COURT OF APPEAL FOR ONTARIO

CITATION: Ontario English Catholic Teachers Association v. Ontario (Attorney General), 2024 ONCA 101
DATE: 20240212
DOCKET: COA-23-CV-0010

Doherty, Hourigan and Favreau JJ.A.

BETWEEN

Ontario English Catholic Teachers Association,
Karen Ebanks and Alexandra Busch

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by the Attorney General of Ontario, the President of the Treasury Board, and the Minister of Education

Respondents (Appellants)

AND BETWEEN

Ontario Secondary School Teachers' Federation,
Paul Wayling and Melodie Gondek

Applicants (Respondents)

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

Respondents (Appellants)

AND BETWEEN

The Elementary Teachers' Federation of Ontario,
Association des enseignantes et des enseignants
franco-ontariens, Jade Alexis Clarke,
Christine Galvin, and Yves Durocher

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by the
Attorney General of Ontario, the President of the Treasury Board,
and the Minister of Education

Respondents (Appellants)

AND BETWEEN

Ontario Nurses' Association, Vicki McKenna
and Beverly Mathers

Applicants (Respondents)

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 (Appellants)

AND 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 (Respondents)

and

The Crown in Right of Ontario, as Represented by
the Attorney General of Ontario and the
President of the Treasury Board

Respondents (Appellants)

AND BETWEEN

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, 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, 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, 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, Aefo unité 103, Educational Assistants Association, Halton District Education Assistants Association, Dufferin-Peel Education Resource Workers' Association, Association of Professional Student Services Personnel, Unite Here Local 272, Seiu 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

Applicants (Respondents)

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 (Appellants)

AND BETWEEN

Unifor, Kelly Godick, Sarah Braganza, and Kathleen Atkins

Applicants (Respondents)

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 (Appellants)

AND BETWEEN

Carleton University Academic Staff Association,
Angelo Mingarelli, Root Gorelick, and R. Gregory Franks,
on their own behalf, and on behalf of all the members of the
Carleton University Academic Staff Association

Applicants (Respondents)

and

The Crown in Right of Ontario, as represented by the President of the
Treasury Board

Respondents (Appellants)

AND BETWEEN

Society of United Professionals, Local 160 of the
International Federation of Professional and Technical Engineers,
Jo-Ann Kinnear, Cindy Roks, and Janet Sakauye

Applicants (Respondents)

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 (Appellants)

AND BETWEEN

Power Workers' Union (Canadian Union of Public Employees, Local 1000),
Andrew Clunis and Robert Busch

Applicants (Respondents)

and

The Crown in Right of Ontario, as represented by the
President of the Treasury Board, and the Attorney General of Ontario

Respondents (Appellants)

Peter Griffin, Nina Bombier and Samantha Hale, for the appellants His Majesty the King in Right of Ontario *et al*.

Paul Cavalluzzo and Balraj Dosanjh, for the respondents Ontario English Catholic Teachers Association *et al.*

Susan Ursel, Karen Ensslen and Emily Home, for the respondents Ontario Secondary School Teachers' Federation *et al.*

Howard Goldblatt and Benjamin Piper, for the respondents Elementary Teachers' Federation of Ontario *et al.*

Janet Borowy and Danielle Bisnar, for the respondents Ontario Nurses' Association *et al.*

David R. Wright, Mae Jane Nam and Rebecca Jones, for the respondents Ontario Public Service Employees Union *et al.*

Steven Barrett and Melanie Anderson, for the respondents Ontario Federation of Labour *et al.*

Anthony Dale, Dijana Simonovic and Jenna Meguid, for the respondents Unifor *et al.*

Colleen Bauman, for the respondents Carleton University Academic Staff Association *et al*.

Michael Wright, Alex St. John and Nora Parker, for the respondents Society of United Professionals *et al.*

Andrew Lokan and Shyama Talukdar, for the respondents Power Workers' Union *et al.*

George Avraam and Ajanthana Anandarajah, for the intervener Canadian Association of Counsel to Employers

Tim Gleason and Adrienne Lei, for the intervener Canadian Civil Liberties Association

Christine Davies, Danielle Sandhu and Kat Owens, for the intervener Women's Legal Education and Action Fund Inc.

Heard: June 20-22, 2023

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated November 29, 2022, with reasons reported at 2022 ONSC 6658, 165 O.R. (3d) 1.

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Favreau J.A.:

A. OVERVIEW

[1] In 2019, the Ontario legislature passed Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, S.O. 2019, c. 12 ("Bill 124" or the "Act"), which imposed a 1% cap per year on increases to salary rates and compensation for three years for employees in the broader public sector.

[2] The respondents, which include organizations that represent employees in the broader public sector, brought applications challenging the Act on the basis that it violated their members' rights to freedom of expression (s. 2(b)), freedom of association (s. 2(d)) and equality (s. 15) under the *Canadian Charter of Rights and Freedoms*.

[3] The application judge granted the applications, finding that the Act violated the respondents' freedom of association and that this violation was not saved by s. 1 of the *Charter*. The application judge did not accept the arguments that the Act violated the respondents' s. 2(b) or s. 15 rights.

[4] His Majesty the King in Right of Ontario ("Ontario")[1] appeals on the basis that the application judge's decision is contrary to decisions of the Supreme Court, this court and other appellate courts that have found similar wage restraint

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[1] Some of the applicants named different Crown respondents. However, for simplicity, I will refer to the appellants as Ontario in these reasons.

legislation to be constitutional. Ontario also argues that the application judge erred in his analysis of s. 2(d) by essentially turning the right to freedom of association, which the Supreme Court has said is a procedural right, into a substantive right. Ontario further contends that the application judge erred in his analysis and application of s. 1 of the *Charter* by failing to sufficiently defer to its policy choices in the face of a pressing need to address the deficit through control of public sector wages and compensation.

[5] I would dismiss the appeal with one exception. I agree with the application judge that the Act violates the s. 2(d) rights of broader public sector represented employees in Ontario and that it is not saved by s. 1. Taking into consideration the context in which Bill 124 was introduced and the restraints imposed by the Act, I am satisfied that the Act substantially interferes with the respondents' right to participate in good faith negotiation and consultation over their working conditions. The circumstances of this case are distinguishable from other cases where wage restraint legislation was deemed constitutional because, here, there was no meaningful bargaining or consultation before the Act was passed, the Act significantly restricts the scope and areas left open for negotiation in the collective bargaining process, there is no meaningful mechanism for collective agreements to be exempted from the Act, and public sector collective agreements to which the Act does not apply generally provide for higher annual wage increases than 1%. Further, I find that the Act is not saved by s. 1 of the *Charter* because it does not

minimally impair the respondents' right to freedom of association, and because the Act's deleterious effects outweigh its benefits.

[6] However, the application judge erred in declaring the entire Act unconstitutional. The Act applies to represented and non-represented employees in the broader public sector. Non-represented employees, given that they do not bargain collectively, do not benefit from the same protections as their represented counterparts under s. 2(d) of the *Charter*. Accordingly, the application judge's declaration was overly broad, and should be limited to a declaration that the Act is unconstitutional in so far as it applies to represented employees.

[7] I start with a review of the Act, the parties and their interests, and the application judge's decision. I then address the s. 2(d) and s. 1 analyses. It is in the context of these analyses that I provide a more detailed review of the evidence, where relevant.

B. THE ACT AND THE SCOPE OF ITS APPLICATION

[8] Bill 124 was introduced in the Ontario legislature on June 5, 2019, and received royal assent on November 7, 2019.

[9] The Act imposes a three-year "moderation" period on compensation, including salary rates, for all employees in the broader public sector. For those three years, compensation increases are not to exceed 1% per year. The Act applies to represented and non-represented employees.

[10] In order to properly address the issues on appeal, it is helpful to review the scope and application of the Act in some detail.

(1) Preamble, purpose and other preliminary matters

[11] As indicated above, the short title of the Act is *Protecting a Sustainable Public Sector for Future Generations Act, 2019*. Its long title is "An Act to implement moderation measures in respect of compensation in Ontario's public sector".

[12] The preamble to the Act emphasizes the government's goal of reducing the deficit and balancing its budget, stating that "Ontario's accumulated debt is among the largest subnational debts in the world". The preamble also states that sustaining the province's finances is in the public interest and is needed to "maintain important public services", and that the "[g]overnment also seeks to protect front-line services and jobs of the people who deliver them." The preamble then addresses the role of public sector compensation in maintaining a sustainable public sector. In doing so, the preamble states that compensation represents a "substantial proportion" of government program expenses and that "the growth in compensation costs must be moderated to ensure the continued sustainability of public services for the future." The preamble further states that the measures imposed by the Act "would allow for modest, reasonable and sustainable compensation growth for public sector employees" and that, for represented employees, the measures "respect the collective bargaining process, encourage

responsible bargaining, and ensure that future bargained and arbitrated outcomes are consistent with the responsible management of expenditures and the sustainability of public services." The preamble concludes with a statement that the "[g]overnment believes that the public interest requires the adoption, on an exceptional and temporary basis, of the measures" in the Act.

[13] Besides the preamble, s. 1 states that the purpose of the Act is "to ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services."

[14] Section 3 of the Act explicitly states that "the right to bargain collectively" is preserved, subject to the provisions of the Act. Section 4 preserves the right to strike lawfully.

(2) Employees affected

[15] Pursuant to s. 5(1), the Act applies to employers in the broader public sector, including to the Crown, Crown agencies, school boards, universities and colleges, hospitals, licensed not-for-profit long-term care homes, and children's aid societies. It also applies to not-for-profit organizations that received at least $1 million in funding from the government in 2018.

[16] Section 5(2) of the Act specifies categories of employers to which the Act does not apply. These include municipalities and for-profit organizations.

[17] Pursuant to s. 8, the Act applies to “bargaining organizations”, which include unions and other organizations that bargain collectively on behalf of the broader public sector employees affected by the Act. In addition, the Act applies to the non-represented employees in the broader public sector.

(3) Scope of compensation affected and length of “moderation period”

[18] The Act limits “salary rate” and “compensation” increases during the moderation period. Salary is a subset of compensation.

[19] The Act defines “salary rate”, at s. 2, as:

> [A] base rate of pay, whether expressed as a single rate of pay, including a rate of pay expressed on an hourly, weekly, bi-weekly, monthly, annual or some other periodic basis, or a range of rates of pay, or, if no such rate or range exists, any fixed or ascertainable amount of base pay.

[20] The Act defines “compensation” very broadly as meaning “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”: s. 2. As a practical matter, and as found by the application judge, it is understood that compensation includes matters such as pension contributions, vacation days, sick days, bereavement days, meal and travel allowances, and any other benefits to which a monetary value can be assigned.

[21] Sections 9 to 16 of the Act address the limits on increases to salary rates and compensation during the moderation period for represented employees covered by the Act.

[22] Pursuant to s. 10(1) of the Act, a collective agreement or arbitration award cannot provide for a salary rate increase of more than 1% per year during the three-year moderation period. This 1% cap applies to any position or class of positions.

[23] In addition, pursuant to s. 11(1) of the Act, increases in compensation, which, as noted above, include salary rates for all employees covered by a collective agreement, are limited to 1% per year during the three-year moderation period:

> During the applicable moderation period, no collective agreement or arbitration award may provide for any incremental increases to existing compensation entitlements or for new compensation entitlements that in total equal more than one per cent on average for all employees covered by the collective agreement for each 12-month period of the moderation period. [Emphasis added.]

[24] Therefore, in combination, s. 10(1) and 11(1) mean that no individual employee can receive a salary rate increase of more than 1% per year during the moderation period. In addition, the overall increase for all compensation, including salary rates, within the bargaining unit cannot exceed 1% per year overall. This means that employers can agree to an increase of compensation for some employees beyond 1% per year, so long as the increase does not apply to their

salary rate and so long as the overall compensation for all employees in the bargaining unit does not exceed 1% per year. In other words, an increase above 1% in compensation, other than the salary rate, for some employees would have to be offset against no increases or lesser increases for other employees.

[25] There are some exceptions to the limitations on compensation increases. For example, s. 10(2) of the Act provides for three exceptions to the 1% per year cap on salary rates, allowing for salary rate increases that recognize an employee's "length of time in employment", "assessment of performance", and "successful completion of a program or course of professional or technical education." Also, s. 11(3) of the Act provides that an employer's increase in the cost of providing a benefit that existed before the moderation period does not constitute an increase in compensation.

[26] In accordance with s. 9 of the Act, for represented employees, the moderation period begins at different times. For example, if a collective agreement was still in effect on June 5, 2019, the three-year moderation period starts on the day immediately following the end of the collective agreement. If the collective agreement had already expired on June 5, 2019, the moderation period starts running on the day immediately following the date on which the previous collective agreement had expired. The same principles generally apply to arbitration awards.

[27] Sections 17 to 23 of the Act set out the provisions that apply to non-represented employees. They are similar to those that apply to represented employees. However, pursuant to ss. 18 and 19, the cap imposed on salary rate and compensation increases is focused on individual employees or classes of employees and not on bargaining units. In addition, for non-represented employees, the start date of the moderation period is different than for represented employees. The moderation period starts on a date selected by the employer that is after June 5, 2019, but no later than January 1, 2022.

(4) Enforcement, oversight and exemptions

[28] The Act includes a number of measures designed to prohibit employers from avoiding compliance with the 1% limit on compensation increases during the moderation period. For example, s. 24 prohibits an employer from providing compensation before or after the moderation period to make up for compensation the employee did not receive during the moderation period.

[29] The Act also gives the government broad powers of enforcement. Section 25 of the Act gives the Management Board of Cabinet the power to obtain information from employers about collective bargaining or compensation to ensure compliance with the Act. Section 26 gives the Minister responsible for administration of the Act the sole discretionary power to make an order declaring that a collective agreement or arbitration award does not comply with the Act,

which then requires the parties to enter into a new collective agreement that is compliant with the Act.

[30] Finally, s. 27 of the Act provides that the Minister "may, by regulation, exempt a collective agreement from the application of [the] Act". However, the Act does not set out criteria or the basis on which the Minister may make such an exemption.

C. THE RESPONDENTS

[31] There were ten groups of respondents on the appeal. While the respondent organizations[2] represent employees that fall within the scope of the Act, they are not all similarly situated. They work in different sectors, including education, health and energy. In addition, some of their members are directly employed by the province, whereas others are employed by other bodies that fall within the scope of the Act; therefore, in some cases, the collective bargaining takes place directly with the province and in other cases it takes place with an employer other than the province. Finally, some of the respondents' members work for employers that are fully funded by the province, partially funded by the province and, in some cases, not funded by the province at all.

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[2] Most of the groups of respondents also include named individuals who are members or representatives of the organizations. For the purpose of describing the respondent organizations' various interests in this section, it is not necessary to list these individuals or to identify their respective interests.

[32] In order to highlight these differences, it is helpful to provide a brief description of each organization:

a. Ontario English Catholic Teachers Association (“OECTA”): OECTA is the designated bargaining agent for teachers employed by the English-language Catholic district school boards in Ontario. While the members of OECTA are employed by their individual school boards, OECTA participates in a process of “central bargaining” with the Crown and school boards over significant issues, such as salary increases.

b. Ontario Secondary School Teachers’ Federation/Fédération des enseignants-enseignantes des écoles secondaires de l’Ontario (“OSSTF”): OSSTF is the designated bargaining agent for secondary school teachers employed by the English-language public district school boards in Ontario. It also represents a variety of other education workers employed by both French and English school boards. While these OSSTF members are employees of their respective school boards, like OECTA, OSSTF participates in a process of “central bargaining” with the Crown and school boards over significant issues. In addition to its school board members, OSSTF also represents members who work for employers offering

transportation services to school boards and members who are non-teaching employees at some universities.[3]

c. Elementary Teachers' Federation of Ontario ("ETFO") and l'Association des enseignantes et des enseignants franco-ontariens ("AEFO"): ETFO is the designated agent to bargain on behalf of English-language elementary teachers in Ontario as well as certain other education workers, such as early childhood education workers and professional support personnel. AEFO is the designated bargaining agent for all public and Catholic French-language elementary and secondary school teachers in Ontario. While the members of ETFO and AEFO are employees of their respective school boards, ETFO and AEFO also participate in a process of "central bargaining" with the Crown and school boards.[4]

d. Ontario Nurses' Association ("ONA"): ONA represents registered nurses, nurse practitioners, registered practical nurses, personal support workers and other health care professionals across Ontario. ONA's members work

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[3] Following the hearing of the appeal but before the release of this decision, counsel for OSSTF advised that their clients and Ontario had settled their claims in relation to this litigation for school board members and withdrew from further participation in those portions of the appeal solely concerning the school board employees. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal and confirmed that they did not seek to withdraw their participation in respect of the members who are not school board employees.

[4] Following the hearing of the appeal but before the release of this decision, counsel for ETFO advised that their clients and Ontario had settled their claims in relation to this litigation for its members and withdrew from further participation in those portions of the appeal concerning the ETFO applicants. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal.

in a variety of settings, including hospitals, long-term care homes and community health clinics.

e. Ontario Federation of Labour ("OFL"): OFL's application was brought on behalf of several organizations, including OFL, the Canadian Union of Public Employees ("CUPE"), the Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") and various university faculty associations. These organizations represent a broad variety of employees in different sectors, including hospitals, long-term care, social and community services, education, universities, transportation, the justice system and the Ontario Public Service.[5]

f. Ontario Public Service Employees Union ("OPSEU"): OPSEU represents a broad range of workers who work in the Ontario Public Service or who are employed by broader public sector employers. They include cleaning staff, personal support workers, college professors, office administrators, correctional officers and education assistants.[6]

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[5] Following the hearing of the appeal but before the release of this decision, counsel for Ontario advised that its client and CUPE had settled CUPE's claims in the OFL application for the school board employees and withdrew from further participation in those portions of the appeal solely concerning those employees. Counsel further advised that Ontario and AMAPCEO have settled AMAPCEO's claim and withdrew from further participation in those portions of the appeal concerning those employees. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal and confirmed that they did not seek to withdraw their participation in respect of other employees represented by CUPE as well as the employees represented by the other unions in the OFL application.

[6] Following the hearing of the appeal but before the release of this decision, counsel for OPSEU advised that their clients and Ontario had settled their claims in relation to this litigation for OPSEU members

g. Unifor: Unifor represents employees in the private and public sector. The public sector workers Unifor represents work in a variety of areas, including health care, social services and education.

h. Society of United Professionals, Local 160 of the International Federation of Professional and Technical Engineers ("Society" or "Society of United Professionals"): The Society represents employees in the energy sector who work for Ontario Power Generation ("OPG"), the Independent Electricity System Operator ("IESO") and the Ontario Energy Board ("OEB"). The Society's members include professionals, such as engineers, accountants, lawyers and managers. The Society bargains with OPG, IESO and OEB, which are self-funded and receive no funding from the province.

i. Power Workers' Union (Canadian Union of Public Employees, Local 1000) ("PWU"): PWU represents employees in the energy sector who work for OPG and IESO as well as other entities not subject to the Act. Its members work in clerical, technical and skilled trade positions. As with the Society, PWU bargains with OPG and IESO, which, again, are self-funded and receive no funding from the province.

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employed by the Crown in the Ontario Public Service Unified Bargaining Unit and withdrew from further participation in those portions of the appeal solely concerning the unified bargaining unit employees. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal and confirmed that they did not seek to withdraw their participation in respect of all other OPSEU members.

j. Carleton University Academic Staff Association: The Association represents faculty members, librarians and instructors employed by Carleton University. The members of the Association are employed by Carleton and their collective bargaining agreement is with Carleton. The province provides funding grants to Carleton, which covers 30 to 35% of its budget. However, the province does not directly fund the compensation paid to the Association's members.

D. THE APPLICATION JUDGE'S DECISION

[33] The application judge rejected the respondents' position that the Act violated their right to freedom of expression or their equality rights. However, he found that the Act violated the right to freedom of association under s. 2(d) of the *Charter*, and that the Act was not saved by s. 1 of the *Charter*.

(1) Application judge's finding that the Act violates s. 2(d) of the *Charter*

[34] In concluding that the Act violates the respondents' s. 2(d) rights, the application judge found that the Act substantially interferes with the respondents' ability to enter into good faith negotiation and consultation. In reaching this conclusion, the application judge considered the following ten factors:

a. The financial impact of the wage cap: The Act interferes with the process of collective bargaining because it places significant limits on the ability of

unions to negotiate higher wages or to use wages to negotiate other better work conditions.

b. The impact on trading salary against other issues: The Act inhibits the ability of unions to trade off wages for other issues.

c. The impact on staffing: The application judge accepted the respondents' evidence that there was a "serious long-term recruitment and retention crisis" in the health care sector. He found that the Act prevents unions from negotiating solutions to this crisis.

d. The impact on wage parity between public and private sector employees: On this factor, the application judge focused on the long-term care sector, which consists of private for-profit homes, private non-profit homes and municipal homes, whose employees have typically bargained together. The application judge held that "[f]ragmenting bargaining units into public and private sector units interferes with the unions' ability to choose who bargains together."

e. The impact on employee self-government: The application judge held that the Act interferes with the respondent organizations' ability to decide democratically how to prioritize their negotiating positions.

f. The impact on freely negotiated agreements: The government's power under the Act to decide whether a collective agreement will or will not be exempted from the Act interferes with freely negotiated agreements.

g. The impact on the right to strike: The application judge held that the Act renders the right to strike “financially meaningless” because the best the unions can achieve is a wage increase of 1% or an increase of benefits equal to 1% of wages, a benefit he found would be exhausted after 2.6 days of striking.

h. The impact on interest arbitration: The Act affects bargaining units subject to interest arbitration, because one of the principles of interest arbitration is the replication of negotiated agreements.

i. The impact on the relationship between unions and their members: The application judge relied, by way of example, on negative responses from ONA’s members to their 1% wage increase as evidence that the Act will cause discord within unions.

j. The impact on the power balance between employer and employees: The application judge stated that the “shadow of the legislator” would loom over negotiations and disrupt the power balance between employees and employers achieved through meaningful collective bargaining.

[35] The application judge then considered whether the process of consultation prior to the introduction of Bill 124 amounted to a meaningful process of collective bargaining. He stated that the government did not have an obligation to consult with the respondents on its legislation. However, relying on prior jurisprudence, he stated that, in appropriate circumstances, meaningful consultation before the

passage of legislation can nevertheless take the place of collective bargaining. In this case, he found that there was no meaningful consultation.

[36] The application judge also reviewed prior decisions dealing with wage restraint legislation where no breach of s. 2(d) of the *Charter* was found. He distinguished those cases on the basis of the evidence in this case and differences between the Act and the legislation in those cases.

(2) Application judge's finding that s. 1 of the *Charter* does not save the Act

[37] The application judge found that the Act was not saved by s. 1 of the *Charter*.

[38] In his s. 1 analysis, the application judge started by rejecting Ontario's definition of the Act's pressing and substantial objective. Ontario had submitted that the Act's objective was fiscal responsibility and moderating the growth rate of public sector compensation. The application judge rejected this objective because the moderation of public service wages was the means by which the objective of fiscal responsibility was to be achieved. It was not an objective in and of itself. On this basis, the application judge redefined the objective as "the responsible management of Ontario's finances and the protection of sustainable public services."

[39] The application judge then found that Ontario did not establish that this was a pressing and substantial objective. In doing so, he considered case law from the

Supreme Court of Canada which suggests that budgetary considerations cannot be a freestanding pressing and substantial objective, except in the context of a financial crisis. The application judge found that, in this case, Ontario's evidence, including a report from its expert, Dr. David Dodge, did not establish that the province was in a financial crisis.

[40] Despite his finding that Ontario had not established a pressing and substantial objective, the application judge went on to consider the other aspects of the s. 1 *Charter* analysis.

[41] On the issue of a rational connection, the application judge found that, because compensation represents approximately one half of provincial government expenditures, moderating the rate of compensation increase is logically related to the responsible management of the province's finances and protecting the sustainability of public services. However, he found that the rational connection did not exist for two categories of broader public sector workers because the province was not responsible for paying wages in these sectors: 1) the employees in the electricity sector working for OPG, OEB and IESO, and 2) the Carleton University academic staff, and by extension academic staff at other universities. Further, and relatedly, he concluded that the rational connection for workers in the long-term care sector was "at best remote."

[42] On the issue of whether the Act minimally impairs the respondents' s. 2(d) *Charter* rights, the application judge found that Ontario failed to explain why the province could not pursue "voluntary wage restraint", as it had in the past, rather than imposing a wage cap through legislation. In addition, specifically with respect to the university sector, he found that the Act interferes with the governance of universities and that Ontario failed to provide an explanation for this interference.

[43] Finally, the application judge found that the salutary effects of the Act did not outweigh its deleterious effects. Amongst his reasons for this finding, he held that Ontario's argument that the province wanted to bring public sector wages in line with private sector wages was not supported by the evidence regarding the wage gap. He further found that the lack of "present or imminent fiscal urgency" weighed against the Act.

(3) Remedy

[44] Based on his conclusion that that the Act violated s. 2(d) and was not saved by s. 1 of the *Charter*, the application judge declared the entire Act void and of no effect. In doing so, he stated that there was no purpose in going through the Act section by section.

[45] In addition, the application judge deferred the issue of any further remedies to a later hearing.

E. ISSUES ON APPEAL

[46] Ontario raises the following issues on appeal:

a. The application judge erred in treating s. 2(d) as a substantive right to a specific outcome rather than as a right to a fair collective bargaining process;
b. The application judge erred in failing to follow existing case law dealing with the constitutional validity of wage restraint legislation;
c. The application judge erred in his s. 1 *Charter* analysis; and
d. Even if the Act is invalid as it relates to represented employees in the broader public sector, the application judge erred in declaring the Act void and of no effect vis-à-vis employees who are not represented by a bargaining organization and who do not bargain collectively.

F. THE STANDARD OF REVIEW

[47] The constitutional validity of the Act is a question of law to be decided on a standard of correctness. However, this court owes deference to the application judge's findings of fact, including findings based on social and legislative evidence. As the Supreme Court held in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 49, a judge's factual findings, including findings on social and legislative facts, are entitled to deference on appeal:

> When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is

> charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case. [Emphasis added.]

See also *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 109.

[48] This is especially important in a case such as this one where, as discussed in the next section of these reasons, the Supreme Court has expressly stated that the issue of whether legislation substantially interferes with s. 2(d) rights, and specifically collective bargaining rights, is a "contextual and fact-specific" inquiry: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 92.

[49] As held by Donald J.A., in dissent, in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, 71 B.C.L.R. (5th) 223, at para. 326, rev'd 2016 SCC 49, [2016] 2 S.C.R. 407 (substantially for the dissenting reasons of Donald J.A.), factual findings underlying a trial judge's conclusion that a government substantially interfered with freedom of association are subject to the palpable and overriding error standard.

[50] Similarly, in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85, 463 D.L.R. (4th) 509, at para. 46, leave to appeal refused, [2021] S.C.C.A. No. 437, the Court of Appeal of Manitoba described the applicable standard of review in deciding on whether wage restraint legislation contravenes s. 2(d) of the *Charter* as follows:

> Whether legislation is constitutional is a quintessential question of law. Therefore, the applicable standard of review is correctness. However, to the extent that the section 2(d) inquiry is premised on an assessment of relevant facts, any relevant factual finding will be owed deference and will be reviewed on the palpable and overriding error standard (see *Consolidated Fastfrate* at para 26). The appellate court will then take a last look at the accepted relevant factual foundation and decide the ultimate issue (whether the legislation is constitutional) on the correctness standard.

[51] Accordingly, the questions of whether the Act violates s. 2(d) of the *Charter* and, if so, whether it is saved by s. 1 of the *Charter* are to be reviewed on a standard of correctness. This inquiry includes consideration of what factors are relevant to deciding these issues. However, the trial judge's findings of fact relevant to this assessment are to be reviewed on the palpable and overriding error standard of review.

G. DOES THE ACT INFRINGE S. 2(D) OF THE *CHARTER*?

[52] In this section, I start with a review of the general principles that apply to s. 2(d) of the *Charter*, followed by a review of other appellate decisions dealing

with wage restraint legislation. I then address whether the Act violates s. 2(d) of the *Charter*.

(1) General principles regarding protection of collective bargaining under s. 2(d) of the *Charter*

[53] Section 2(d) of the *Charter* provides that everyone has the freedom of association, which is a fundamental freedom.

[54] In a series of decisions, starting in 2007 with *Health Services*, the Supreme Court has recognized that, in the labour context, s. 2(d) of the *Charter* protects the right to collective bargaining.

[55] In *Health Services*, the Supreme Court established that the s. 2(d) right to freedom of association protects collective bargaining, which the court described as "the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining": at para. 87. The court stated that recognizing the right to engage in collective bargaining is consistent with *Charter* values because it affirms the "values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*": *Health Services*, at para. 86.

[56] The Supreme Court reaffirmed that s. 2(d) of the *Charter* protects the right to engage in collective bargaining in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and again in a 2015 trilogy of decisions: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R.

3, *Meredith. v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125, and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245. In *Mounted Police*, at para. 5, the court emphasized that the purpose of s. 2(d) is to protect "a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests." In *Saskatchewan Federation*, the Supreme Court also confirmed that the right to strike forms part of collective bargaining rights protected by s. 2(d): at para. 75.

[57] In these cases, the Supreme Court has consistently stated that s. 2(d) does not guarantee specific outcomes, but rather protects the right to a collective bargaining process: *Health Services*, at paras. 89, 91; *Fraser*, at para. 45; and *Mounted Police*, at para. 67. Similarly, the court has stated that s. 2(d) does not protect a specific model of labour relations or bargaining method, but rather the right is to a general process of collective bargaining: *Health Services*, at para. 91; *Fraser*, at para. 42; and *Mounted Police*, at para. 93.

[58] Further, the Supreme Court has emphasized that s. 2(d) "does not protect all aspects of the associational activity of collective bargaining"; rather, it only protects against "substantial interference" with associational activity: *Health Services*, at para. 90. As described in *Health Services*, to constitute substantial interference with the right to collective bargaining, "the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue

the common goals of negotiating workplace conditions and terms of employment with their employer": at para. 92. Similarly, in *Mounted Police*, the court stated that a "process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is … inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*)": at para. 71.

[59] In *Health Services*, at para. 93, the court established that there are two parts to the "substantial interference" inquiry:

a. First, the court must assess "the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert."
b. Second, the court must assess "the manner in which the measure impacts on the collective right to good faith negotiation and consultation."

[60] In *Health Services*, the court further emphasized that "[b]oth inquiries are necessary": at para. 94. There will be no violation if the matter impacted does not substantially affect the process of collective bargaining. Similarly, even if the matter at issue substantially touches on collective bargaining, it will not violate s. 2(d) of the *Charter* if it preserves a "process of consultation and good faith negotiation": at para. 94.

[61] In *Fraser* and the 2015 trilogy, the Supreme Court did not specifically refer to or apply the two-part substantial interference inquiry. However, in *Meredith*, at

para. 24, the court explicitly stated that the test to determine whether state action "substantially impair[s] … employees' collective pursuit of workplace goals" is "[t]he test … set out in *Health Services*." In addition, in *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590, at para. 47, leave to appeal refused, [2016] S.C.C.A. No. 444 (*Professional Institute of the Public Service of Canada*), and [2016] S.C.C.A. No. 445 (*Gordon*), upon reviewing the Supreme Court decisions that followed *Health Services*, this court confirmed that the two-part inquiry still applies.

[62] Before moving on to a review of the wage restraint legislation cases, it is helpful to describe each of the two inquiries further.

[63] With respect to the first part of the inquiry, namely the importance of the matter to the process of collective bargaining, "the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively…. The more important the matter, the more likely that there is substantial interference": *Health Services*, at para. 95.

[64] In *Gordon*, at para. 53, this court explained that "while protection is not afforded to the 'fruits' of bargaining, but only to the process by which they are to be negotiated, employer actions unilaterally undermining the ability of unions to bargain about significant matters are constitutionally suspect." The court further

explained, at paras. 53 and 54, that legislation affecting certain matters and employer actions which restrict those matters are by their nature “constitutionally suspect”. The matters of concern include salary, hours of work, job security and seniority, equitable and humane working conditions, and health and safety protections: *Gordon*, at para. 53. The employer actions that are “constitutionally suspect” for the purpose of s. 2(d) of the *Charter* include taking important matters off the table or restricting the matters that may be discussed, imposing “arbitrary outcomes”, unilaterally nullifying negotiated terms, removing the right to strike, and imposing limits on future bargaining: *Gordon*, at para. 54.

[65] With respect to the second part of the inquiry, as described above, the court must inquire into the impact of the measure on the collective right to good faith negotiation and consultation. In assessing the impact of a measure, the Supreme Court has emphasized that the duty to bargain in good faith requires the parties to engage in meaningful dialogue and to be willing to explain their positions: *Health Services*, at para. 101. However, the duty to bargain in good faith does not impose an obligation to reach an agreement or to accept any contractual provision: *Health Services*, at para. 103. Similarly, it does not require the parties to bargain indefinitely or preclude the parties from engaging in hard bargaining: *Health Services*, at paras. 102-3.

[66] Further, the circumstances under which an impugned law was adopted can be relevant to assessing the impact of the law on the process of good faith

negotiations. For example, a law that is adopted after a period of meaningful negotiation and consultation is less likely to be seen as interfering with the process of collective bargaining: see *Health Services*, at para. 92; *Association of Justice Counsel v. Canada (Attorney General)*, 2012 ONCA 530, 117 O.R. (3d) 532, at para. 41, leave to appeal refused, [2012] S.C.C.A. No. 430; and *British Columbia Teachers' Federation*, at para. 82, *per* Bauman C.J.B.C. and Harris J.A., and at paras. 287-91, *per* Donald J.A. (dissenting). However, "[s]ituations of exigency and urgency" may be relevant and "[d]ifferent situations may demand different processes and timelines": *Health Services*, at para. 107.

[67] In *Health Services*, at para. 109, the Supreme Court summarized the two-part inquiry by emphasizing that both the matter at issue and the effect on good faith collective bargaining must be substantial. The court also emphasized that this is a contextual and fact-specific inquiry:

> In summary, s. 2(*d*) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(*d*). Conversely, less central matters may be changed more summarily, without violating s. 2(*d*). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached. [Emphasis added.]

(2) Previous wage restraint decisions

[68] The Supreme Court, this court and other appellate courts in Canada have had the opportunity to consider the constitutional validity of other wage restraint legislation: *Meredith*; *Gordon*; *Canada (Procureur général) c. Syndicat canadien de la function publique section 675*, 2016 QCCA 163, leave to appeal refused, [2016] S.C.C.A. No. 117; *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156, 84 B.C.L.R. (5th) 341; and *Manitoba Federation*. In addition, the decision in *Reference re Bill 148, An Act Respecting the Sustainability of Public Services*, 2022 NSCA 39, 471 D.L.R. (4th) 547, is also relevant because, while the court declined to decide the issue on a reference, it nevertheless addressed some of the applicable principles in such cases.

[69] In all the decisions referred to above where the courts considered the constitutional validity of wage restraint legislation, the courts found that the legislation did not substantially interfere with the right to collective bargaining protected by s. 2(d) of the *Charter*. Ontario relies on these decisions in support of its position that the Act at issue in this case does not contravene s. 2(d). Ontario argues that the legislation in those cases is similar or more restrictive than the Act and that the application judge erred in failing to follow those decisions.

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

[71] Therefore, in order to assess the relevance of the prior appellate wage restraint legislation decisions, it is helpful to review those decisions in some detail to distill the relevant factors that led to each respective court's determination that the legislation in the corresponding case did not infringe the s. 2(d) rights of the represented employees in those cases. Below, I start with a review of the four decisions that dealt with challenges to the federal *Expenditure Restraint Act*, S.C.

2009, c. 2, s. 393 (“*ERA*”), followed by review of the *Manitoba Federation* decision, which dealt with wage restraint legislation enacted by the Manitoba government.

(a) Decisions challenging the *Expenditure Restraint Act*

[72] The decisions in *Meredith*, *Gordon*, *Dockyard* and *Procureur général* all dealt with challenges to the *ERA*. The legislation was enacted in response to the 2008 worldwide financial crisis. The *ERA* applied to over 400,000 unionized and non-unionized employees who worked for the federal Crown and approximately 48,000 employees who worked for federal Crown corporations. The *ERA* limited wage increases by specified percentages over a five-year period as follows: a) 2.5% for the 2006-2007 fiscal year, b) 2.3% for the 2007-2008 fiscal year, c) 1.5% for the 2008-2009 fiscal year, d) 1.5% for the 2009-2010 fiscal year, and e) 1.5% for the 2010-2011 fiscal year. The legislation was enacted after multiple collective agreements had already been negotiated. In some cases, where collective agreements that were subject to the *ERA* had already been negotiated, the legislation had the effect of rolling back negotiated wage increases.

[73] In *Meredith*, the parties challenging the *ERA* were members of the Royal Canadian Mounted Police (“RCMP”). In *Mounted Police*, which was decided at the same time as *Meredith*, the Supreme Court had found that the existing labour relations regime imposed by legislation for RCMP officers infringed s. 2(d) of the *Charter*. It was in that context that the Supreme Court reviewed the general

principles from *Health Services* and *Fraser* applicable to determining whether legislation substantially interferes with collective bargaining rights. In *Meredith*, despite having found that the labour relations regime for RCMP officers violated s. 2(d) of *Charter*, the court nevertheless considered the constitutional validity of the *ERA* as it applied to RCMP officers.

[74] The majority of the court held that the *ERA* did not violate the affected employees' s. 2(d) rights. In reaching this conclusion, the court did not engage in a detailed analysis of the circumstances under which wage restraint legislation may or may not constitute a violation of s. 2(d). Rather, in its reasoning at paras. 28-29, the court focused on the circumstances of the case, including that the relevant wage increases were similar to wage increases achieved by other employees who engaged in the collective bargaining process in the public sector and that the affected RCMP employees were nevertheless able to negotiate other improvements to their compensation:

> [T]he level at which *ERA* capped wage increases for members of the RCMP 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. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future.
>
> Furthermore, the *ERA* did not prevent the consultation process from moving forward. Most significantly in the

> case of RCMP members, s. 62 permitted the negotiation of additional allowances as part of "transformation[al] initiatives" within the RCMP. The record indicates that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Service pay was increased from 1% to 1.5% for every five years of service – representing a 50% increase – and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved. Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the *ERA* had a minor impact on the appellants' associational activity. [Emphasis added.]

[75] In *Gordon*, two unions representing employees in the federal public service challenged the *ERA* on the basis that it infringed their collective bargaining rights under s. 2(d) of the *Charter*. The evidence on the application was that most of the bargaining units represented by the unions had reached collective bargaining agreements with the federal government before the *ERA* was enacted. Many did not challenge the legislation. Furthermore, the evidence was that, as had been found in *Meredith*, the wage caps in the *ERA*, for the most part, were equivalent or higher than negotiated wage increases.

[76] In the circumstances, this court found that the *ERA* did not breach the union members' s. 2(d) rights. In reaching that conclusion, the court accepted that the first part of the "substantial interference" inquiry was met because "[b]argaining over wages is ordinarily a significant matter in free collective bargaining" and because the evidence in that case showed that wages were an important issue for

most bargaining units: at para. 122. However, the court was not satisfied that the *ERA* amounted to a substantial interference with good faith negotiation and consultation. In reaching this conclusion, the court relied on the evidence that the caps on wage increases in the *ERA* were equivalent or higher than those in most collective agreements reached around that time. The court reasoned, at paras. 127-28, that:

> The *ERA*'s imposition of the wage increase caps therefore was consistent with the results of free collective bargaining that were the most favourable to the unions, having been negotiated by the largest union.
>
> From a process perspective, it is difficult to imagine that continuation of an unfettered bargaining process for the remaining minority of units 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.

[77] The court recognized that, as held in *Meredith*, outcomes are not determinative, but they can support a conclusion that the *ERA* had a minor impact on the unions' associational activities: *Meredith*, at para. 29; *Gordon*, at para. 130. The court concluded that "viewing the matter in context, union members were not discouraged from the collective pursuit of common goals as a result of the upper limits placed on wage increases for the restraint period": *Gordon*, at para. 131.

[78] Ultimately, at para. 176, this court concluded that the *ERA* did not infringe the appellant unions' s. 2(d) rights on the following basis:

> The Government engaged in permissible hard bargaining during a period of economic crisis and government austerity. And by enacting the *ERA*, the Government capped wage increases for a limited period. The *ERA* did not completely prohibit any wage increases, the cap was in place for a limited period of time, and the limit imposed was in line with the wage increases obtained through free collective bargaining. Moreover, the appellant unions were able to make progress on matters of interest to some of the bargaining units they represented. They were still able to participate in a process of consultation and good faith negotiations. As such, neither the *ERA* nor the Government's conduct before or after the enactment of *ERA* limited the appellants' s. 2(d) rights.

[79] In *Procureur général*, the Court of Appeal of Québec dealt with a challenge to the *ERA* brought on behalf of two groups of employees of the Société Radio-Canada in the province of Québec and Moncton. Prior to the passage of the *ERA*, one of the bargaining units had negotiated wage increases of 3.5% as of October 1, 2007, followed by four annual increases beginning in December 2007 of 3%, 2.5%, 2.5% and 2.5%. The other bargaining unit had negotiated annual wage increases of 2.6% in 2007, 2.5% in 2008 and 2.5% in 2009. In that case, the evidence was that, at the time the *ERA* was tabled, the unions representing the affected employees did not realize that the wage caps in the *ERA* would apply to their collective agreements.

[80] In that context, the Court of Appeal of Québec, at para. 43, held that there was no question that the issue of wage increases was a matter of central importance to workers involved in collective bargaining: "[t]hese issues are central

to the exercise of this freedom in a workplace and are ordinarily one of the crucial points of discussion during collective bargaining" [translation].

[81] Despite finding that there was interference, the court found on the second branch of the *Health Services* analysis that the *ERA* did not substantially interfere with the collective bargaining process because it preserved a process of consultation and good faith negotiation: at para. 59. In reaching this conclusion, the court relied on the following contextual factors and characteristics of the *ERA*:

a. The *ERA* did not freeze or reduce salaries, but rather restricted the scope for wage increases for what the court described as a non-negligible period of time: at para. 48.
b. As the Supreme Court found in *Meredith*, and as subsequently found in *Gordon*, the wage increase caps in the *ERA* were comparable to wage increases that had been freely negotiated within the federal public sector: at paras. 50-51.
c. Once the wage restraint measures concluded, the parties would be free to negotiate agreements that mitigated the lost increases over time: at para. 52.
d. Section 8 of the *ERA* permitted the reopening of already negotiated collective agreements to enhance non-monetary aspects of the collective agreements, such as hours or work, vacation, leaves, employment security, staffing assignments and transfers. This provision was consistent with

Meredith in allowing for consultation on other compensation-related issues: at paras. 53-56.

[82] The court concluded, at para. 100, that the *ERA* did not substantially interfere with freedom of association because the legislation did not deprive the employees and associations representing them of the possibility of having meaningful collective negotiations on workplace matters, the right to actual collective bargaining processes, or the ability to engage in collective bargaining.

[83] Finally, in *Dockyard*, before the introduction of the *ERA*, a bargaining agent for the members of its constituent trade unions had obtained a 5.2% wage increase through arbitration as of October 2006, as well as wage increases within the limits of the *ERA* from 2006 to 2009. The effect of the *ERA* was to nullify the 5.2% wage increase. The court found that the rollback did not substantially interfere with the process of collective bargaining for a number of reasons, including the lengthy negotiations and the warning, before pressing ahead with the arbitration, that there may be a rollback.

[84] There are four common threads between the decisions dealing with the constitutional validity of the *ERA*: 1) the measures were imposed in the context of the 2008 global economic crisis; 2) multiple bargaining units had reached agreements about wage increases similar to those that were legislated before the *ERA* was enacted; 3) the legislation was imposed after a relatively long period of

negotiation; and, 4) in some cases, following the enactment of the *ERA*, bargaining units were nevertheless able to reopen their collective agreements to negotiate for wage increases (*Meredith*) or other matters of interest, including matters related to compensation (*Procureur général*).

[85] The Supreme Court denied leave to appeal on *Gordon*, *Procureur général* and *Dockyard*.

(b) Manitoba wage restraint legislation decision

[86] The only other appellate decision in Canada raised by the parties deciding the constitutional validity of wage restraint legislation is the decision of the Court of Appeal of Manitoba in *Manitoba Federation*. Ontario relies heavily on this decision as the basis for its position that the application judge erred in finding that the Act infringes the respondents' s. 2(d) rights. Specifically, Ontario argues that the Act and the legislation at issue in *Manitoba Federation* are very similar and, in fact, that the Manitoba legislation imposed more draconian caps on wage increases in comparison to the Act.

[87] *Manitoba Federation* involved a challenge to *The Public Services Sustainability Act*, S.M. 2017, c. 24 (the "*PSSA*"). The *PSSA* was passed in 2017. It imposed wage caps of 0%, 0%, 0.75% and 1% over a four-year period. The *PSSA* applied to represented and non-represented employees in Manitoba's public service, which covered nearly 20% of the province's workforce.

[88] The trial judge had found that the *PSSA* infringed the s. 2(d) rights of the represented employees who were subject to the legislation, and that it was not saved by s. 1 of the *Charter*.

[89] The Court of Appeal of Manitoba allowed the appeal on this issue, finding that the *PSSA* did not infringe the s. 2(d) rights of represented employees affected by the statute. The court found that the trial judge made several errors in her analysis.

[90] First, while the court noted that the government of Manitoba had not engaged in any pre-legislation consultation before enacting the *PSSA*, it was an error for the trial judge to find that this consideration was relevant because the government had no obligation to consult with the unions before passing legislation: at para. 81. (I will have more to say below about how the court dealt with this issue.)

[91] Second, the court found that the trial judge had improperly compared private sector wages to public sector wages in determining that the results achieved through collective bargaining were higher than the wage increases in the *PSSA*: at paras. 84-85. The court held that, when comparing the *PSSA* wage increase caps to other public sector negotiated collective agreements to which the *PSSA* did not apply, the wage increases were comparable to those in the *PSSA*: at para. 86.

[92] Having found that the trial judge erred in her s. 2(d) analysis, the court conducted its own fresh analysis. In doing so, the court considered a number of factors. First, the court found that the relevant provisions of the *PSSA* are functionally equivalent to those in the *ERA*, which were found to be constitutional. Second, the court found that, despite the passage of the *PSSA*, bargaining units were able to negotiate over various workplace conditions other than wages. Third, the court noted that, unlike the *ERA*, the *PSSA* included a clause permitting exemption from the statute. In making this finding, the court pointed out that s. 7(4) of the *PSSA* gave the Manitoba government the ability to grant an exemption from the *PSSA*, and that the unions could strike for the purpose of pressuring the government into granting an exemption: at para. 123.

[93] The court accepted, as conceded by Manitoba, that “taking wages off the bargaining table” met the first inquiry in the test established by *Health Services*: at para. 128. However, the court found that the second branch was not met because, based on the factors referred to above, the *PSSA* preserves a process of consultation and good faith negotiation. In reaching this conclusion, at para. 128, the court stated that “the case law establishes that that type of legislative interference does not amount to ‘substantial interference’ when it is broad-based and for a limited period of time.”

[94] As with the decisions that considered the *ERA*, the Supreme Court denied leave to appeal from the *Manitoba Federation* decision.

(c) General principles that arise from prior wage restraint legislation decisions

[95] As mentioned above, one of the arguments made by Ontario is that the application judge erred in failing to follow previous appellate wage restraint legislation decisions. In making this argument, Ontario points to the similarities between the legislation in these other cases and the Act, especially the Manitoba legislation.

[96] However, this argument fails to have regard to the fact-specific and contextual analysis mandated by the Supreme Court in deciding whether legislation substantially interferes with the right to collective bargaining.

[97] One of the challenges in understanding the wage restraint cases is that there is an inherent tension between the protection of a right to a *process* of collective bargaining but not of the right to a specific *outcome*. By imposing specific limitations on compensation increases, wage restraint legislation places limitations on the potential outcomes of collective bargaining, which on its own is not a violation of s. 2(d). However, imposing limits on potential outcomes, such as wages, does interfere with good faith negotiation and consultation because it limits the potential areas and scope for negotiation and consultation. As held by the Court of Appeal of Québec in *Procureur général*, at para. 97, the question becomes

one of degree and intensity, and the degree to which legislation imposing a wage cap interferes with the ability of organizations to bargain collectively.

[98] Based on my review of the case law above, there is no formula for assessing whether the degree of interference reaches the level of substantial interference. Rather, the courts have looked at a set of factors to assess the degree of interference, and whether the measures imposed nevertheless leave room for a meaningful process of good faith negotiation and consultation.

[99] These indicia include consideration of the circumstances and process leading to the passage of the legislation. Significant collective bargaining prior to the passage of the legislation or meaningful consultation on the legislation diminish the finding of interference, because such processes mean that there was negotiation or consultation before the imposition of the wage restraint measure, and that not much more could have been gained through further negotiation or consultation. On this issue, with respect, I do not agree with the Court of Appeal of Manitoba's finding that it was an error for the trial judge to consider the fact that the Manitoba government did not consult with the unions before passing the *PSSA*. Negotiation of collective agreements and consultation on legislation are different. However, as acknowledged in the decisions dealing with the constitutionality of the *ERA*, they can both play a role in determining whether legislation limiting the areas of negotiation violate s. 2(d). Good faith collective bargaining prior to the enactment of legislation can form the basis for a finding that there has been no substantial

interference with the process of collective bargaining. Similarly, while consultation on legislation is not required, meaningful consultation can also serve as evidence that there has not been significant interference with the collective bargaining process.

[100] Another indication that wage cap legislation does not substantially interfere with the process of good faith negotiation and consultation is where the legislation leaves room for meaningful negotiation and consultation on issues other than wages. This is because, in such circumstances, the legislation still allows workers to come together in an effort to achieve workplace goals.

[101] Similarly, where the wage restraint legislation allows for a process of exemption, over which organizations can negotiate or even strike, there is an attenuated interference with the ability to negotiate and bargain in good faith.

[102] Finally, where the terms of the wage restraint legislation replicate the terms of collective bargaining agreements freely negotiated in the public sector, this serves as an indication that there has not been substantial interference because it suggests that a free process of collective bargaining would not have led to a better outcome if the unions had participated or continued to participate in negotiations.

[103] Before turning to an analysis of the Act and the circumstances under which it was enacted, I pause to comment on two additional factors the Court of Appeal of Manitoba suggested are also relevant.

[104] First, as mentioned above, the court stated, at para. 128 and elsewhere, that one relevant consideration is whether the legislation is “broad[ ]based”, applying to represented and non-represented employees. With respect, this cannot be a relevant consideration. The s. 2(d) analysis requires consideration of whether legislation substantially interferes with the process of collective bargaining. The fact that legislation may also apply to non-represented employees does not assist in this inquiry. The issue is not whether the legislation targets represented employees, but rather the impact the legislation has on represented employees’ collective bargaining rights.

[105] Second, in *Manitoba Federation*, the Court of Appeal of Manitoba also suggested that other wage restraint legislation cases had established that time-limited wage restraint legislation does not substantially interfere with the process of collective bargaining. Again, I do not agree with this characterization of the other decisions. The focus of the *ERA* decisions was on whether, despite the legislated wage cap, a process remained for the unionized employees to come together and engage in good faith negotiation and consultation over working conditions. The fact that a measure is not permanent may be relevant to assessing whether it constitutes a substantial interference. However, it is still appropriate to measure the degree of interference within the relevant collective bargaining period. It is hard to imagine that legislation that halted all collective bargaining, even for a period of one year, would sustain s. 2(d) scrutiny. In other words, time limits may be relevant

but they should not be overemphasized when looking at the impact of the legislation on collective bargaining in the context and circumstances of a particular case. In this respect, I agree with the comment made by the Nova Scotia Court of Appeal in *Reference re Bill 148*, at para. 49:

> In my view, *Manitoba Federation* does not add any new principles to the jurisprudence with respect to s. 2(d) of the *Charter*. The Attorney General relies heavily on this decision because of the similarities between the legislation under consideration and the *PSSA*. He argues it stands for the proposition time limited wage restraint legislation is always constitutional. If the suggestion is this conclusion can be reached without the need to consider the surrounding context, this runs contrary to the clear advice of the Supreme Court of Canada in *Health Services, Meredith* and *British Columbia Teachers' Federation*. I would not adopt such an interpretation of *Manitoba Federation*. [Emphasis added.]

[106] Ultimately, while I take issue with the Court of Appeal of Manitoba's treatment of pre-legislation consultation, the application of legislation to represented and non-represented employees and the time-limited nature of the legislation, I note that this does not detract from the fact that the *PSSA* has several of the characteristics I referred to above as indicia of constitutionality. Notably, the court found that the *PSSA* left room to negotiate matters of importance, including an exemption clause that maintained a right to strike over wages, and it replicated wage increases in other public sector collective agreements.

[107] As reviewed below, in contrast with the *ERA* and *PSSA* decisions, the circumstances leading up to the passage of the Act and the terms of the Act,

including a comparison of those terms to other public sector negotiated agreements, all support a finding that the Act substantially interfered with the ability of the respondents to enter into good faith negotiation and consultation with their employers. I now turn to a review of these indicia as they apply to the circumstances leading up to the passage of the Act and the provisions of the Act itself.

(3) Application of s. 2(d) jurisprudence to this case

[108] As set out above, the Supreme Court has established a two-part process for determining if a law substantially interferes with the right to collective bargaining. First, the court must assess the importance of the matter to the process of collective bargaining. Second, the court looks at the manner and extent to which the measure impacts on the collective right to good faith bargaining and consultation.

[109] In this case, as uncontested by Ontario, and consistent with the prior wage restraint legislation decisions, there is no doubt that wages and compensation are matters of central importance to collective bargaining. Besides the fact that this has been recognized as a self-evident proposition in other cases, the respondents all put forward evidence supporting a finding that wages and compensation were central to their collective bargaining goals and interests.

[110] Therefore, the key issue in this case, as in the other wage restraint legislation decisions, is the second part of the *Health Services* analysis, namely whether the Act preserves a meaningful "process of consultation and good faith negotiation": *Health Services*, at para. 94.

[111] Before turning to my analysis on this issue, I want to deal briefly with the application judge's s. 2(d) analysis. As discussed above in the section addressing the standard of review, this court does not owe deference to the application judge's finding that the Act violates s. 2(d). This includes the ten factors he considered as part of his determination that the Act did not preserve a process of consultation and good faith negotiation that are relevant to the inquiry.

[112] Based on my review of the case law above and the indicia of potential substantial interference they identify, the application judge may have considered some factors that were not necessary or germane to the inquiry. For example, I am not persuaded that the application judge's reliance on evidence from ONA that some of its members expressed a lack of confidence in their association rises to the level of supporting a finding that the Act substantially eroded a process of good faith negotiation and consultation; there will likely always be some union members who are dissatisfied with their association's inability to influence government policy or with the terms of a negotiated collective agreement.

[113] However, given the standard of review, I do no need to consider each of the ten factors the application judge relied on in any detail. For this exercise, the primary relevance of those factors is that they include some findings of fact that are relevant to the analysis below. As indicated above, this court owes deference to those findings of fact.

[114] I now turn to a review of the indicia of interference identified above as they apply in this case.

(a) The government did not engage in a significant process of collective bargaining or consultation before passing the Act

[115] As reviewed above, when wage restraint legislation comes after a significant period of collective bargaining or after meaningful consultation with collective bargaining organizations over the terms of the legislation, the impact of the legislation on collective bargaining is attenuated. In this case, the evidence does not support a finding of significant collective bargaining or meaningful consultation over the Act.

(i) The status of collective bargaining at the time of Bill 124's introduction

[116] With respect to collective bargaining prior to the passage of the Act, the Act applies to over 2,500 bargaining units, so it is not possible to assess the state of collective bargaining with each of those bargaining units at the time Bill 124 was

introduced. However, at least two factors make clear that, unlike the *ERA*, the Act was not introduced after a period of significant collective bargaining with the respondents. In other words, in this case, unlike in *Gordon*, the evidence does not support a finding that little more could be achieved with further collective bargaining: see *Gordon*, at paras. 100-1, 128.

[117] First, as reviewed above, the 1% cap on wage and compensation increases was to come into effect as collective agreements came to an end starting on June 5, 2019. This means that, in many cases, if not most cases, no collective bargaining would have started before the Act was enacted.

[118] Second, there is evidence that the Act was introduced in anticipation of the beginning of collective bargaining in the education sector. As the application judge observed, 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, conceded that the commencement of education sector bargaining was a key consideration with respect to the timing of the Act. This consideration is supported by the course of events leading up to the introduction of Bill 124. With collective bargaining set to take place in 2019 for many working in the education sector, the government announced it was launching a consultation process on compensation growth with public sector bargaining agents and employers in April 2019. Many of the bargaining agents representing teachers and other education workers served notices to bargain in the weeks before Bill 124's

introduction and passage. For example, OECTA served its notice to bargain on May 21, 2019, just 15 days before the government introduced Bill 124. Similarly, OSSTF served its notice to bargain on April 29, 2019, the earliest possible date under the legislation governing collective bargaining in the education sector. Notably, the president of OSSTF testified before a legislative committee that he learned of Bill 124's introduction on June 5, 2019, while sitting at the bargaining table.

[119] Again, the government was not precluded from introducing Bill 124 before the beginning of collective bargaining in the education sector and other sectors. However, this timing makes clear that it was not introduced after a period of meaningful bargaining and negotiation, which could have attenuated the impact of the Act on the respondents' collective bargaining rights.

(ii) Consultation on Bill 124

[120] Similarly, there is no requirement for governments to consult unions and their members before passing wage restraint legislation or any other legislation that may affect work conditions. Consultation on legislation is not the same as collective bargaining. However, where there is meaningful consultation on legislation, this can reduce the impact of the unilateral imposition of legislation on the collective bargaining process. In this case, as found by the application judge,

there was no meaningful consultation with the respondents before the passage of the Act.

[121] As identified by the application judge, the government engaged in consultations over a four-week period beginning in April 2019 before introducing Bill 124, but this did not amount to meaningful consultation with the respondents. The application judge noted in particular the following:

a. The government circulated no consultation paper to the respondents before the consultations, but instead provided them with a series of questions about managing compensation costs and legislated compensation caps. The questions did not set out any proposed caps, even though the President of the Treasury Board had directed staff to explore caps of 1% to 2% as early as February 2019. Internal government timelines and documents did not provide for further consultations following receipt of answers to the questions, but instead contemplated the introduction of legislation, if necessary, soon after the end of the scheduled consultations.

b. The consultations were led by an external lawyer hired by the government, not government officials from the Treasury Board Secretariat or any other relevant ministry with whom the unions could bargain. During the consultations, counsel read from a prepared script and provided non-responsive answers to questions. For example, when asked about the sort of wage caps in the government's contemplation, counsel did not provide

information about the range of proposed caps but instead directed unions to the 2019 budget and a series of broad-based financial figures.

c. Mr. Porter, Ontario's chief affiant in the proceedings, conceded in cross-examination that the consultation process was not intended to replicate or replace collective bargaining. This was evident in the consultations that occurred. For example, the Society of United Professionals was invited along with four other bargaining agents to a 60-minute consultation, allowing each of the five bargaining agents 12 minutes of consultation. During that consultation, counsel could not explain how compensation at OPG, IESO and OEB (which are self-funded) contributed to the province's debt.

d. The consultations took a very different route from past consultations on labour relations issues. For example, the government previously engaged in a four-month consultation with OSSTF on hiring practices. As part of those consultations, it provided a detailed consultation paper setting out the issues and sub-issues the government was considering, the status of those issues and the proposed changes. Here, in contrast, the consultations were not preceded by any consultation paper and the duration of the consultations was shorter, even though they concerned a much broader sector of the public sector.

[122] Shortly after these limited consultations occurred, Bill 124 was introduced on June 5, 2019. On June 6, 2019, government officials sent a mass email to

stakeholders announcing the legislation and inviting them “to provide feedback on this proposed approach” to a generic email address. As the application judge observed, however, the email was not an offer to meet and discuss issues with any of the respondents.

[123] Again, there is no requirement that the government consult with the respondents over its intended legislation. However, a process of meaningful consultation could have significantly attenuated the impact of the Act on collective bargaining given that it could have served as a substitute for negotiation. Here, there was no such process.

(b) The Act removes the ability to negotiate over significant matters

[124] One of the issues considered by the courts in the other wage cap legislation cases was that, despite the limit imposed on wage increases, the unions were still able to negotiate over other substantial matters. For example, in *Meredith*, a provision in the legislation that applied to compensation for RCMP officers permitted for negotiation of additional allowances. The court found that this resulted in “significant” benefits following the passage of the *ERA*: at para. 29. Similarly, in *Procureur général*, the Court of Appeal of Québec found that the bargaining units at issue could still bargain over matters such as hours or work, vacation, leaves, assignments and transfers: at para. 55.

[125] In this case, the broad definition of “compensation” in the Act significantly limits the areas that remain available for negotiation. As reviewed above, the cap does not just apply to salaries; it also applies to any kind of benefit or compensation that can be monetized, such as sick days, vacation days and other benefits. The *ERA* and Manitoba’s *PSSA* did not impose such broad limitations on the areas affected by the caps in those statutes.

[126] The impact of the broad limitations in this case is twofold. First, it significantly limits the scope for negotiations over all areas of compensation. Second, it impedes the respondent organizations from using wages and other compensation as a bargaining chip to achieve gains in other areas. The application judge made findings of fact that support both concerns.

[127] On the first point, the application judge noted the significant limits on areas of negotiation and gave the following example:

> 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.

[128] On the second point, the application judge also provided examples of the impact on collective bargaining in other areas of interest to the respondents:

> 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.
>
> By way of further example, in 2019 – 2020, the [ONA] 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.
>
> 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. 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." 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. The Act prevents Unifor from bargaining about these issues even as understaffing was exacerbated during the Covid 19 pandemic. [Footnotes omitted.]

[129] Removing wages and compensation as an item from negotiation is not an impediment to good faith negotiation and consultation *per se* if there is room left for meaningful bargaining on other matters. This is because s. 2(d) of the *Charter* does not guarantee a specific outcome, but only a right to a meaningful process. However, in this case, the scope of the items removed from negotiations and the

impact of removing those items on the ability to bargain over other items did evidently interfere with the respondents' ability to participate in good faith negotiation and consultation.

(c) The Act does not provide a meaningful process for exemption

[130] One of the other considerations in some of the other wage restraint legislation is the availability of a process for seeking exemptions from the wage increase cap. For example, as mentioned above, in *Meredith*, at paras. 29 and 42, the Supreme Court relied on the RCMP members' ability to seek compensation above the caps imposed by the *ERA* based on a statutory provision that allowed them to do so. In *Manitoba Federation*, at para. 123, the Court of Appeal of Manitoba pointed to a provision in its legislation that allowed the unions in years three and four of the wage restraint timeframe to negotiate savings and increase employee compensation. In addition, the *PSSA* gave the Treasury Board the ability to exempt "any person or class of persons" from the statute's application: *PSSA*, s. 7(4). Further, the court reasoned that a union could exercise its right to strike for the purpose of seeking an exemption under that provision.

[131] In this case, Ontario relies on the exemption in s. 27 of the Act in support of its position that the Act does not substantially interfere with the process of collective bargaining. In taking this position, Ontario suggests that the respondents could strike for the purpose of seeking an exemption.

[132] I do not accept this argument.

[133] Unlike in *Manitoba Federation*, in this case there is significant evidence that supports a finding that the possibility of an exemption is illusory rather than a meaningful avenue of negotiation. While s. 27 provides for exemptions, the Minister has only granted one exemption despite multiple requests. Notably, the majority of such requests have gone unanswered. At the time of the hearing before the application judge, he made the following findings on the use of the exemption:

> 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.
>
> 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.

[134] Further, there is no evidence of a process or any criteria used by the Minister to consider such requests.

[135] Therefore, while in theory s. 27 suggests that the respondents may have an avenue for seeking an exemption from the application of the Act, there is in fact no evidence that this is a meaningful channel for negotiation or collective bargaining.

[136] In so far as Ontario suggests that the respondents could engage in a strike to obtain an exemption, this position is not supported by the reality of how lawful

strikes take place in Ontario. First, for many of the employees affected by the Act, their employer is not the provincial government. In those cases, a strike would not place meaningful pressure on the government to grant an exemption. Second, the right to strike in Ontario arises after the parties engage in a series of required steps, and, once those steps are completed, the union and its members can only strike over matters which the employer can compromise. As such, I accept the respondents' position that Ontario is suggesting that they could engage in strikes that are unlawful. Third, many of the bargaining units represented by the respondents are essential workers who do not have a right to strike; instead, they are subject to binding arbitration. In the circumstances, there is simply no basis for Ontario's blunt assertion that the respondents could strike for the purpose of being exempted from the Act.

[137] While the ability to obtain or negotiate an exemption from wage restraint legislation can be relevant to assessing the degree of interference of such legislation with the process of collective bargaining, the hypothetical possibility of an exemption is of no moment in this case. Accordingly, s. 27 of the Act does not attenuate the interference of the Act with the respondents' ability to engage in good faith negotiation and consultation because it does not offer a meaningful avenue for negotiation and consultation.

(d) The Act does not match other collective agreements negotiated in the public sector in the same time period

[138] As mentioned above, one of the considerations in all wage restraint legislation decisions is whether the restrictions imposed by the legislation are similar to terms freely negotiated in other public sector agreements during the relevant timeframe.

[139] In *Meredith*, at para. 28, the Supreme Court found that the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the rates reached in collective agreements negotiated in the core and broader public sector. In *Gordon*, at para. 127, this court similarly found that the "*ERA*'s imposition of the wage increase caps was consistent with the results of free collective bargaining that were the most favourable to the unions." As reviewed above, the courts made similar findings in *Procureur général* and *Manitoba Federation*.

[140] As noted in these previous cases, this factor is not determinative, but it can serve as an indication that the wage restraint legislation did not impede the ability to engage in good faith negotiation and consultation. If the outcome achieved by other public sector organizations is consistent with or lower than the wage cap imposed by legislation, this is an indication that the wage cap had a minimal impact on the collective bargaining process because it is unlikely that a better outcome could have been achieved through collective bargaining.

[141] In this case, the application judge made a finding of fact regarding other freely negotiated collective agreements in the public sector before and after the passage of the Act:

> 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%.
>
> 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. [Footnote omitted.]

[142] The application judge also rejected the comparators proposed by Ontario on the basis that this small subsection of collective agreements providing for wage increases of 1% or lower represented only 1.05% of public sector collective agreements and were therefore not representative of what was generally available in collective bargaining.

[143] Notably, in this case, as reviewed above, the 1% cap in the Act does not only apply to wages, but also to all forms of compensation that can be quantified in monetary values such as sick days and vacation days. Accordingly, while the application judge found that collective bargaining negotiations in the broader public sector at the time Bill 124 was introduced resulted in overall salary increases of

approximately 1.6%, the 1.6% figure does not account for all forms of compensation increases. Presumably, taking account of the monetary value of other changes in compensation negotiated in comparable collective agreements would lead to a bigger difference between the 1% cap imposed by the Act and results achieved in other negotiated collective agreements.

[144] Again, this factor is not determinative. However, unlike in previous wage restraint legislation decisions, the difference between the 1% cap in the Act and the terms of negotiated agreements does not support a finding that the Act had little impact on the respondents' ability to come together and negotiate with their employers in pursuit of their collective interests.

(4) Conclusion on s. 2(d) interference

[145] I agree with the application judge's conclusion that the Act substantially interferes with the respondents' collective bargaining rights. First, it affects a matter of central importance to collective bargaining, namely wages. Second, the circumstances leading up to the passage of Bill 124 and the characteristics of the Act substantially impact the respondents' ability to participate in good faith collective bargaining and consultation. The Act did not come after a significant or meaningful process of collective bargaining. While this could have been attenuated by meaningful consultation over Bill 124 itself, no meaningful consultation took place. Further, the broad definition of compensation significantly limits the areas

of potential negotiation left on the table for collective bargaining. Moreover, the Act does not provide a meaningful avenue for negotiating or seeking potential exemptions from the 1% cap in appropriate circumstances. Finally, the 1% cap on salary and compensation increases does not replicate collective agreements reached in other public sector bargaining. In combination, these factors persuade me that the Act substantially interferes with the respondents' ability to participate in good faith negotiation and consultation with their employers.

H. IS THE ACT SAVED BY S. 1 OF THE *CHARTER*?

[146] Section 1 of the *Charter* provides that the *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."

[147] Once a law has been found to violate a *Charter* right, the government bears the onus of establishing that the law is a reasonable limit on that right. This must be shown on a balance of probabilities: *Health Services*, at paras. 138-39.

[148] The test in *R. v. Oakes*, [1986] 1 S.C.R. 103, applies to deciding whether a law is saved by s. 1 of the *Charter*. The government must first establish that the impugned law pursues a pressing and substantial objective. Next, the government must establish that the objective of the law is proportional to the means chosen to achieve the objective. This aspect of the test has three components. First, there must be a rational connection between the pressing and substantial objective and

the means chosen to achieve the objective. Second, the law must be minimally impairing. Third, the salutary effects of the law must be proportional to its deleterious effects. Further, "the *Oakes* test must be applied flexibly, having regard to the factual and social context of each case": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 132.

[149] In *Health Services*, at para. 108, the Supreme Court explained that, in the context of a law infringing the right to collective bargaining under s. 2(d) of the *Charter*:

> [Section 1] may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

[150] As discussed below, I find that the Act is not saved by s. 1 of the *Charter*. I accept that Ontario has established that the Act has a pressing and substantial objective. However, while I find that the objective is generally rationally connected to the Act, I do not find that the objective is rationally connected in its application to workers in the electricity sector, namely the members of the Society of United Professionals and PWU, or to the members of the Carleton University Academic Staff Association and academic staff at other universities. In addition, I am not persuaded that the Act minimally impairs the respondents' collective bargaining rights or that its salutary effects are proportional to its deleterious effects. I address each of these issues below.

[151] Before doing so, however, I note that, in *Meredith*, the Supreme Court did not conduct a s. 1 analysis. In contrast, in *Gordon* and *Procureur général*, despite the courts' findings that the legislation in those cases did not violate s. 2(d), the courts nevertheless conducted s. 1 analyses, finding in each case that, even if the *ERA* did violate s. 2(d), it would have been saved by s. 1 of the *Charter*. Accordingly, in addressing each of the parts of the s. 1 analysis, I will address and distinguish those cases as appropriate.

(1) Pressing and substantial objective

[152] The application judge did not accept that Ontario established a pressing and substantial objective for two primary reasons. First, he did not accept that Ontario put forward a workable definition of a pressing and substantial objective. On that basis, he redefined the objective. Second, he found that Ontario had not established that the province was in a financial crisis such that Ontario's objective was pressing and substantial.

[153] In my view, having regard to the jurisprudence in this area and the evidence, the application judge failed to give sufficient deference to the government's ability to pursue its priorities in financial and budgeting matters. I start with a discussion of the definition of the objective, followed by a discussion of whether Ontario established that the objective is pressing and substantial.

(a) Definition of objective

[154] At the hearing below, as described by the application judge, Ontario submitted that the objective of the Act was "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." The application judge found that this objective "conflate[d]" the means of achieving the objective with the objective itself. He explained that:

> 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.

[155] On this basis, the application judge redefined the objective as "the responsible management of Ontario's finances and the protection of sustainable public services."

[156] Before this court, Ontario again submitted that the objective of the Act was "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." During argument, Ontario submitted that the responsible management of the province's finances and sustainability of

public services is the Act's main objective, and that the moderation of the rate of growth of compensation increases for public sector employees is its sub-objective. Ontario submits that the application judge erred in redefining the objective.

[157] I agree with the application judge. His redefinition of the Act's objective was consistent with the case law and with the preamble to the Act.

[158] The Supreme Court has explained that the objective of a law must not be stated in too general terms because, otherwise, "it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose": *R. v. Moriarity*, 2015 SCC 55, [2015] S.C.R. 485, at para. 28; see also *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46. On the other hand, an articulation that is too narrow "may merely reiterate the means chosen to achieve it": *Frank*, at para. 46. On this basis, the Supreme Court has stated that a law's purpose should be "both precise and succinct" and distinguished from the means chosen to implement it: *Moriarity*, at para. 29; see also *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 23.

[159] In this case, I agree with the application judge's articulation of the objective as the responsible management of the province's finances and the protection of sustainable public services. The moderation of public service wages is a means to that end; it is not a valid objective on its own.

[160] This is evident from the wording of the preamble of the Act and the Act's purpose, which emphasize that its goals are responsible fiscal management and sustainability of public services, and that the means to achieving this goal is the moderation of public sector employee wages. For the purpose of highlighting this point, portions of the preamble are reproduced below, with emphasis on the stated goals of fiscal responsibility and preservation of public sector services:

> The Government is committed to restoring the Province's fiscal health by putting Ontario on a path to balance the budget in a responsible manner. As outlined in the Government's 2019 Budget, the Government inherited a very substantial deficit. Ontario's accumulated debt is among the largest subnational debts in the world, and the Province's net debt to Gross Domestic Product ratio exceeds 40 per cent. Interest on debt payments is the fourth largest line item in the 2019 Budget after health care, education and social services.
>
> Restoring sustainability to the Province's finances is in the public interest and is needed to maintain important public services that matter to the people of Ontario. The Government seeks to ensure the sustainability of public services by restoring fiscal balance and lowering Ontario's debt burden as a percentage of Gross Domestic Product. The Government also seeks to protect front-line services and the jobs of the people who deliver them.
>
> A substantial proportion of government program expenses is applied to public sector compensation, whether paid directly by the Province to Ontario Public Service employees or provided indirectly to employees in the Broader Public Sector. Given the fiscal challenge the Province is facing, the growth in compensation costs must be moderated to ensure the continued sustainability of public services for the future.
>
> This Act contains fiscally responsible measures to address compensation in the Ontario Public Service and for specified Broader Public Sector employers. These measures would allow for modest, reasonable and sustainable compensation growth for public sector employees. For public sector employees who collectively bargain,

> these measures respect the collective bargaining process, encourage responsible bargaining, and ensure that future bargained and arbitrated outcomes are consistent with the responsible management of expenditures and the sustainability of public services. [Emphasis added.]

[161] Similarly, s. 1 of the Act states that its purpose is "to ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services" (emphasis added).

[162] As structured and worded, the preamble and purpose of the Act emphasize that its objective is to address the province's fiscal situation and to sustain public services, and that the means to those ends is the moderation of public service wages.

[163] Before concluding on this issue, it is worth reviewing the objectives of the *ERA*. In *Gordon*, at para. 192, and *Procureur général*, at para. 67, the courts described the three objectives of the *ERA* as follows:

- Display leadership through diligent management of public funds in periods of economic difficulty;
- Ensure management of costs associated with public sector compensation that is predictable and that sustainably contributes to the solidity of the government's financial position; and
- Reduce undue upward pressure on private sector salaries.

[164] Notably, unlike Ontario's proposed sub-objective in this case, these stated objectives are not the reduction or moderation of public sector wages *per se*, but are rather focused on the management of public funds in a time of crisis and establishing leadership vis-à-vis private sector wages.

[165] In oral argument, Ontario relied on the decision in *Health Services* to argue that it is appropriate to have a main objective with sub-objectives. Ontario submitted that, in this case, fiscal responsibility and the maintenance of public services is the main objective, while moderation of public sector wages is the sub-objective. There is no doubt, in accordance with *Health Services*, that it may be appropriate to have a main objective and sub-objectives. However, in this case, unlike in *Health Services*, Ontario's proposed sub-objective of moderating public sector wages is the means of achieving the main objective and not a sub-objective.

[166] Accordingly, I agree with the application judge's re-characterization of the objective of the Act as the responsible management of the province's finances and the protection of sustainable public services.

(b) The objective is pressing and substantial

[167] While I agree with the application judge's characterization of the Act's objective, I do not agree with his finding that Ontario did not establish that the objective as restated was pressing and substantial. In my view, the application

judge's decision shows insufficient deference to the legislature's ability to identify policy priorities, especially on fiscal and labour matters.

(i) General principles

[168] As a general principle, Ontario must establish that the Act's objective is "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 352. This ensures that "objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection": *Oakes*, at p. 138.

[169] As this court stated in *Gordon*, "[t]his stage … is not usually an evidentiary contest. Rather, 'the proper question at this stage of the analysis is whether the Attorney General has asserted a pressing and substantial objective' and a 'theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis'": at para. 196 (emphasis in original), citing *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 25-26. The court also noted, at para. 199, that "[m]ost s. 1 *Charter* cases move quickly past the first stage of determining whether a government's objectives were pressing and substantial."

[170] In *Gordon*, at para. 224, this court further emphasized the deference courts owe governments in setting their policy objectives, specifically in the context of labour legislation:

> Courts conducting full-scale *Oakes* assessments in relation to labour legislation are obliged to delve deeply into government fiscal policy and its determination in highly sensitive areas. Judicial probing will lead inevitably into real tensions about the respective roles of Parliament and the judiciary in governing Canada, since s. 1 of the *Charter* places courts in the role of final arbiter of constitutional rights. Courts have recognized, through a series of limiting principles, that judicial deference to government policy determinations is prudent as a matter of institutional capacity and the constitutional legitimacy of judicial review. In general terms, judges ought not to see themselves as finance ministers.

[171] The court went on to list the limiting principles as: 1) the separation of powers between legislatures, the courts and the executive; 2) the recognition of the respective institutional capacities of each branch; and 3) the core competencies of each branch, including the government's core competency in determining economic policy, budgeting decisions, the proper distribution of resources in society, labour relations regulation and how best to respond to situations of crisis. Regarding these core competencies, the court observed, at para. 234, that "most importantly, it is a core function of government to provide leadership in times of crisis, when something must be done to protect the common good." Further, when complex policy issues are at stake, the court should refrain from second-guessing, in hindsight, the legislatures' policy decisions: *Gordon*, at para. 293.

[172] Despite the direction to defer to legislatures' policy decisions, especially in matters involving decisions related to their core competencies, this court in *Gordon* nevertheless noted that "deference never amounts to submission, since that would

abrogate the court's constitutional responsibility…. 'The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*'": at para. 236, citing *PSAC v. Canada*, [1987] 1 S.C.R. 424, at p. 442, *per* Dickson C.J. (dissenting in part).

[173] In addition, as discussed more fully below, the Supreme Court has consistently stated that concerns over managing a limited budget cannot normally serve as a free-standing pressing and substantial objective and that attempts to justify *Charter* right infringements based on budgetary constraints will be approached with strong skepticism: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 109; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 72; *Health Services*, at para. 147; and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 153.

(ii) The application judge's decision

[174] The application judge started his analysis of this issue by reviewing s. 1 decisions that involved the invocation of budgetary concerns as the basis for a pressing and substantial government objective. He noted the line of cases referred to above in which courts have stated that budgetary concerns should be treated

as “suspect”. He further noted that cases in which budgetary concerns were accepted as pressing and substantial objectives involved situations of financial emergency, including the 2008 financial crisis leading to the *ERA*, and the substantial cut in transfer payments which caused a downgrade in Newfoundland’s debt and higher interest payments in *N.A.P.E.* Based on this review of the jurisprudence, the application judge concluded that for an objective based on budgetary considerations to be pressing and substantial, there must be “some level of urgency”, which, consistent with *Conseil scolaire*, he described as requiring something “more than the day-to-day business of government.”

[175] On this basis, the application judge went on to review the evidence available in this case and determined that the Act was not passed in the context of a crisis or an emergency. In doing so, he reviewed the evidence Ontario relied on in support of the Act’s objective.

[176] First, he noted that, after the 2018 election, the Ontario government appointed an Independent Financial Commission of Inquiry. The Commission delivered a report in August 2018 that stated a deficit of $3.7 billion for 2017-2018 and projected a deficit of $15 billion for 2018-2019.

[177] Second, Ontario relied on the expert evidence of Dr. David Dodge, a professor of economics, which the application judge summarized as follows:

> 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.
>
> 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.
>
> 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. In Dr. Dodge's view, the ratio of debt service costs to revenues "should be significantly less than 10%." 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%.
>
> 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." [Footnotes omitted.]

[178] The application judge went on to note that Ontario did not claim that the province faced a severe financial crisis. Rather, Dr. Dodge's evidence was that the cost of debt would potentially rise "at some future unspecified point." The application judge stated that this called for prudent fiscal management, but it did not justify a *Charter* breach.

[179] In this context, the application judge noted various other government policies which he found belied any sense of urgency or crisis. For example, he noted that, in 2019, the government introduced tax cuts that had the effect of reducing revenues in an amount far beyond the savings to be achieved by the Act. As a further example, in 2022, the government eliminated revenue from license plate stickers, which again reduced revenue by an amount that far exceeded the savings to be achieved by the Act.

[180] Ultimately, the application judge concluded as follows:

> 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.

(iii) The Act's objective is pressing and substantial

[181] In my view, the application judge erred in his approach to the analysis of whether Ontario had posited a pressing and substantial objective because he failed to give sufficient deference to the legislature's policy objectives. This is not a case in which the government's only rationale for the policy was a desire to better manage its finances. Rather, based on various information about its deficit and economic forecasts, the government concluded that any interest rate increase could lead to financial difficulties and therefore sought to proactively avert a

potential fiscal crisis. Indeed, as Dr. Dodge explained, the province was facing a growing gap between its spending and revenues, resulting in increasing debt and debt service charges. Borrowing to finance the ongoing deficit threatened the province's fiscal sustainability by reducing the scope of traditional fiscal stimulus to respond to changes in the business cycle, increasing the risk premium on the province's debt, and forcing the province to spend more of its revenue on the interest costs of the debt. Managing these fiscal and budgetary concerns is one of government's core responsibilities. As held in *Gordon*, the court should defer to these types of policy objectives.

[182] While I appreciate that the Supreme Court has warned that courts should treat fiscal rationales as constitutionally suspect, these are ultimately matters of degree. Fiscal prudence on its own may be constitutionally suspect. However, where fiscal prudence arises from the government's determination that it faces a real potential for fiscal crisis, the court should not engage in an overly technical analysis of the economic evidence and should refrain from analyzing subsequent savings or spending policies to assess the credibility of the government's stated objective. Governments are entitled to set policy objectives and one of their core areas of policy-making is fiscal and budgetary. If the government can state a pressing and substantial objective that is rooted in its evidence, the court should defer to that policy choice. As held in *Gordon*, at para. 242, "the court should generally accept Parliament's objectives at face value, unless there is an attack on

the good faith of the assertion of those objectives or on their patent irrationality". This does not mean that the other branches of the *Oakes* test will be met, but governments should be granted a generous margin for determining when and how to address and avoid a potential fiscal crisis.

[183] Accordingly, contrary to the application judge's finding, I accept that Ontario has put forward a pressing and substantial objective in support of the Act.

[184] However, this does not end the inquiry. I now turn to the proportionality assessment, starting with the rational connection analysis.

(2) Rational connection

[185] I agree with the application judge that the Act is, for the most part, rationally connected to the government's objectives. However, as found by the application judge, I see no rational connection between the Act's objectives and its application to workers in the electricity sector or the university sector.

(i) General principles

[186] On this branch of the *Oakes* test, the question is whether the impugned measure is rationally connected to the pressing and substantial objective: *Health Services*, at para. 148; *Mounted Police*, at para. 143. It is sufficient for the government to show that it is reasonable to suppose that the measure may further the objective – not that it will actually do so: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48. Nevertheless, the measure

must not be arbitrary, unfair or based on irrational considerations: *Canada v. Taylor*, [1990] 3 S.C.R. 892, at p. 921.

[187] The evidentiary burden at this stage is "not particularly onerous": *Health Services*, at para. 148, citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228, *per* Iacobucci J. (dissenting). Direct proof of a causal relationship between the measure and the objective is not required: *Thomson Newspapers Co.*, at para. 39.

(ii) The application judge's decision

[188] The application judge accepted that, for those wages that the government pays directly, there is a rational connection between the Act's objective and moderating compensation increases:

> Compensation represents roughly half of the Province's expenditures. Moderating the rate [of] 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. [Footnote omitted.]

[189] However, the application judge did not accept that there was a rational connection in the context of the electricity sector and the Carleton University Academic Staff Association. He also held that any rational connection in the long-term care sector was "at best remote."

[190] With respect to the electricity sector, the application judge found that OPG, OEB and IESO are self-funded, and that they do not receive any funds from the Ontario government to pay employee salaries. In addition, he found that, while some of the profits generated from electricity may be redirected to the province's consolidated revenue fund, this redirection is not automatic; extra profits may be used to credit consumers with future rate adjustments. The application judge also rejected an argument by Ontario that moderating wage increases for employees in the electricity sector would lower or moderate the cost of electricity because this does not fall within the stated purposes of the Act. The application judge ultimately concluded that "[g]iven 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."

[191] With respect to the Carleton University Academic Staff Association, the application judge found no rational connection based on his finding that, while the province provides some funding to Carleton University, moderating the wages of the Association's members would have no impact on the amount the province is obligated to provide to the University. The application judge found that the province generally provides funding that covers 30 to 35% of the University's budget. The rest of its funding comes from tuition fees, donations, grants and other sources. As described by the application judge, the province provides funding to the University

pursuant to a Strategic Mandate Agreement ("SMA"), which sets the maximum amount of funding the province will provide the University each year (the province has similar SMAs with other universities in Ontario). The specific funding the province provides to the University depends on various metrics, which do not include the salaries the University negotiates with the Association's members. Under the circumstances, including the fact that funding for the University was "locked in" under the current SMA until 2025, the application judge concluded that it is difficult to find a rational connection between the Act's objectives and the salaries paid to the Association's members.

[192] With respect to the long-term care sector, the application judge found that any rational connection between the Act's objective and moderating compensation for workers in long-term care homes was at best remote because long-term care workers are not paid directly by the province. The application judge explained that long-term care homes receive a fee per patient based on the level of care each patient requires. Accordingly, the province would only bear indirect responsibility for any increased wages if those increases led long-term care homes to demand higher daily fees for patients under their care. Further, the application judge noted that only 24% of the province's long-term care homes are covered by the Act. If higher wages in the remaining 76% of long-term care homes led to demands for increases in the daily patient fee, the Act would do nothing to limit those demands.

(iii) The Act is rationally connected to its objective, except in the energy sector and the university sector

[193] I agree with the application judge that, generally, the objective of the Act is rationally connected to wage moderation. As a matter of logic and common sense, moderating compensation increases will help achieve the government's goals of responsible management of its finances and the protection of sustainable public services.

[194] I also agree with the application judge that this logic does not apply to the electricity sector. Given that OPG, OEB and IESO are self-funded, imposing a cap on compensation that can be paid to their employees cannot logically lead to a decrease in the province's expenses. While Ontario speculates that moderating wage increases would allow OPG to generate more profits that could lead to an increase in the province's revenue from electricity, this is, at best, remote and speculative given that OPG is already earning above the permitted rate of return and no revenue flows from OEB and IESO to the province. More importantly, the goals of the Act are not to increase the province's revenues but to manage its spending and maintain public services.

[195] Similarly, I agree with the application judge that there is no rational connection between the Act's objectives and imposing caps on compensation for members of the Carleton University Academic Staff Association or, by extension,

academic staff at other universities. As the application judge explained, there is no direct relationship between the funding the province provides to Carleton University (and other universities) and the compensation it pays to its employees. The province has agreed to pay a fixed amount to the University until 2025. The University receives multiple sources of funding, and can negotiate over compensation increases without any impact on the amount the province is obligated to pay under the SMA.

[196] I do not agree with the application judge's finding with respect to the long-term care sector. As the application judge correctly noted, the province does not pay long-term care workers directly, but rather provides long-term care homes a daily fee for each patient based on the level of care that patient requires. The fact that the province does not pay long-term care workers directly, however, is not determinative. The application judge found that increased wages for long-term care workers could lead homes to demand higher daily fees for the patients under their care. While the relationship is somewhat tenuous, based on this finding, I accept that there is a rational connection between the Act's objective and moderating compensation increases in the long-term care sector.

[197] Accordingly, with the exception of members of the unions representing employees discussed above who work in the electricity and university sectors, I am satisfied that the measures in the Act are rationally connected to its objectives.

(3) Minimal impairment

[198] I agree with the application judge that the Act did not minimally impair the respondents' right to collective bargaining under s. 2(d) of the *Charter*.

(i) General principles

[199] In *Carter*, at para. 102, the Supreme Court explained this stage of the *Oakes* analysis as follows:

> At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

[200] In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, the Supreme Court emphasized that "the law must be carefully tailored so that rights are impaired no more than necessary": at para. 58, citing *RJR-MacDonald Inc.*, at para. 134. While the court accords deference to the legislature's choices, deference does not insulate the government from having to demonstrate that an impugned measure is minimally impairing and justified under s. 1: *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at paras. 62-64. At the same time, however, legislators are not held to a level of perfection; the court should not

find a law minimally impairing because it can "conceive of an alternative which might better tailor the objective to infringement": *Libman*, at para. 58; see also *Martin*, at para. 112.

(ii) The application judge's decision

[201] The application judge found that Ontario did not demonstrate that the Act was minimally impairing because it "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 more than a 1% wage increase."

[202] In reaching this conclusion, the application judge noted the evidence of Professor Christopher Riddell, an expert put forward by Ontario, who "gave many examples throughout his report of negative wage settlements that had been voluntarily agreed to in the public sector." Professor Riddell identified groups of workers who agreed to 0% wage increases at various points in time. For example, nurses in the hospital sector agreed to wage freezes in 2011 and 2012, and secondary school teachers agreed to a wage freeze in 2014.

[203] The application judge observed that the province could have taken this approach with its direct employees and that it could have also used various tools to control wage increases in the broader public sector through other means of influencing collective bargaining. For example, while the province does not employ

teachers, it nevertheless participates in central bargaining with the teachers' unions over wages and other compensation matters. As another example, in the long-term care sector, the province could control its expenditures by freezing the daily patient fees it pays.

[204] Finally, the application judge stated that Ontario had not demonstrated why the Act was minimally impairing with respect to the electricity sector and university sector because, as discussed in the rational connection section, there was no evidence that a 1% cap on compensation increases would have any impact on government expenditures in those sectors.

(iii) The Act is not minimally impairing

[205] I agree with the application judge that the Act is not minimally impairing essentially for the reasons he provided.

[206] Ontario provided no evidence that the province could not achieve the same goals through collective bargaining with the employees under its direct employment and by capping the funding it provides to broader public sector employers thereby limiting the money those employers would have available for collective bargaining with their employees.

[207] As discussed above, the province had not tried to negotiate collective agreements with the respondents in which it put forward the position that it would not agree to increases in compensation above 1% per year. There was no

evidence that further negotiation would be futile. As noted by the application judge and as discussed above, there were several examples in the record of agreements in prior years where wage increases were capped at 0%, not even allowing for increases that accounted for inflation. In addition, while I accept that Ontario's objective is pressing and substantial, there is no evidence of urgency or of an imminent need to impose a cap on compensation increases, such that there was no time to achieve the desired cost savings through negotiations.

[208] As also discussed above, the right to collective bargaining protected by s. 2(d) is not a right to an outcome but a right to a process of collective bargaining. In my view, Ontario has failed to explain why, in this case, the right to such a process should be infringed without first attempting to engage in a process of good faith bargaining.

[209] Ultimately, the only potential rationale for obviating the process of collective bargaining is expediency. However, in the absence of any evidence showing a need for expediency, imposing broad-based legislation of this nature is not minimally impairing.

[210] Ontario argues that at the minimal impairment stage of the analysis, the court is only permitted to look at whether different legislative provisions could have been implemented that would be less impairing and that it was improper for the application judge to consider voluntary wage restraint as an alternative because

this was not a legislative alternative. I reject this argument. Ontario has provided no authority for this position. More importantly, in the context of a s. 2(d) analysis, it is logically relevant to consider whether the government's goals can be achieved without impeding the process of collective bargaining through legislation.

[211] Even if one were to accept Ontario's argument that the only appropriate comparator on a minimal impairment analysis must be legislative, Ontario has failed to demonstrate that the Act is minimally impairing of the respondents' collective bargain rights. Notably, as discussed above, the government's failure to implement a meaningful process that would allow for exemptions demonstrates that the Act is not minimally impairing. I accept that a meaningful exemption process could provide evidence that legislation is carefully tailored to meet its objective by providing a mechanism to alleviate against a law's potential disproportionate impact in a particular case. In this case, however, for the reasons discussed above, there is no evidence that the exemption process in s. 27 of the Act has provided such a mechanism. Ontario has not advanced evidence to establish that, as implemented, the exemption process affords a meaningful channel for negotiation and collective bargaining.

[212] Accordingly, I find that Ontario has not demonstrated that the Act is minimally impairing.

(4) Proportionality

[213] Having found that the Act is not minimally impairing, it is technically not necessary to consider whether its salutary effects are proportional to its detrimental effects: *Carter*, at para. 122.

[214] Nevertheless, dealing with this issue briefly, I note that many of the same considerations that lead me to conclude that the Act is not minimally impairing lead to the conclusion that its detrimental effects outweigh its salutary effects.

(i) General principles

[215] This last branch of the s. 1 analysis asks whether there is proportionality between the overall effects of the *Charter*-infringing measure and the legislative objective: *Hutterian Brethren*, at paras. 72-73. The court must turn its mind to the effects of the measure to determine, on a normative basis, whether the infringement of the right in question can be justified in a free and democratic society: *Frank*, at para. 76. This requires a balancing between the measure's salutary and deleterious effects: *Hutterian Brethren*, at para. 100. In *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 79, the Supreme Court explained the court's task in the following terms:

> 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.

(ii) The application judge's decision

[216] The application judge was not satisfied that the Act's infringement on collective bargaining rights was justified. His conclusion on this issue rested heavily on his finding, which I have not accepted, that Ontario did not put forward a pressing and substantial objective.

[217] First, he rejected Ontario's argument, which drew on evidence from Professor Riddell, that bringing public sector wages in line with private sector wages was a valuable and proportionate social goal, reasoning that the argument was premised on dated evidence, ignored large sectors of the public service where there is no wage gap, and overlooked Professor Riddell's acknowledgment that any gap was attributable at least in part to unionization. In the application judge's view, any attempt to eliminate an alleged wage gap was therefore an attempt to reverse the benefits of collective bargaining.

[218] Second, the application judge observed that some of the same issues that appeared in his pressing and substantial objective analysis were relevant to balancing the Act's salutary and deleterious effects. Drawing on the stated objective of the Act, he reasoned that it was a "day-to-day government duty" to

moderate compensation to responsibly manage government expenditures and that such a duty only warrants a breach of *Charter* rights in unusual circumstances.

[219] Third, the application judge opined that the question of wage restraint could have been resolved as part of the collective bargaining process. Instead, the government took a "key tool" away from unions and, in doing so, not only interfered with collective bargaining but also "hampered the development of public consensus on the issue."

[220] Finally, the application judge stated that even if the government wanted to avoid the risk of strikes, it did not explain why the tax cuts it implemented could not have been smaller to maintain the respondents' *Charter* rights.

(iii) The Act's salutary effects are not proportional to its deleterious effects

[221] I agree with the application judge that the Act's salutary effects are not proportional to its deleterious effects, although I arrive at this conclusion through somewhat different reasoning.

[222] The government is responsible for ensuring responsible fiscal management and the delivery of public services to Ontarians. These are core government functions. Ontario put forward some evidence that it would be most prudent to manage potential financial challenges by decreasing the province's debt load and reducing its spending. Public sector wages are a significant proportion of

government spending. The Act would no doubt assist the government in reaching these goals.

[223] However, I cannot accept that the circumstances surrounding the government's decision to enact the legislation justify its infringement of the *Charter*. Ontario has not been able to explain why wage restraint could not have been achieved through good faith bargaining. While I accept that Ontario has stated a pressing and substantial objective, in the proportionality analysis, the degree to which the objective is pressing becomes relevant: *Oakes*, at p. 140. In the absence of evidence establishing a need to proceed with expediency, it is difficult to see how the Act's benefits outweigh its substantial impact on the respondents' collective bargaining rights.

[224] Ontario's argument that s. 2(d) of the *Charter* is meant to protect the process of collective bargaining and not specific outcomes becomes relevant again. There is no dispute that the government can seek to keep compensation increases to 1% per year or less. The issue becomes the process through which the government arrived at this outcome. In the absence of any evidence for the need for expediency or that the same goal cannot be achieved through collective bargaining, it is hard to understand on what basis the Act's salutary effects outweigh its deleterious effects.

[225] In contrast, because of the Act, organized public sector workers, many of whom are women, racialized and/or low-income earners, have lost the ability to negotiate for better compensation or even better work conditions that do not have a monetary value. Considering these impacts against the Act's purported benefits leads me to conclude that, on balance, the Act's infringement cannot be justified. By imposing a cap on all compensation increases with no workable mechanism for seeking exemptions, the deleterious effects of the Act outweigh its salutary effects.

(5) Conclusion on s. 1 of the *Charter*

[226] Accordingly, in my view, the Act is not saved by s. 1 of the *Charter*. While I accept that the Act pursues a pressing and substantial objective and that the means it uses are generally rationally connected to its goals, it is not minimally impairing and its salutary effects are outweighed by its detrimental effects.

I. REMEDY

[227] Having found that the Act violates s. 2(d) of the *Charter* and that it is not saved by s. 1, the application judge struck the whole statute. This was an error.

[228] The Act applies to represented and non-represented employees. The rights protected by s. 2(d) of the *Charter* do not apply in the same way to non-represented employees and accordingly the Act is only unconstitutional in so far as it applies to the represented employees covered by the Act.

[229] At the hearing of the appeal, one of the respondents' counsel suggested that the application judge's order should stand because non-represented employees may wish to organize for the purpose of bargaining collectively in the future. This may well be the case. However, as long as they remain non-represented, the Act is not unconstitutional in so far as it applies to non-represented employees.

J. CONCLUSION AND DISPOSITION

[230] Accordingly, I would grant the appeal, but only to the extent of varying the disposition to declare that the Act is invalid in so far as it applies to represented employees.

[231] If the parties are unable to agree on costs, they are to make submissions in writing. The respondents, as the more successful parties, are to make submissions not exceeding 3 pages, exclusive of their bills of costs, to be submitted to the court within 14 days of the release of this judgment. Ontario is to make responding submissions not exceeding 15 pages, exclusive of its bill of costs, within 14 days thereafter.

[232] In accordance with the orders granting leave to intervene to the interveners, no costs are awarded to or against the interveners.

"L. Favreau J.A."
"I agree. Doherty J.A."

Hourigan J.A. (dissenting):

A. INTRODUCTION

[233] On occasion, courts must engage with principles that lie at the heart of our judicial system. This is such a case. The principle put in play by the reasons of my colleagues and the application judge is the separation of powers between the legislature and the courts. As will be discussed, when judges second guess a government's policy decisions in the course of their *Charter of Rights and Freedoms* analysis, they are touching the third rail of judicial reasoning. Such conduct imperils the legitimacy of constitutional judicial review.

[234] The analysis of the application judge and my colleagues on the issue of whether s. 2(d) of the *Charter* has been violated demonstrates an incautious approach about wading into matters that have always been within the exclusive remit of the legislative branch. In addition, my colleagues offer unconvincing grounds to distinguish a series of binding authorities from the Supreme Court, effectively avoiding what is settled precedent.

[235] I conclude that there has been no violation of s. 2(d), as Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act*, 2019, S.O. 2019, c. 12 ("Bill 124" or the "Act"), has not substantially interfered with associational rights guaranteed under that section.

[236] In his s. 1 analysis, the application judge eschewed the law at every stage of the *Oakes* test, offered his own gratuitous views on policy making, and declined

to meaningfully engage with the evidence, creating a nearly impossible burden for Ontario (or the "Province") to meet. That analysis is built on legal errors and palpable and overriding factual errors and must be set aside. My colleagues have not endorsed the application judge's reasoning in its entirety. Still, they have repeated many of the same errors in law in their rational connection, minimal impairment, and proportionality analyses.

[237] I conclude, in the alternative, that if Bill 124 breached s. 2(d), it is a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society.

[238] In these reasons, I will first briefly review the separation of powers between the judiciary and the legislature and then consider jurisprudence regarding s. 2(d) and collective bargaining. Next, I will consider, in the alternative, the issue of whether Bill 124 is justified under s. 1 of the *Charter* and whether the application judge erred in striking the law down in its entirety. In my view, the appeals should be allowed, the order of the application judge set aside, the applications dismissed, and Ontario should be awarded its costs of the applications below and in this court.

B. ANALYSIS

(1) Separation of Powers

[239] The *Charter* is the supreme law of the land and for it to be effective courts must engage in rigorous constitutional review of government actions. However,

courts must be careful not to exercise their review power in a manner that second guesses policy decisions because doing so undermines the separation of powers between the legislature and the judiciary. The fundamental importance of the separation of the judiciary and legislatures has been described as “a characteristic feature of democracies”: *Director of Public Prosecutions of Jamaica v. Mollison*, [2003] UKPC 6; [2003] 2 A.C. 411, and *R. (Anderson) v. Secretary of State for the Home Department* [2002] 3 WLR 1800, at 1821-1822, paragraph 50.

[240] As recognized by the Supreme Court in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 104, “[O]ur system works best when constitutional actors respect the role and mandate of other constitutional actors.” There are certain areas that the courts have recognized as purely political and immune from judicial interference. For example, courts have found that allocating public resources is a political decision: *Anderson v. Alberta*, 2022 SCC 6, at para. 22; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 (“*CLA*”). This makes sense because courts do not understand competing demands for the government’s limited resources. Courts are instead necessarily focused on individual cases and do not appreciate how overturning a resource allocation decision impacts other competing funding priorities.

[241] Closely related to the issue of the allocation of resources is the area of core policy decisions. Such decisions involve “weighing competing economic, social, and political factors and conducting contextualized analyses of information. These

decisions are not based only on objective considerations but require value judgments — reasonable people can and do legitimately disagree": *Nelson (City) v. Marchi*, 2021 SCC 41, at para. 44. Courts have recognized that they are institutionally incapable of making core policy decisions because they are "ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation … courts possess neither the expertise nor the resources to undertake public administration": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 120, *per* LeBel and Deschamps JJ. (dissenting) (see also para. 34 of the majority reasons, *per* Iacobucci and Arbour JJ.).

[242] Courts are public policy amateurs who lack the expertise, experience, and resources to understand where a policy fits in the bigger picture. Thus, it is not the role of judges to second guess the policy choices made by governments because this is a role they are wholly unqualified to undertake. As Justices Moldaver and Brown stated in *R. v. Chouhan*, 2021 SCC 26, 459 D.L.R. (4th) 193, at para. 84:

> The role of the courts in the *Charter* analysis "is to protect against incursions on fundamental values, not to second guess policy decisions", because when "struggling with questions of social policy and attempting to deal with conflicting (social) pressures, 'a legislature must be given reasonable room to manoeuvre'" [Citations omitted.]

[243] Developing the type of economic policies at issue in Bill 124 is the essence of what governments do in terms of macroeconomic management. These issues

inherently involve policy choices; a government has to choose what it considers to be the best course of action for the management of the economy among many options. Governments must be granted the freedom to make and implement policy, and courts must not misuse their power of judicial review to second guess a government's policy choices.

[244] This is not just a matter of expertise; the separation of the legislative and judicial branches respects the accountability that underlies a democratic system of government. Fundamentally, courts are not accountable to the people for their policy choices, while elected representatives are accountable at the ballot box. For example, in the case of Bill 124, the government campaigned on a platform of fiscal restraint, and the legislation was consistent with its policy platform. When courts impermissibly interfere with government policy making, their actions undermine our democratic form of government. They arrogate to themselves authority that belongs to democratically elected representatives and undermine the legitimacy of constitutional judicial review.

(2) Section 2(d)

(i) Association Rights and Collective Bargaining

[245] The text of s. 2(d) places no limits on the freedom of association. This contrasts, for example, with the right in s. 8 to be secure from unreasonable search and seizure. There are no such qualifiers in the text of s. 2(d). However, courts

have, in the context of the field of collective bargaining, added definitional qualifiers that clearly limit the scope of this right. These limitations were succinctly summarized by Chief Justice Chartier in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85, 463 D.L.R. (4th) 509, at paras. 22-23:

> Section 2(d) guarantees "freedom of association." It is often referred to as an "associational right" (see, for example, *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 90, 97, 112, 128-29; and, more recently, *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 62, 131, 147). In the workplace context, the s. 2(d) right that is guaranteed is the right of employees "to associate in a process of collective action" (*Health Services* at para 19) in order "to engage in a meaningful process of collective bargaining" (*Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 1 (*SFL*)).
>
> The Supreme Court of Canada describes s. 2(d) as "a limited right" (*Health Services* at para 91) in that it is restricted in the three following ways:
>
> > a) <u>It is a procedural right</u>: It guarantees the right to a process, not a certain substantive or economic outcome. This includes a right to a fair and meaningful process of collective bargaining, which incorporates a) the right of employees "to join together to pursue workplace goals"; b) the right "to make collective representations to the employer, and to have those representations considered in good faith"; and c) "a means of recourse should the employer not bargain in good faith" (*SFL* at paras 1, 29).

> b) It is general in nature: The associational right does not protect "all aspects of 'collective bargaining'" (*Health Services* at para 19). It guarantees the right to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method (see *Mounted Police* at para 67).
>
> c) It is limited to "substantial interference": The associational right does not protect against all interference with the procedural right to bargain collectively, only against "substantial interference" with the associational activity (*Health Services* at para 90). [Emphasis in original.]

[246] It is important to emphasize that the right to collective bargaining provides protection only against *substantial interference* in the collective bargaining process, as the Supreme Court explained in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at paras. 92-94, as follows:

> To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every

> case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.
>
> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.

[247] Based on the foregoing, the jurisprudence is relatively straightforward. In contrast to, for example, freedom of expression rights, where virtually any violation requires a s. 1 analysis, s. 2(d) rights in the labour relation field are qualified. They are only engaged where there has been substantial interference. Thus, the notion of substantiality serves as a gatekeeper in determining whether a s. 2(d) right may have been impaired, and consequently, whether a s. 1 analysis is required. That qualified right is qualified further as s. 2(d) does not protect a particular result. Instead, it is restricted to the protection of a fair collective bargaining *process*.

[248] The Supreme Court's case law provides guidance regarding the onus the respondents were obliged to meet in establishing a breach of their s. 2(d) rights. The test of substantial interference has remained consistent since *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, through *Health Services, and Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and into the 2015 labour trilogy of *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245. To establish a breach of s. 2(d) of the *Charter*, the respondents had to prove on a balance of probabilities that Bill 124 "substantially interferes with a meaningful process of collective bargaining": *Mounted Police*, paras. 72-74.

[249] To be clear, s. 2(d) "does not protect all aspects of the associational activity of collective bargaining" and "the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(d)": *Health Services*, at paras. 90, 92. It also does not protect against all interferences with collective bargaining or collective agreements: *Fraser*, at para. 76. Instead, the jurisprudence requires substantial interference with the process of collective bargaining to ensure that the contents of collective agreements and the right to an outcome in bargaining do not "take on a sort of immutable constitutional status through the effect of s. 2(*d*)": *Canada (Procureur*

général) c. Syndicat canadien de la fonction publique, section locale 675, 2016 QCCA 163, at paras. 30-31.

[250] There is no debate in the cases at bar that compensation is of central importance to collective bargaining. The real issue is the manner in which Bill 124 impacts the collective right to good faith negotiation and consultation.

(ii) Distinguishing Factors

[251] The precedents from the Supreme Court are clear in their application of these principles. The Court has never found that temporary wage restraint legislation violates s. 2(d) of the *Charter*. In distinguishing other wage restraint legislation cases, namely those that dealt with the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), my colleagues find that:

> [t]here are four common threads between the decisions dealing with the constitutional validity of the *ERA*: (1) the measures were imposed in the context of the 2008 global economic crisis; (2) multiple bargaining units had reached agreements about wage increases similar to those that were legislated before the *ERA* was enacted; (3) the legislation was imposed after a relatively long period of negotiation; and, (4) in some cases, following the enactment of the *ERA*, bargaining units were nevertheless able to reopen their collective agreements to negotiate for wage increases (*Meredith*) or other matters of interest, including matters related to compensation (*Procureur général*).

Implicit in this statement is the notion that unless these factors are present, Bill 124 violates s. 2(d). Each of these factors is reviewed below.

(a) Economic Crisis

[252] Regarding the first factor, the affidavits from Dr. Dodge, former Governor of the Bank of Canada, make clear that action had to be taken to protect the sustainability of public services and the government's fiscal health. As in the situation in *Health Services*, the Province's determination to come to grips with spiralling costs was fuelled by the laudable desire to preserve and protect quality public services: *Health Services*, at para. 134.

[253] My colleagues ignore that evidence and rely on the severity of the economic crisis in 2008 as a factor that distinguishes Bill 124 from the *ERA*. On what basis do they differentiate the severity of the economic challenges? There is no analysis undertaken to explain the distinction between the two situations. This factor is nothing short of an invitation to courts to second-guess policy choices made by a democratically elected government without engaging in an analysis of the challenges facing the Province at the time of the enactment of Bill 124. As discussed, this is a function that courts do not have the institutional capacity to undertake.

(b) Bargaining Outcomes

[254] The second distinguishing factor my colleagues relied on raises the question of the extent to which bargaining outcomes can be considered in a breach analysis. Given that the Supreme Court has made clear that the associational right under

s. 2(d) does not protect outcomes, one might be tempted to find that outcomes are irrelevant. Indeed, that is Ontario's position. It submits that the economic outcomes dictated by Bill 124 do not matter because there is a clear separation between process and outcomes, and only the former counts in determining whether there has been substantial interference.

[255] Despite the above, the Supreme Court's analysis in *Meredith* left open the door for considering outcomes in determining whether a breach of s. 2(d) has had a substantial impact. Similarly, in the leading Ontario case on wage restraint legislation, *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590, at para. 55, citing *Meredith*, at para. 29, this court relied on comparative bargaining outcomes to determine that the legislation did not breach s. 2(d): "Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the *ERA* had a minor impact on the appellants' associational activity".

[256] My colleagues conclude that because compensation increases capped at 1.0 percent under Bill 124 are less than the average 1.6 percent increases in compensation obtained through collective bargaining at the time of the introduction of Bill 124, this is an important factor in finding a breach of s. 2(d).

[257] I disagree with that analysis. The cases relied on by my colleagues in support of this submission – *Meredith* and *Gordon* – were examples where the

courts found that other collective bargaining results were comparable to what was provided for in the *ERA* and therefore did not breach s. 2(d). There is no case where other collective bargaining results were used to ground a finding of a breach of s. 2(d). This is a problematic precedent.

[258] While comparable wage settlements may be a factor pointing to the absence of a breach of s. 2(d), I do not accept that the obverse is true. If it were otherwise, and we accepted my colleagues' expansion of the law, then we would be left in the unsatisfactory position where the Supreme Court has instructed that outcomes are not protected under s. 2(d), yet they become a *de facto* minimum in deciding whether there has been a s. 2(d) violation. Thus, if the wage cap imposed by legislation is lower than what was being negotiated in other comparable collective agreements at the time of the passage of the wage restraint legislation, then the legislation will likely violate s. 2(d).

[259] The Supreme Court's injunction that bargaining results are not protected under the s. 2(d) umbrella appropriately recognized the separation of powers between the legislature and the judiciary. If courts do not abide by that direction, they impermissibly enter into the arena of government spending policy by imposing a minimum result as a condition of constitutionality. In so doing, they also largely remove the opportunity for governments to use wage restraint legislation in the public sector to achieve meaningful savings. Put simply, if governments are obliged to pay the going rate, what is the point in wage restraint legislation?

[260] The fact that the application judge found that the wage cap under Bill 124 was marginally less than what was negotiated under other pre-legislation agreements is of no moment. My colleagues' expansion of the law and reliance on this factor makes bargaining results an integral part of the test for constitutional validity. That is inconsistent with the Supreme Court's jurisprudence.

(c) Pre-legislation Negotiations and Consultation

[261] Reliance on this factor is in keeping with the approach taken by my colleagues' reasons. They state that:

> [s]ignificant collective bargaining prior to the passage of the legislation or meaningful consultation on the legislation diminish the finding of interference, because such processes mean that there was negotiation or consultation before the imposition of the wage restraint measure, and that not much more could have been gained through further negotiation or consultation.

Indeed, they even reference the fact that Ontario used external lawyers rather than internal lawyers to lead its consultations. This approach is problematic for several reasons.

[262] First, it is worth reiterating, as my colleagues concede, that governments have no obligation to engage in collective bargaining or meaningful consultation before the introduction of legislation. As stated by the Supreme Court in *Health Services*, at para. 157:

> Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be

> useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.

[263] This emphasis at the breach stage of the analysis on what the government did or did not do when it had no legal obligation to do anything has the effect of transferring the onus to the government to justify its conduct rather than leaving it with the applicant to establish that there has been a breach.

[264] Second, it is unfair to say on the one hand that a government has no such obligation but, on the other hand, conclude that there will be adverse consequences if a government does not consult or bargain before passing legislation. This is an indirect way of imposing an obligation on a government while maintaining that there is no obligation.

[265] Third, it is inaccurate to suggest that only if the government negotiates or consults will it know "that not much more could have been gained through further negotiation or consultation." Negotiations, particularly in the early stages, often reveal nothing about the parties' real bottom line. In any event, in this instance, did the Ontario government really need to consult and bargain to figure out that the unions were not going to agree to a one percent cap? The fact that the unions

have launched a legal challenge to Bill 124 demonstrates that negotiation would have achieved nothing.

[266] Fourth, governments have always been permitted to control the timing of the release of information about planned legislation before it is introduced in the legislature. Many political and strategic reasons may go into the timing of the release of information to the public or stakeholders regarding what the government intends to do. That is a discretion that courts have no business interfering with. However, once a bill is introduced in the legislature, it has a structure in place to conduct public hearings and provide other methods for giving input on legislation. As noted by the Supreme Court, the "constitutionally mandated process in ss. 17 and 91 of the *Constitution Act, 1867*, ensures that the legislation is made in public forums that provide opportunities for substantial examination and debate": *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1, at para. 291, *per* Côté J. (dissenting in part, but not on this point).

[267] That process of consultation was exactly what happened in this case. After Bill 124 was introduced, the government invited feedback from stakeholders (including bargaining agents) over the spring and summer of 2019. The result was that prior to its enactment, six amendments to Bill 124 were moved and adopted, which were informed by comments received during the consultation process after the introduction of the legislation.

[268] Fifth, many of the union respondents represent workers whom the Province does not directly employ. For those employees, who exactly do my colleagues envision the Province should have negotiated with?

[269] Sixth, why is consultation and negotiation important in the analysis? If a government consults widely and introduces draconian legislation, does that pass constitutional muster? Of course not. No court would be satisfied with the explanation, “Rights to bargain and associate have been stripped bare, but we told them we were going to do this.” Nor should legislation that minimally impacts collective bargaining rights be found to constitute substantial interference because the government failed to consult or negotiate.

[270] Seventh, at para. 66 of my colleagues’ reasons, they state as follows: “Further, the circumstances under which an impugned law was adopted can be relevant to assessing the impact of the law on the process of good faith negotiations. For example, a law that is adopted after a period of meaningful negotiation and consultation is less likely to be seen as interfering with the process of collective bargaining: see *Health Services*, at para. 92.”

[271] This is not an accurate paraphrase of para. 92 of *Health Services*. As set forth above, what the Supreme Court actually said in para. 92 is: “Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of

collective bargaining." My colleagues' recasting of the statement is unfair, especially since there is no suggestion in the context of Bill 124 that the government acted in bad faith or unilaterally nullified negotiated terms.

[272] When courts make implicit threats that certain procedural and political steps should be taken by governments – even though it is common ground that they have no legal obligation to do so – or their legislation risks being found to be unconstitutional, they overstep their bounds and undermine the separation of powers. Further, once these obligatory non-obligations are imposed, they invite courts to engage even more deeply with the minutiae of government decision making, further violating the separation of powers. It is this approach that causes courts to comment on whether internal or external lawyers are used in a consultation process, a matter that is none of the court's concern. If we have reached this level of judicial scrutiny, one wonders if the line separating the legislature from the judiciary has been obliterated.

(d) Renegotiated Agreements

[273] My colleagues point to *Meredith* as an example of a situation where the parties had the ability to reopen their collective agreements to negotiate for wage increases. Once again, this observation focuses on bargaining outcomes. Regardless, it is unpersuasive given that the *ERA* was used in *Meredith* to roll back previously agreed wage increases. That type of retroactive restriction is not

permitted under Bill 124 and arguably has a much more significant impact on associational rights, as the government was given the power to nullify an agreement reached by a collective bargaining process.

[274] There should be no requirement that the parties be able to reopen their agreement later to address compensation as a condition of constitutionality. Such a requirement defeats the purpose of wage restraint legislation. If a government moves to save money and halt the pace of compensation growth in the public sector, there is little point in doing so if those achievements can be retroactively wiped out when the wage restraint period ends. It is not the place of the courts to impose such a dubious policy choice.

(e) Summary Regarding Distinguishing Factors

[275] In summary, the distinguishing factors relied on by my colleagues are unpersuasive. There is nothing in the factors that they cite to distinguish Bill 124 from the *ERA* jurisprudence and the case law under the *Public Services Sustainability Act*, S.M. 2017, c. 24 ("*PSSA*").

(iii) Compensation and Other Gains

[276] My colleagues also rely on the alleged broad definition of compensation in Bill 124. That term is defined under s. 2 of Bill 124. The *PSSA* and *ERA* do not have a definition for "compensation" but define "additional remuneration." Significantly, additional remuneration is also restricted in the federal and Manitoba

legislation. As will be noted in the chart below, the legislation is largely consistent in casting a broad net regarding compensation increases:

Bill 124	***PSSA***	***ERA***
Interpretation **2** In this Act, … "compensation" means 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.	**Definitions** **2** The following definitions apply in this Part. **"additional"** means an allowance, bonus, premium or benefit of any kind to be paid or provided to an employee.	**Definitions** **2** The following definitions apply in this Act. ***additional remuneration*** means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments.

[277] Given these similarities in the legislation, I do not agree with my colleague's statement in para. 125 that "[t]he *ERA* and Manitoba's *PSSA* did not impose such broad limitations on the areas affected by the caps in those statutes."

[278] In addition, a singular focus on compensation ignores the fact that after the passage of Bill 124, the union respondents were able to engage in collective bargaining and achieve significant gains.

[279] Ontario produced communications from the unions to their members wherein they confirmed that bargaining agents continued to have access to a meaningful process used to achieve gains and resist concessions sought by employers since the passage of Bill 124. For example, the Ontario English Catholic

Teachers' Association ("OECTA") provided an update to its membership and reported that it was able to push back against the concessions and obtain a "fair agreement." This agreement included significant non-monetary issues, such as a reduction in the proposed secondary class size averages and the new Supports for Student Fund. The union reported to its members:

> The solidarity and resolve shown by Catholic teachers over the past year has been remarkable. The Association endeavoured to keep members informed through almost 70 Provincial Bargaining Updates, regular updates to the Members' Area at catholicteachers.ca, and a series of local rallies leading up to the strike vote in November. Members responded by delivering a resounding strike vote, with 97.1 percent voting in favour of taking strike action if necessary, and then by enthusiastically engaging in OECTA's first-ever province-wide strike action, including extensive administrative job sanctions and four one-day full withdrawals of service. These actions, combined with the Association's efforts at the bargaining table, helped to slowly move the government toward a fair agreement.

[280] The Ontario Secondary School Teachers' Federation ("OSSTF") and the Elementary Teachers' Federation of Ontario ("ETFO") issued similar updates about successful bargaining results.

[281] Another example is in the healthcare sector. SEIU Healthcare provided an update about bargaining with an employer subject to Bill 124, which provided access to health benefits:

> For the first time in history, through the SEIU Benefit Trust Fund, these members have drug coverage, dental care, vision care, and so much more. Although these

> benefits are only for full-time Circle of Care staff, this is a step in the right direction for all our members in the HCC sector.
>
> "We are thrilled that through the hard work of the bargaining committee and their union representative Murray Cooke, we were able to obtain a health benefits plan for full-time members," said Tyler Downey, SEIU Healthcare's Secretary-Treasurer. "This victory is just one small step in the right direction for the home and community care sector."
>
> …
>
> On top of benefits, the new contract also included the creation of a Labour-Management Committee, more union steward rights, improved compensation language, and more access to float days. This collective agreement is proof that when members step up and into situations where their voices cannot be ignored, we can win together and create meaningful change in your workplaces.

[282] Similarly, the Ontario Nurses' Association ("ONA") advised its membership that it could identify their interests, advocate for those interests in bargaining and arbitration, and improve monetary and non-monetary matters. The Canadian Union of Public Employees ("CUPE") also issued an update after concluding an agreement at Unity Health Toronto in which a member of the bargaining committee noted they were "thankful that a fruitful bargaining process resulted in a freely negotiated agreement" and had achieved "substantial gains."

[283] In a video update after concluding a tentative agreement, a bargaining committee member for CUPE 3902, which represents academic and contract faculty at the University of Toronto, stated that they "came together and thought

about the impact of Bill 124…. And so early on we were thinking about how to ensure we get the -- we could get the most we could absolutely get under those provisions of the legislation. And the Committee did that." The bargaining committee highlighted examples of its achievements, including: (i) denying all the concessions sought by the employer; (ii) improved hiring criteria; (iii) better workload protections; (iv) 70 hours of guaranteed work for PhD students whose funding had run out, which would cover the cost of tuition and allow access to health benefits; and (v) paid pregnancy/parental leave.

[284] According to information provided by the Ontario Public Service Employees Union ("OPSEU") to its membership, it was able to work within Bill 124 to obtain significant benefits for them and resist concessions sought by the government and other public sector employers. For example, it advised part-time college support workers that the bargaining team was proud to recommend ratification of a tentative agreement negotiated on their behalf, which included increased job security. It also advised its membership:

> The employer had a long list of cuts and concessions they wanted us to accept, but I'm proud to say that the team held firm against each and every one of them.
>
> …
>
> The theme going into this round was 'bargaining for better,' and I'm proud to say that's exactly what we were able to do.
>
> …

> We are recommending our members vote in favour of this deal because it will mean better for students, better for workers, and better for the economic recovery of the province.

[285] OPSEU also negotiated a deal with the Ontario Public Service, which included increases to paramedical benefits, a healthcare spending account, seniority calculations for fixed-term employees, job security language, and equity-related gains.

[286] A good example of the ability of union members to bargain collectively is with respect to employees at the LCBO. OPSEU reported to its LCBO membership that it was the right time to focus on non-monetary issues given Bill 124, observing, “That’s where your team negotiates better schedules and work-life balance, increased job security, stronger protection from privatization, strengthened health and safety rules, and workplaces that are equitable and fair for all.” After a tentative agreement was reached, OPSEU issued a further bargaining update noting that despite many challenges, the union “squeezed every possible penny out of what’s allowed under Bill 124. And there are no losses to you. Not a single one. No losses on job security. No losses on privatization. No losses on scheduling.”

[287] The application judge briefly referred to these union communications but gave them short shrift, finding that they were not evidence of a meaningful bargaining process because the unions were legally obligated to “sell” any collective agreement they negotiated in order to promote ratification. In fact, the

bargaining unit representatives confirmed in their testimony that they provided accurate updates under a responsibility they took seriously. My colleagues have not referenced these communications.

[288] The respondent unions downplay these successful bargaining results, suggesting they made the best of a bad situation on behalf of their members. However, that does not change the fact that they were able to use collective bargaining to obtain improvements for their membership.

[289] My point in referencing these bargaining results and the unions' communications to their members is not to establish that Bill 124 did not impact collective bargaining. Obviously, there was an impact on increases in compensation. However, it is evident that within the Bill 124 framework, unions were able to negotiate gains that they identified as significant for their members. This is the essence of collective bargaining and demonstrates that Bill 124 did not result in substantial interference with associational rights under s. 2(d).

(iv) Impact on the Right to Strike

[290] The reasons of the application judge raise the question of the impact of Bill 124 on the right to strike. Before considering this issue, it is important to recognize that many bargaining units are considered essential workers who do not have a right to strike. Consequently, these comments are restricted to respondents who have this right.

[291] In 2015, the Supreme Court in *Saskatchewan Federation of Labour* overruled its own jurisprudence and found that the right to strike was constitutionally protected by s. 2(d) of the *Charter*. However, there was no suggestion in that case or any other jurisprudence from the Supreme Court that the content of associational rights, including the new right to strike, included a right to a particular result. To the contrary, as discussed above, s. 2(d) rights are procedural in nature.

[292] To determine the impact of Bill 124 on the right to strike, it is instructive to first look at the wording of the legislation. It expressly provides in s. 4 that "Nothing in this Act affects the right to engage in a lawful strike or lockout." Despite that clear wording, the application judge found that Bill 124 indirectly limits the right to strike because it imposes restrictions on compensation increases, making it difficult for unions to obtain strike votes for non-monetary issues. This conclusion ignored the evidence that many bargaining units held successful strike votes during the application of Bill 124.

[293] There was ample evidence in the record of bargaining units engaging in strikes or holding strike votes and using those actions to secure gains in bargaining after the passage of Bill 124. These include strikes by OSSTF, AEFO, and ETFO members. In their updates to their members, both OECTA and OSSTF highlighted their job actions and organizing as a factor that helped them push back against concessions sought by the government in central bargaining.

[294] Similarly, the Ontario Institute of Technology Faculty Association ("UOITFA") engaged in a two-week strike, which resulted in a settlement. A union report following the settlement noted that it made "big gains on the faculty association's workload, equity, and benefits priorities. This represented a hard-fought and well-deserved victory for the UOITFA." The report emphasized that the settlement followed months of actions by UOITFA, including the two-week strike.

[295] This evidence demonstrates that strikes or strike votes were available to unions and were used by several of them to obtain workplace gains. In failing to appreciate the legal significance of the evidence of many bargaining units exercising their right to strike under Bill 124 and the preservation of the collective bargaining process that resulted, the motion judge made plain that, in his mind, the right to strike includes a right to achieve specific economic results. Put another way, the application judge ignored that the most crucial element of the process that allows union members to effectively act collectively remained available to them because members were limited in what they could achieve financially.

[296] That approach marks a substantial increase in the scope of the right to strike, one that is inconsistent with the Supreme Court's jurisprudence on the issue. According to the application judge, a process is only worthwhile if it creates a desired financial result. Therefore, any interference with achieving a particular financial result constitutes a breach of s. 2(d). Thus, the right to a process

transforms into the right to a result, and the scope of the right to strike is expanded to achieve a particular financial result.

(v) Summary Regarding s. 2(d)

[297] The question before the court is not whether Bill 124 affects collective bargaining; it is whether it constitutes a substantial interference with the right to collective bargaining. Only if this has occurred does the burden of justification under s. 1 arise.

[298] My colleagues' finding of a breach of s. 2(d) is premised on several irrelevant factors. They admit that there is no obligation on the government to consult or negotiate before introducing wage restraint legislation but rely heavily on these factors to support their finding of a breach. Comparable collective bargaining results, which have never been relied on to support a finding of breach, also play a central part in their breach analysis. Further, my colleagues ignore the evidence of the collective bargaining and strike activity that actually took place and rely instead on their views of the economic conditions extant at the time of the introduction of Bill 124.

[299] This approach undermines the separation of powers because it flips the onus on the issue of whether there has been a breach and allows the court to require the Province to establish the constitutionality of its legislation. In so doing, my colleagues are content to ignore the evidence of the collective bargaining that

was actually occurring under Bill 124 and premise their breach finding on irrelevant factors or the failure of the government to meet obligations that are unknown at law.

[300] An evidence-based analysis of the impact of Bill 124 demonstrates that it does not constitute substantial interference with the associational right to bargain collectively. Under Bill 124, compensation increases were temporarily capped, but the record demonstrates that unions were able to secure other important gains for their members through collective bargaining. Further, the right to strike was preserved and utilized to achieve gains.

[301] Based on the foregoing, it is evident that, in keeping with the dicta from *Saskatchewan Federation of Labour*, workers were able to join together to pursue workplace goals, had the right to make collective representations to the employer and to have those representations considered in good faith, and had a means of recourse should the employer not bargain in good faith. There was no breach of s. 2(d).

(3) Section 1 Analysis

(i) Background

[302] In the alternative, if Bill 124 breached s. 2(d), it is a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society.

[303] I agree with my colleagues' conclusion that Ontario has advanced a pressing and substantial objective in support of the Act. I disagree with their findings regarding rational connection, minimal impairment, and proportionality.

[304] As will become apparent, it is essential to review all aspects of the application judge's s. 1 analysis in detail. I do this because my colleagues are quick to adopt his factual findings in support of their analysis. They rely on *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 49, which holds that absent a palpable and overriding error, an appellate court should not interfere with the factual findings in a s. 1 analysis. Why this high standard is appropriate, given that most s. 1 cases are based on a written record, is not self-evident. Nonetheless, in this case, it is important to carefully scrutinize the application judge's factual findings because his analysis is filled with personal opinions and value judgments in the place of evidentiary-based factual findings.

[305] It is helpful to first review the background to the enactment of Bill 124 to place the legislation and the s. 1 analysis in their proper context. It is uncontested that the government of Ontario enacted the legislation in response to what it perceived to be a pressing economic issue. My colleagues find that the legislation's objective was the responsible management of the Province's finances and protecting sustainable public services. I am prepared to accept that characterization for the purposes of my analysis. It follows that, to achieve its objective, the legislation had to moderate the growth of compensation expenses in

the broader public service funded by the Province and those entities who, although not funded by the government, contribute to provincial revenue. There is no evidence that the government introduced the legislation in bad faith. Instead, Bill 124 was enacted in what the government perceived to be the Province's best interests.

(ii) *Oakes* Test

[306] On a s. 1 analysis, the party seeking to uphold the limit must establish two components on a balance of probabilities. First, the objectives of the provision are pressing and substantial to justify curtailing a *Charter* right. This is a threshold requirement, analyzed without consideration of the scope of the infringement, the means employed, or the effects of the measure. Second, the objective furthered must be proportionate. In this context, proportionality has three components: "(a) rational connection to the objective; (b) minimal impairment of the right; and (c) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective": *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 38; *R. v. Oakes*, [1986] 1 S.C.R. 103, at paras. 67-70.

[307] The interaction of these components and subcomponents in a s. 1 analysis is summarized by Peter W. Hogg and Wade K. Wright in *Constitutional Law of*

Canada, 5th ed., vol. 2 (Toronto: Thomson Reuters Canada Ltd., 2023) (loose-leaf release 1, 7/2023), at §38:12, as follows:

> Only in a rare case will a court reject the legislative judgment that the objective of the law is sufficiently important to justify limiting a Charter right (first step). It is also a rare case where a court will find that the law is not rationally connected to the objective of the law (second step). And the inquiry into disproportionate effect (fourth step) has rarely, if ever, played an independent role in the s. 1 justification analysis, in the sense of changing the outcome of a case. The heart of the inquiry, therefore, is the question whether the law has impaired the Charter right no more than is necessary to accomplish the objective (third step)…. [N]early all the s. 1 cases have turned on the answer to this inquiry.

[308] As will be discussed, the application judge erred in law at each stage of his *Oakes* analysis. His reasons display a misunderstanding of the role of courts in reviewing government policy choices on resource distribution and the regulation of labour relations, which are areas of core government competency.

(a) Pressing and Substantial Objective

[309] As noted by this court in *Gordon*, in the context of *Oakes* assessments in relation to labour legislation, courts have recognized certain limiting principles that underlie judicial deference to government policy choices. Such principles are "prudent as a matter of institutional capacity and the constitutional legitimacy of judicial review": *Gordon*, at para. 224. These limiting principles include the following:

- The separation of powers, which, as described above, recognizes that the legislative branch makes policy choices, and the executive implements and administers them with the assistance of a professional public service. The legislative branch alone holds the purse strings of government: *Gordon*, at para. 225; *CLA*, at para. 28.
- The recognition of each branch's respective institutional capacities includes an understanding that each branch will be prevented from fulfilling its mandate if it is unduly interfered with by the other: *Gordon*, at para. 226; *CLA*, at para. 29.
- The recognition that courts should accept and defer to the government's core competencies, which include "the determination of economic policy, budgeting decisions, the proper distribution of resources in society, labour relations regulation, and how best to respond to situations of crisis": *Gordon*, at para. 227.

[310] The application judge erred in law in his analysis of the first stage of *Oakes*. He referenced the warning from this court in *Gordon* that judges conducting a s. 1 analysis in the context of labour law must resist the temptation to act as finance ministers, effectively imposing their policy choices as part of their *Charter* analysis: see *Gordon*, at para. 224. Despite this recognition, the application judge did just that. He ignored the limitations on his powers of review found in the jurisprudence. Particularly concerning aspects of this analysis include the following.

[311] At paras. 282 to 283, the application judge finds that he cannot ignore the fact that new governments “disclose with surprise and disappointment that the fiscal situation left by the previous administration was far worse than imagined.” It appears to be implicit in his reference to this “not uncommon political scenario” that the current government is misrepresenting the Province’s financial position. However, he hastens to add, “I am not saying that this is what occurred here,” but then goes on to point out that the government reduced its calculation of the deficit after Bill 124 was introduced.

[312] One would have thought that if the application judge were seeking to conduct an evidence-based assessment of the first stage of the *Oakes* test, there would not be a gratuitous reference to something he said did not happen. The inclusion of this discussion is troubling. It suggests that the application judge has misconstrued his judicial role. Further, the inference I draw from the application judge’s reference to this non-event was that he intended to cast aspersions on the Province’s motivations without explicitly saying so. This troubling approach colours the entirety of his s. 1 analysis.

[313] Similarly, at paras. 285 to 292, the application judge provides his views on the wisdom of government policies cutting taxes and providing licence plate sticker refunds. He compares the cost of these programs to the savings from the compensation caps and suggests that it was within the power of the government to refrain from implementing such programs. The application judge then states that

"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."

[314] It was an error of law to require the government to justify selected expenditures to determine whether money spent on other programs could have been better invested in increased compensation in the analysis of whether there is a pressing and substantial objective. Courts overstep their institutional role when they require governments to account to them in such a granular fashion. Further, the application judge's analysis also has an inherent value judgment. Tellingly, he does not require the government to justify investments in areas like healthcare, transportation, cultural programs, or education. Instead, the focus is on items like tax cuts, which apparently must be justified.

[315] The application judge also erred in his treatment of Dr. Dodge's evidence. At para. 294, he finds that:

> 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.

[316] According to the application judge, at para. 293 of his reasons, “Judicial deference is owed to cogent explanations that justify *Charter* infringements. Deference was not owed to simple assertions.” The same standard applies to judges’ reasons under s. 1. If there is a basis for rejecting Dr. Dodge’s evidence, the application judge is obliged to explain it in clear terms. It is insufficient to simply assert that he, the application judge, believes – based on no evidence – that the economy is strong. I note that this conclusion conflicts with the evidence of Dr. Dodge who testified that “[g]rowth in Ontario never came back to its longer-term pre-recession average.”

[317] Further, the application judge mischaracterizes and devalues Dr. Dodge’s evidence by his finding that he “merely advocates for fiscal prudence.” That is plainly incorrect. Dr. Dodge’s affidavit, which was not the subject of cross-examination, includes his conclusion that “the effort to contain unit costs, including through temporary wage restraint as set out in Bill 124, is critical to ongoing fiscal sustainability, even more so than I assessed it to be in 2019.” Again, the application judge was obliged to engage with that evidence. Mischaracterizing expert evidence and relying on that mischaracterization to dismiss it falls short of what is required of a judge in a s. 1 analysis.

[318] In summary, I agree with Ontario’s submission that the application judge erred in applying too stringent a standard at this stage of the *Oakes* test; he wrongly ignored the good faith assertions of the government and cast aspersions

on their motivation while denying that he was doing so. He also went beyond the record to substitute his own opinion for the views of the elected government and financial experts.

(b) Rational Connection

[319] The jurisprudence under the rational connection stage of the *Oakes* test holds that the evidentiary burden here "is not particularly onerous": *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228 (*per* Iacobucci J., dissenting in part); *Health Services*, at para. 148; and *Mounted Police*, at para. 143. Indeed, Hogg and Wright, at §38.18, suggest that "the requirement of a rational connection has very little work to do."

[320] All that is necessary is that the government establish a "causal connection between the infringement and the benefit sought on the basis of reason or logic": *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 99, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. As long as the challenged limit "can be said to further in a general way an important government aim," it will pass the rational connection branch of the analysis": *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at pp. 925-26. Further, where the legislation at issue has more than one goal, any of them can be relied upon to meet the s. 1 test: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 44-45.

[321] Regarding the nature of the evidence to be adduced on this issue, a rational connection can be established on "a civil standard, through reason, logic or simply common sense": *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 53, citing *RJR-MacDonald*, at para. 184. The government need only demonstrate a reasonable prospect that the limiting measure will further the objective to some extent, not that it will certainly do so: *Hutterian Brethren*, at para. 48.

[322] In the cases at bar, the application judge held that moderating compensation rate increases is logically related to the responsible management of Ontario's finances and the protection of the sustainability of public services insofar as it concerns wages that Ontario pays for directly. However, he found that there is no rational connection between the government's objective and workers in the energy sector or the university sector, and that any rational connection between the objective and the long-term care sector is remote at best.

[323] My colleagues reject the application judge's conclusion on the long-term care sector. However, they agree with his conclusion regarding the energy sector and post-secondary education sectors.

[324] The application judge and my colleagues erred in law in their rational connection analysis with respect to these sectors by demanding too stringent a level of proof, which required the government to establish an empirical connection and direct causal relationship. They fail to consider the indirect ways that wage

control in these entities would benefit the responsible fiscal management of the Province. The government has an interest in reducing wage growth in entities that are provincially funded (e.g., the university) or wholly provincially owned (e.g., the electricity sector).

[325] Ontario need not directly pay the wages of employees for it to benefit from a compensation limitation because a cap would place their employers in a more sustainable financial position. It must be remembered that when public sector institutions face financial pressures, they look to the government for funding because it serves as a fiscal backstop. Thus, to the extent their fiscal situation is improved, it furthers the objective of the Act, as found by my colleagues, which is to address the Province's fiscal situation to sustain public services.

[326] My colleagues conclude that concerning the energy sector, a cap on compensation is of no benefit to the Province because no revenues flow from the Ontario Energy Board and the Independent Electricity System Operator to it. This conclusion reflects their restrictive approach to rational connection, which is at odds with the Supreme Court's jurisprudence. It is evident that a wage limitation would further the ability of these entities to maintain a sustainable financial position.

[327] A wage restriction affecting Ontario Power Generation ("OPG") also supports Ontario's aim of maintaining a sustainable financial position. Ontario is

the sole shareholder of OPG. In 2018, OPG had a net income of approximately $1.12 billion. A wage restriction would contribute to a larger dividend for Ontario in its position as sole shareholder, thereby contributing directly to the Province's fiscal health.

[328] In addition, it makes no difference that Ontario is not, as in the case of the university sector, the sole source of funding. Bill 124 is rationally connected insofar as the provincial government is a significant source of funding for universities. This point was considered in *Syndicat canadien de la fonction publique, section locale 675,* 2014 QCCA 1068. In that case, the Court of Appeal of Quebec accepted that it was rational for Parliament to limit salary growth at the Canadian Broadcasting Corporation even though the federal government is only one source of its funding.

[329] Further, my colleagues' reliance on a funding agreement for Carleton University that extends to 2025 is misplaced. Funding requests of the provincial government represented approximately 29 percent of universities' operating revenue in 2019-20 and tuition fees are partly government funded through student financial supports. It is unrealistic to think that when that agreement expires, Carleton will not seek increased funding, either direct or indirect, from the Province to cover compensation increases made during the life of the agreement. Again, it is worth emphasizing that Ontario serves as the ultimate financial back stop for public services in the province.

(c) Minimally Impairing

[330] The Supreme Court in *Carter*, at para. 102, describes the minimal impairment step of the s. 1 analysis, as follows:

> [T]he question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid*. at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

[331] At this stage of the analysis, the court must afford the legislature some leeway to create a law that falls within a range of reasonable alternatives to respond to a policy problem: *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 58, citing *RJR-MacDonald*, at p. 342. Courts should not interfere on the basis that they can conceive of less restrictive alternative measures: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 112. The appellants submit – and I agree – that the application judge failed to adopt this deferential approach and erred in concluding that voluntary wage restraint – or hard bargaining – was the alternative that should have been pursued.

[332] It was an error to conclude that voluntary wage restraint would be a better alternative to a legislative measure. This conclusion reflects a misunderstanding

of the scheme and scope of Bill 124. The legislation extends beyond the government's bargaining role and includes situations where the government is not the employer or not at the bargaining table. Thus, hard bargaining is not an available alternative in all sectors covered by the legislation and does not fit within the range of reasonable alternatives to meet the government's purpose.

[333] Compounding this error was the application judge's and my colleagues' focus on hard bargaining, which prevented them from analyzing whether Bill 124 falls within a range of reasonable alternatives to respond to a policy problem. They avoided that analysis and failed to consider compelling reasons supporting the government's submission that it met the minimal impairment test.

[334] For example, the terms of Bill 124 are not as restrictive as in other temporary wage control legislation. There is no rolling back of wage gains in existing collective agreements or arbitration awards as in the *ERA*. Further, unlike Bill 124, which provides for a one percent wage increase per year, the *PSSA* moderation period included two years with zero percent increases. The moderation period in Bill 124 is also one year shorter than the *PSSA* and two years shorter than the *ERA* moderation period.

[335] The government also adduced persuasive evidence in the form of affidavits from Dr. Dodge indicating that Ontario's fiscal situation was unsustainable and that temporary wage restraint was imperative to gain control of the Province's finances

and protect the delivery of public services. In addressing this challenge, the government made the political decision, as it was entitled to do, that it would not raise taxes or cut critical front-line services and that it would avoid involuntary job cuts.

[336] The record reveals that the government considered and attempted various options for limiting public spending growth associated with salaries, but they were found to be insufficient. For example, in November 2018, it established a requirement for government approval of employer bargaining mandates and tentative collective agreements reached by all public service entities as defined by the *Management Board of Cabinet Act*, R.S.O. 1990, C. M.1. However, that proved insufficient to meet the government's fiscal goals. The government also considered options for greater oversight over bargaining in the broader public service, but those options were not sufficient to curtail compensation costs in the immediate to medium term as they need time to be developed and successfully implemented.

[337] In these circumstances, it was open to the government to choose a legislative solution that was both effective and did not result in such measures as involuntary layoffs and mandatory unpaid days off. The avoidance of these outcomes should be considered in determining whether the legislation was minimally impairing. After all, a laid off employee has very limited associational rights.

[338] Finally, it is unpersuasive that the unions can point to agreements in 2012 that provided for zero percent wage increases. As my colleagues point out, the 2008 economic crisis had a devastating impact on the economy. It is difficult to accept that in 2018, the unions would be prepared to accept such a contract. The fact that they have commenced this litigation objecting to a cap of one percent strongly suggests that the notion that they would have accepted zero percent increases is fanciful.

(d) Balancing Step

[339] In undertaking the balancing step, a court measures the proportionality between the measure's effects (including a balance of its salutary and deleterious effects) and the stated legislative objective. The crux of the issue is whether the limit on the right is proportionate in effect to the public benefit of the measure: *Hutterian Brethren*, at para. 73-78. This analysis leads to a series of essential questions identified by the Supreme Court in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 45: "What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"

[340] The application judge's analysis on this issue suffers from some of the same defects found earlier in his s. 1 analysis. In particular, he chose to downplay the

evidence of Dr. Dodge and recast Ontario's fiscal situation to fit his conclusion. He described the challenge facing the government as moderating "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." The application judge also stated that the case involved collective bargaining in an "ordinary, unremarkable environment."

[341] Implicit in this finding is that the application judge disagrees with the government's assessment of its fiscal situation. If Dr. Dodge was wrong in his evidence and Ontario's fiscal situation was business as usual, then the application judge was obliged to explain where he got it wrong. Sweeping statements about times of relative growth and prosperity are no substitute for rigorous analysis. Nor is it satisfactory to point out that the fiscal situation was arguably worse in other cases. The application judge was obliged to engage with the evidence before him, not to discount it in favour of his own assessment of the economic conditions in Ontario, which was untethered to the evidence in the record.

[342] In support of this analysis, the application judge returns to the value-laden false dichotomy he created between tax cuts and fiscal restraint:

> 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.

[343] Left out of the application judge's balancing analysis is any consideration of the impact of ever-increasing compensation costs on front-line services and debt servicing obligations. That omission illustrates the fundamental problem with his reasoning. Properly balancing the salutary and deleterious effects of a piece of legislation requires a consideration of the positive impacts of the law. That is the essence of balancing. The application judge declined to consider the positive impacts of Bill 124.

[344] Further, the application judge's insistence that there has to be an immediate and severe economic crisis to justify a temporary breach of *Charter* rights is unduly restrictive. There can be no doubt that Dr. Dodge's evidence made clear that the rate of spending on compensation was unsustainable. In light of this fact, the government should be permitted to temporarily reduce the unit costs of providing public services in preference to cutting services. According to the application judge's analysis, it would be permissible for the government to temporarily reduce wage costs when the economy was on the brink of collapse, but it would be

unconstitutional for the government to act proactively to prevent the inevitable. If a government sees an economic cliff on the horizon, courts should not require it to wait till the last moment to act.

[345] My colleagues distance themselves from the application judge's balancing analysis. They conclude that the government could have achieved the same results via collective bargaining. That is an unrealistic and unworkable proposition for the reasons set forth above.

[346] Finally, in their brief discussion of the balancing of the salutary and deleterious effects, my colleagues offer this statement: "In contrast, because of the Act, organized public sector workers, many of whom are women, racialized and/or low-income earners, have lost the ability to negotiate." There are many issues to unpack in this comment. However, I will restrict myself to reminding my colleagues that "women, racialized and/or low-income earners" pay taxes in this Province, and they too have an interest in ensuring the responsible management of the Province's finances and the protection of sustainable public services.

(e) Conclusion Regarding s. 1

[347] In summary, the application judge and my colleagues erred in their approach to their s. 1 analysis as follows:

- On the issue of pressing and substantial objective, the application judge erred in applying too stringent a standard and went beyond the record to

substitute his own opinion for the views of the elected government and financial experts.

- Regarding the rational connection issue, the application judge erred in finding that there was no rational connection regarding the energy and university sectors and only a remote connection to the long-term care sector. My colleagues made the same errors regarding the energy and university sectors. Both the application judge and my colleagues failed to consider indirect ways that wage control in these entities would benefit the responsible fiscal management of the Province and ignored the fact that the government had an interest in reducing wage growth in entities that are provincially funded or owned.
- In their minimal impairment review, the application judge and my colleagues failed to consider whether the legislature created a law that falls within a range of reasonable alternatives to respond to the policy problem. Instead, their analysis focused exclusively on his erroneous conclusion that voluntary wage restraint or hard bargaining was a viable and better alternative to further the government's policy objectives.
- Finally, at the balancing stage, the application judge chose to ignore the expert evidence and recast Ontario's fiscal situation to fit his s. 1 analysis. Further, my colleagues' analysis of the balancing stage is based on a misunderstanding of the operation of Bill 124.

[348] A proper s. 1 analysis would have found ample evidence to support the government's submission that the control of compensation costs was a pressing and substantial objective. The government also established a rational connection when considering the indirect ways that wage control in the energy and university sectors benefitted Ontario's fiscal position. Regarding minimal impairment, the record made clear that the government tried other measures to fulfil its objectives and that it created a law that was not as intrusive as similar laws in Canada or other policy options. Therefore, the government established that Bill 124 was within a range of reasonable alternatives to respond to Ontario's pressing and substantial fiscal problem. Finally, at the balancing stage, it is evident that the Act's salutary effects of protecting Ontario's financial health and preserving the sustainability of public services far outweigh any deleterious effects.

[349] Based on the preceding, I would find, in the alternative, that if Bill 124 breached s. 2(d), it is a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society.

(4) Reading Down

[350] I agree with my colleagues that the application judge erred when he declined to consider the pertinent sections of Bill 124 and simply invalidated the whole Act. The idea that non-unionized workers have associational rights under s. 2(d) is unknown at law.

(5) Disposition

[351] For the foregoing reasons, I would allow the appeals, set aside the order of the application judge, dismiss the applications, and award the Province its costs below and in this court.

Released: February 12, 2024 “D.D.”

“C.W. Hourigan J.A.”