS~~ JANET SAKAUYE

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondents

AND

Court File No. CV-20-00653130-0000

B E T W E E N:

POWER WORKERS' UNION (CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000), ANDREW CLUNIS and ROBERT BUSCH

Applicants

- and –

THE CROWN IN RIGHT OF ONTARIO as represented by the PRESIDENT OF THE TREASURY BOARD, and the ATTORNEY GENERAL OF ONTARIO

Respondent

AND

Court File no. CV-20-00084683-0000

B E T W E E N:

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION and ANGELO MINGARELLI, ROOT GORELICK, and GREG FRANKS on their own behalf, and on behalf of all of the members of the Carleton University Academic Staff Association

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the President of the Treasury Board

Respondent

CITATION: Ontario English Catholic Teachers Assoc. v. His Majesty, 2022, ONSC 6658
COURT FILE Nos.: CV-20-00-636089-0000; CV-20-636421-0000; CV-20-00636524-0000; CV-20-00636529-0000; CV-20-00637314-0000; CV-20-00638156-0000; CV-20-00646385-0000; CV-20-0084683-0000; CV-20-00653134-0000; CV-20-00653130-0000;
DATE:

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION; ALEXANDRA BUSCH; AND KAREN EBANKS,

AND NINE OTHER APPLICATIONS IN THE MATTER OF THE PROTECTING A SUSTAINABLE PUBLIC SECTOR FOR FUTURE GENERATIONS ACT, 2019 LISTED IN SCHEDULE 1 HERETO

Applicants

– and –

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE PRESIDENT OF THE TREASURY BOARD, MINISTER OF HEALTH, MINISTER OF LONG-TERM CARE AND MINISTER OF EDUCATION, AND THE ATTORNEY GENERAL OF ONTARIO

Respondents

REASONS FOR JUDGMENT

Koehnen J.

Released: November 29, 2022