Court File No. COA-23-CV-0010

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION,
KAREN EBANKS and ALEXANDRA BUSCH

Applicants
(Respondents in Appeal)

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 in Appeal)

AND BETWEEN:

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

Applicants
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(Appellants in Appeal)

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(Title of Proceeding Continued on p. 2)

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 in Appeal)

and

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(Appellants in Appeal)

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THE ONTARIO NURSES' ASSOCIATION, VICKI MCKENNA
and BEVERLY MATHERS

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and MINISTER OF LONG-TERM CARE

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

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(Respondents in Appeal)

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(Appellants in Appeal)

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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
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FACULTY ASSOCIATION, ASSOCIATION OF MANAGEMENT,
ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF
ONTARIO, UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE

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Applicants
(Respondents in Appeal)

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 in Appeal)

AND BETWEEN:

UNIFOR, KELLY GODICK, SARAH BRAGANZA, and KATHLEEN ATKINS

Applicants
(Respondents in Appeal)

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HIS MAJESTY THE KING IN RIGHT OF ONTARIO, as represented by
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Respondents
(Appellants in Appeal)

AND BETWEEN:

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ANGELO MINGARELLI, ROOT GORELICK, and R. GREGORY FRANKS, on
their own behalf, and on behalf of all of the members of the Carleton University
Academic Staff Association

Applicants
(Respondents in Appeal)

and

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

Respondents
(Appellants in Appeal)

AND BETWEEN:

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

Applicants
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and

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Respondents
(Appellants in Appeal)

AND BETWEEN:

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Applicants
(Respondents in Appeal)

and

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PART I - OVERVIEW

1. When the Government of Ontario introduced the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (the "*Act*" or "Bill 124"),[1] over half of Ontario's annual fiscal expenditure was made up of employee compensation. The *Act* affected 780,000 employees in the broader public service ("BPS").

2. The Legislature determined, within its legitimate sphere of activity and in good faith, that identified risks to Ontario's fiscal sustainability and its ability to maintain important public services required intervention in compensation growth in the BPS.

3. The Application Judge struck down the entirety of the *Act* under s. 2(d) of the *Canadian Charter of Rights and Freedoms*, even those portions unrelated to associational activity.[2] He found that it was not saved under s. 1 of the *Charter*.

4. The Application Judge failed to properly apply the substantial expenditure restraint jurisprudence in this Court, other appellate courts, and in the Supreme Court of Canada. This resulted in fundamental legal errors:

   (a) He failed to correctly apply the governing principle that s. 2(d) as it applies to labour relations protects collective bargaining as a process as opposed to protecting outcomes of that process;

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[1] S.O. 2019, c.12 ["***Act***" or "**Bill 124**"].

[2] *Canadian Charter of Rights and Freedoms*, s. 2(d), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

(b) He concluded that Bill 124 substantially interfered with the associational rights of employees based on the incorrect conclusion that the inability to achieve particular substantive outcomes is by itself a substantial interference with collective bargaining;

(c) Accordingly, he failed to consider whether there was substantial interference with employees' ability to associate to pursue workplace goals effectively, or to their ability to participate in meaningful, good faith consultation and negotiation;

(d) He misinterpreted Bill 124 as interfering with the right to strike, which courts have recognized as central to the process of collective bargaining. Not only did the *Act* expressly provide otherwise, and Ontario affirm that such a strike would be lawful, but the record confirms that following passage of Bill 124, strike actions had occurred, and unions had reported to their membership successes in meaningful collective bargaining processes;

(e) He failed to correctly construe the significance of unions' ability under the *Act* to seek a ministerial exemption from the wage cap and to pursue the right to strike, which is meaningful associational activity, exerting pressure on the Minister to grant such an exemption.

5. These errors flowed in no small measure from the Application Judge's failure to adhere to Canadian constitutional jurisprudence that has long accepted that it should not be presumed that Legislatures intend to exceed their powers. The Application Judge inverted that presumption in his analysis regarding the right to strike.

6. The Application Judge erred in his s. 1 *Charter* analysis:

(a) Which led him to make his own policy choices rather than defer to the Legislature and which led inevitably to a result contradictory to the prevailing expenditure restraint jurisprudence. Policy choices are those of the Legislature, not the Application Judge;

(b) He mischaracterized the pressing and substantial purpose of Bill 124, requiring there to be a financial crisis to qualify as justification and then discounting the uncontradicted evidence of Dr. David Dodge:

(i) Who testified that given the fiscal and economic realities facing Ontario since the 2008 financial crisis, Ontario had to be prepared to deal with adverse financial outcomes and take steps to reduce the rate of program spending, of which compensation restraint constituted a critical element;

(ii) This leaves Ontario unable to deal with a severe negative shock to the economy in the short run and render funding of social services, such as health and education, unsustainable in the future.

7. The prudent time to act was before, not upon, a crisis. Deference must be given to the Legislature to take steps to avert a dire financial situation which arises from the "fundamentally unstable" gap between spending and debt.

8. In the result:

(a) The decision of the Application Judge should be set aside and the Applications dismissed; or

(b) In the alternative, the *Act* should be read down to its savable components rather than being struck down in its entirety.

PART II - SUMMARY OF THE DECISION AND EVIDENCE

9. The Application Judge, both in his s. 2 (d) and s. 1 analyses, inevitably veered into, and analyzed evidence based on, his view of what the Legislature ought to have considered and ought to have done in respect of fundamental fiscal decisions.

A. OPERATION OF BILL 124: WHAT DOES IT DO? WHAT DOES IT NOT DO?

10. The Government of Ontario introduced Bill 124 on June 5, 2019, and it received royal assent on November 8, 2019.

11. The Preamble of Bill 124 describes the Government's commitment to restoring the Province's fiscal health and the need to restore the sustainability to the Province's finances in the public interest and to maintain important public services. Key provisions of Bill 124 include:

(a) **Section 1: Purpose**. 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.[3]

(b) **Section 2: Interpretation.** Compensation is defined as anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary,

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[3] Bill 124, s. 1.

benefits, perquisites and all forms of non-discretionary and discretionary payments.[4]

(c) **Section 3: Right to bargain collectively.** Subject to the *Act*, the right to bargain collectively is continued.[5]

(d) **Section 4: Right to Strike.** Nothing in the *Act* affects the right to engage in a lawful strike or lockout.[6]

(e) **Section 5(1): Application to Employers.** The *Act* applies to a wide range of employers, employees and unions in the broader public service including the Crown in Right of Ontario, Crown agencies, school boards, universities, colleges, public hospitals, non-profit long term care homes, children's aid societies and every authority, board, commission, corporation, office or organization of persons that does not carry on its activities for profit of its members or shareholders and receives at least $1 million in funding from Ontario in 2018.[7]

(f) **Section 5(2): Exceptions**. The *Act* does not apply to, *inter alia*, municipalities, which have their own taxing powers. It does not apply to for-profit enterprises which are subject to free markets.[8]

(g) **Section 10: Maximum increases in salary rates**:

(i) No collective agreement or arbitration award may provide for an increase in a salary rate during the moderation period of three years which is greater than one per cent for each 12-month period of the moderation period;

(ii) But an employee's salary rate may increase in recognition of employment length, performance assessment and/or completion of professional training.[9]

(h) **Section 11: Maximum increases in compensation**. During the 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 for each 12-month period of the moderation period.[10]

(i) **Section 16: Conflict with the *Act*.** The *Act* prevails over any collective agreement or arbitration award and, if the Minister makes an order under subsection 26 (1)

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[4] Bill 124, s. 2.
[5] Bill 124, s. 3.
[6] Bill 124, s. 4.
[7] Bill 124, s. 5(1).
[8] Bill 124, s. 5(2).
[9] Bill 124, s. 10.
[10] Bill 124, s. 11.

declaring that a collective agreement or arbitration award is inconsistent with the *Act*, the collective agreement or arbitration award is void and deemed never to have had effect.[11]

(j) **Section 26: Minister's Order.** The Minister may make an order declaring that a collective agreement or an arbitration award is inconsistent with the *Act*. Notice shall be provided to the parties of an opportunity to make written submissions regarding whether the collective agreement or arbitration award is consistent with the *Act*.[12]

(k) **Section 27: Exemption from application of the *Act*.** The minister may, by regulation, exempt a collective agreement from the application of the *Act*.[13]

12. Bill 124 applies across the BPS and Ontario public service ("OPS") to both unionized and non-bargaining employees. It does not single out any particular union or sector. It includes entities funded by the province, public sector entities that pay dividends to the province or whose net earnings are attributable to Ontario as sole shareholder, and provincial public sector entities that draw their revenue from ratepayers or from mandatory premiums on employers.[14]

13. The *Act* gives the Minister authority to exempt an employer or collective agreement from the legislation or any provision. Three collective agreements have been exempted pursuant to that authority.[15]

[11] Bill 124, s. 16.
[12] Bill 124, s. 26.
[13] Bill 124, s. 27.
[14] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 94, p. 46, "While some executives are excluded from Bill 124, they continued to be subject to long-standing compensation restraint measures under the *Broader Public Sector Executive Compensation Act, 2014*. Put another way, the two Acts are complementary and together cover all managers and executives working at employers in scope for Bill 124"; Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 91, p. 45.
[15] Bill 124, O. Reg. 659/20: Exemptions Under Section 27 of the Act. At the time the Applications below were heard, only one exemption had been granted.

14. Bill 124 is time-limited and exceptional. Any employee covered by the *Act* is subject to a three-year moderation period. After the applicable moderation period, the parties can collectively bargain compensation without a cap.

15. Bill 124 permits negotiations over both monetary and non-monetary issues. While it imposes a cap on annual compensation increases during a time-limited moderation period, it does not prevent collective bargaining on monetary issues consistent with legislated caps and does not prohibit collective bargaining on non-compensation matters.

16. The right to bargain collectively is expressly continued, and existing collective bargaining regimes continue including under the *Labour Relations Act* ("*LRA*"),[16] the *Crown Employees Collective Bargaining Act* ("*CECBA*"),[17] the *Hospital Labour Dispute Arbitration Act* ("*HLDAA*"),[18] the *School Boards Collective Bargaining Act* ("*SBCBA*"),[19] and the *Ambulance Services Collective Bargaining Act*.[20]

17. Bill 124 does not alter or remove any of the extensive processes contained in these statutory regimes or in negotiated framework agreements.

18. The Act expressly preserves the right to strike, and many bargaining units held successful strike votes during the application of the *Act*.[21]

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[16] *Labour Relations Act*, *1995*, S.O. 1995, c. 1, Sch. A.
[17] *Crown Employees Collective Bargaining Act*, *1993*, S.O. 1993, c 38.
[18] *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H14.
[19] *School Boards Collective Bargaining Act*, *2014*, S.O. 2014, c. 5.
[20] *Ambulance Services Collective Bargaining Act*, *2001*, S.O. 2001, c. 10.
[21] *Ontario English Catholic Teachers Association v. His Majesty,* 2022 ONSC 6658 ["**Application Decision**"], para. 114; Doyle Affidavit, January 12, 2021, B.1.01.0001, at paras. 80-81, p. 23; Transcript, Cross of Doyle, May 26, 2022, L.1.04.0001, at Q 152, p. 62; Bennett Affidavit, January 14, 2021, C.1.01.0001 at paras. 97-107, 126, pp. 34-37, 45; Léonard Affidavit, February 11, 2021, D.1.02.0001, at

19. Bill 124 operates by imposition of an annual cap on compensation rather than a wage freeze, thereby permitting negotiations on monetary issues consistent with the cap. Individual compensation increases are not capped, as progression through existing salary and experience grids is expressly permitted.[22]

20. Parties may average compensation changes across employee groups,[23] and trade-offs between salary rate increases and other forms of compensation changes-including cost neutral changes-can still be sought through bargaining.

21. Bill 124 does not interfere with agreements or arbitration awards concluded prior to its introduction.[24] Bill 124 applies a rolling compensation moderation period that applies only as individual collective agreements (if any) expire.[25]

22. In summary, Bill 124 does not prevent collective bargaining on monetary issues consistent with legislated caps and does not limit collective bargaining on non-compensation matters at all.

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paras. 133-135, pp. 41-42; DeQuetteville Affidavit, January 14, 2021, D.1.01.0001, at paras. 103, 121, pp. 27, 32; Transcript, Cross of DeQuetteville, June 22, 2022, L.1.26.0001, at QQ 68, 96-105, pp. 35-36, 44-48; Exhibit 2 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0003; Exhibit 3 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0004; Exhibit 12 to Transcript, Cross of Wurtele, June 1, 2022, EXB L. 1.11.0013; Exhibit 16 to Transcript, Cross of Wurtele, June 1, 2022, EXB L. 1.11.0017; Transcript, Cross of Burke, May 25, 2022, L.1.02.001, at QQ 91-94, p. 42; Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 21-38. Exhibit 1 to Transcript, Cross of Cox, June 1, 2022, EXB L.1.10.0002; Fortier Affidavit, March 8, 2021, H.1.01.0001, at paras. 143, 156, pp. 46-47, 51-52; Braganza Affidavit, June 28, 2021, H.2.02.0001, at para. 32, p. 9; Murdaca Reply Affidavit, April 8, 2022, F.1.26.0001, at paras. 17-36, pp. 6-10; Wurtele Affidavit, January 20, 2021, F.1.07.0001, at paras. 86, p. 19; Wurtele Reply Affidavit, April 14, 2022, F.1.24.0001, at para. 24, pp. 9-10; Atkins Affidavit, June 29, 2021, H.2.03.0001, at para. 58, p. 12.

[22] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 84, p. 43; Transcript, Cross of Porter, June 15, 2022, L.1.19.0001, at QQ 705, pp. 230-231; Transcript, Cross of Porter, June 17, 2022, L.1.21.0001, at QQ 903, 907, pp. 55-57.

[23] Porter Affidavit, March 4, 2022, A.1.01.0001, at paras. 86, 89, pp. 44-45; Transcript, Cross of Porter, June 17, 2022, L.1.21.0001, at QQ 903, 907, pp. 55-57.

[24] Bill 124, ss. 9(2)-(3).

[25] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 90, p. 45. The only exception is a few agreements settled or awards issued after Bill 124's introduction but before the legislation was enacted.

It does not remove the right to strike. It allows for a ministerial exemption. Its compensation caps are time-limited and only apply for three years. It does not substantially interfere with the process of collective bargaining.

B. THE DECISION OF THE APPLICATION JUDGE

23. The Application Judge found that the *Act* infringes on the right to freedom of association under s. 2(d) of the *Charter* and is not a reasonable limit on a right that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*. The Application Judge struck down the entire *Act*.

(i) Section 2(d) Analysis

24. The Application Judge affirmed that the general interpretative approach of s. 2(d) of the *Charter* must have regard to both the larger objects of the *Charter* and the purpose behind the particular associational rights at issue.[26] The purpose of collective bargaining is to empower weaker members of society to meet the more powerful, including the state, on more equal terms.[27] Legislative provisions that take issues off the bargaining table can amount to violations of s. 2(d) even though they do not formally limit the ability of employees to associate with each other.[28]

25. The Application Judge held that the *Charter* protects not just the right to associate but also the right to a meaningful process in which unions can put on the table the issues of concern to workers and discuss them in good faith.[29] The test under s. 2(d) is "substantial interference" and requires review of two questions: (i) how important the matter affected is to the process of

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[26] Application Decision at paras. 39-40.
[27] Application Decision at para. 41.
[28] Application Decision at paras. 43-48.
[29] Application Decision at para. 49.

collective bargaining and (ii) how does the measure impact on the right to good faith negotiation and consultation.[30]

26. In answer to the first question and importance of the matter affected, the Application Judge was satisfied that the issue of a 1% on wage increase is of vital importance to an employee to engage in effective collective bargaining.[31]

27. The Application Judge analyzed his view of the effect of the *Act* on an "outcomes" basis, looking at ten factors:

(a) the financial importance of the wage gap;[32]

(b) the impact on trading salary against other issues;[33]

(c) the impact on staffing;[34]

(d) the impact on wage parity between public and private sector employees;[35]

(e) the impact on employee self-government;[36]

(f) the impact on freely negotiated agreement;[37]

(g) the impact on the right to strike;[38]

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[30] Application Decision at para. 52.
[31] Application Decision at paras. 54-59.
[32] Application Decision at para. 63.
[33] Application Decision at para. 78.
[34] Application Decision at para. 101.
[35] Application Decision at para. 105.
[36] Application Decision at para. 108.
[37] Application Decision at paras. 109-112.
[38] Application Decision at para. 117.

(h) the impact on interest arbitration;[39]

(i) the impact on the relationship between unions and their members;[40] and

(j) the impact on the power balance between employer.[41]

28. In this analysis, the Application Judge held, contrary to the express language of the *Act* and evidence of strike actions and strike votes, that Bill 124 limits, both directly and indirectly, the right to strike. He discounted contemporaneous evidence, including union documentation and communications, demonstrating ongoing and meaningful bargaining processes. He held, contrary to the definition otherwise, that Bill 124 applied to anything with monetary implications for employers.

29. In considering the evidence from the two collective bargaining experts, Robert Hebdon for the Respondents and Christopher Riddell for the Appellants, the Application Judge preferred the evidence of Professor Hebdon because he concluded that it coincided with the evidence of numerous fact witnesses[42] and "coincided more closely with common sense".[43] The Application Judge then relied upon this evidence to find legal consequences that do not comply with *Meredith v. Canada*[44] and related appellate court decisions.[45]

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[39] Application Decision at paras. 128-129, 139.
[40] Application Decision at paras. 141-148.
[41] Application Decision at para. 154.
[42] Application Decision at para. 169.
[43] Application Decision at para. 170.
[44] *Meredith v. Canada (Attorney General)*, 2015 SCC 2 ["***Meredith***"].
[45] *Manitoba Federation of Labour et al v. The Government of Manitoba*, 2021 MBCA 85 ["***Manitoba Federation of Labour***"] at para. 99.

30. With respect to the exemption process, the Application Judge found that it is of limited value when assessing *Charter* compliance. Focusing on outcomes, not process, he concluded that as only one exemption had been granted at that point under the *Act*, the outcome of the exemption process was not meaningful.[46]

31. While the Application Judge concluded that s. 2(d) does not impose a duty on Ontario to consult affected parties,[47] he found that consultations in this case were not a substitute for collective bargaining and were not designed to reach any agreement with any of the Respondents.

32. The Application Judge distinguished previous authority upholding expenditure restraint legislation on the basis that in those cases:

(a) The limited salary increases were consistent with the going rates reached in agreements with other bargaining agents;

(b) It was not demonstrated that the salary cap was behind the rate of inflation and thereby deprived employees of the right to negotiate compensation increases to keep up with increases in the cost of living;

(c) The legislation at issue were enacted during a time of a looming financial crisis; and

(d) The government negotiated with the unions before imposing the restraints.[48]

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[46] Application Decision at paras. 173-175.
[47] Application Decision at para. 177.
[48] Application Decision at paras. 202, 204, 207, 208-212.

33. The Application Judge declined to follow the Manitoba Court of Appeal's decision in *Manitoba Federation of Labour* upholding similar wage restraint legislation – broad-based, time-limited wage restraint legislation and with even lower wage increase caps. He stated that each case was contextual and fact-based and that it would be an error to conclude there was no substantial interference simply because some other cases involving different legislation and different factual contexts exist.[49]

(ii) Section 2(b) Analysis

34. The Application Judge found no infringement of s. 2(b). There is no appeal of this finding.

(iii) Section 15 Analysis

35. The Application Judge found that the *Act* does not violate equality rights under s. 15 of the *Charter*. The *Act* does not draw a distinction based on a protected ground; it distinguishes between employers, not occupations.[50] As such, the Application Judge did not find it necessary to address the interpretation of s. 28.[51] This finding, too, is not under appeal.

(iv) Section 1 Analysis

36. While the Application Judge acknowledged that there is even greater deference owed for complex fiscal and economic balancing by government, his s. 1 analysis failed to respect the relative legitimate spheres of activity of the Legislature as opposed to the courts.[52]

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[49] Application Decision at para. 217.
[50] Application Decision at paras. 231-234.
[51] Application Decision at para. 244.
[52] Application Decision at para. 253.

(A) Pressing and Substantial Objective

37. While 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,[53] the Application Judge found that the moderation of wages was more of a means to achieve responsible financial management than the objective itself. He re-defined the objective of the *Act* as the responsible management of Ontario's finances and the protection of sustainable public services.[54]

38. The Application Judge followed cases that suggested that financial and budgetary considerations should be treated as suspect when raised as an objective because governments are always subject to budgetary tensions.[55] The Application Judge noted that when budgetary considerations have amounted to pressing and substantial objectives under s. 1, this generally involved some sort of financial emergency either internationally or a severe financial crisis was present, thus the question became whether the financial situation of Ontario in 2019 was sufficiently serious to justify an infringement.[56]

39. The Application Judge injected his own assessment of whether managing public resources in a way to sustain public services amounted here to a pressing and substantial objective. He concluded that there was not sufficient of a crisis to warrant infringing on a constitutionally protected right.[57] In so doing, the Application Judge effectively ruled out the legitimate legislative

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[53] Application Decision at para. 256.
[54] Application Decision at paras. 257-259.
[55] Application Decision at para. 263.
[56] Application Decision at paras. 269, 273.
[57] Application Decision at para. 297.

decision to act prudently to avoid the very crisis that he determined was a *sine qua non* of justification for the *Act*.

(B) Rational Connection

40. As compensation represents roughly half of the Province's expenditures, the Application Judge held that moderating the rate compensation increases is logically related to the responsible management of the Province's finances and the protection of the sustainability of public service insofar as it concerned wages Ontario paid for directly.[58] However, the Application Judge concluded that there is no rational connection between the government's objective and wages at Ontario Power Generation ("OPG"), the Ontario Energy Board ("OEB"), the Independent Electricity System Operator ("IESO"), Carleton University salaries and long-term care homes given the government does not pay for these salaries directly.[59]

(C) Minimal Impairment

41. The Application Judge found that the government did not explain why it did not pursue voluntary wage restraint when bargaining or why alternative methods like wage restraints, freezing or funding arrangements when it came to universities, long-term care homes, OPG, IESO and OEB were not possible. He failed to afford deference to the Legislature's decision-making regarding whether various alternatives open to it are reasonable under the circumstances.[60]

(D) Balancing Salutary and Deleterious Effects

42. In balancing the salutary and deleterious effects, the Application Judge noted the objective to moderate compensation to manage government expenditure is a day-to-day government duty

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[58] Application Decision at para. 301.
[59] Application Decision at paras. 302-322.
[60] Application Decision at para. 327.

that does not call for the breach of *Charter* rights absent unusual circumstances, ultimately the benefit of the *Act* did not outweigh its detrimental effect.[61]

(v) Remedy

43. The Application Judge declared the entire *Act* to be void and of no effect:

> Given that the entire purpose of the act is to implement the 1% limitation on wage increases in the broader public sector, there is no purpose served in reviewing the Act section by section. While it may be possible that some sections, standing entirely in isolation from each other do not violate any *Charter* rights, those sections have no purpose apart from enforcing the overall wage limitation that the Act imposes. As a result, I declare the Act to be void and of no effect.[62]

44. In so doing, the Application Judge did not seek the least intrusive remedy in face of his finding of a s. 2(d) violation. Among other things, he did not consider that s. 2(d) of the *Charter* would not apply to non-bargaining unit employees.

C. WHY DID THE LEGISLATURE PASS BILL 124?

45. Bill 124 must be evaluated in light of the economic and fiscal situation facing the Province at the time of its enactment. These matters are technical (outside the institutional competence of the courts or the usual topics of courtroom evidence) and inherently political. They are policy choices made at the highest levels of democratic decision-making on questions over which elections are won and lost. The litigation process is highly unsuited, both institutionally and constitutionally, for second-guessing these decisions.

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[61] Application Decision at para. 347.
[62] Application Decision at para. 363.

46. Bill 124 was enacted to moderate the growth of compensation expense in the BPS funded by the Province and BPS entities that contribute to provincial revenue.[63] It responds to a fundamental economic reality faced by Ontario: real output growth and revenue will continue to be lower than the growth of demand for government services. This growing gap between spending and revenues, which implied ever-increasing debt and debt service charges, is fundamentally unsustainable. In the short run, it limits Ontario's ability to deal with a severe negative shock to the economy. In the long run, interest on debt crowds out spending on vital services such as health and education.[64]

47. This is the factual context for why the Legislature determined that acting early to head off a fiscal crisis was the prudent thing to do.

48. Its decision making was informed by this economic and fiscal context and choices the government made with respect to taxation levels and other revenue measures, the adoption of a plan, as set out in the 2019 Budget, to achieve budgetary balance over five years, reduction of the Province's net debt as a percentage of Gross Domestic Product ("net-debt-to-GDP") over that period with a view to protecting the sustainability of public services, and the maintenance of critical front line service levels.[65]

49. Dr. David Dodge, whose credentials are beyond debate, testified as to the economic and fiscal context for Bill 124 and Ontario's fiscal plan. Dr. Dodge has held senior positions dealing with fiscal and macroeconomic policy (including as Governor of the Bank of Canada from 2001-

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[63] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 9, p. 12.
[64] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 12, p. 14.
[65] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 9, p. 12.

2008, federal Deputy Minister of Health from 1998-2001, and federal Deputy Minister of Finance from 1992-1997), holds a PhD in economics, and is a tenured professor of economics.[66] The Application Judge found that Dr. Dodge's credentials "are undoubted".[67] The Respondents did not cross-examine him.

50. In general, the Application Judge did not disagree with Dr. Dodge's evidence or the other evidence discussed below about the fiscal challenges faced by Ontario. He explicitly stated that he was not "expressing any critical view about the fiscal policies that the government wishes to pursue" and that "[f]iscal prudence and ensuring the sustainability of public services are essential responsibilities of government."[68]

51. The Application Judge, however, injected his own fiscal assessment and speculation on government motives in concluding that Ontario should have addressed these issues in a different manner. He was in no position to do so.

(i) Economic Outlook for Ontario as of 2019: Low Growth and High Risks

52. Ontario's expenditure budget is rooted in the current and future performance of its economy which determines the capacity to finance government expenditures. Any analysis of the government's fiscal capacity begins with the performance of the economy.[69]

53. Dr. Dodge laid out a detailed assessment of Ontario's potential for, and risk to, economic growth as of 2019.[70] He explained that since the 2008 financial crisis, Ontario had coped with a

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[66] Dodge Affidavit, August 12, 2021, A.1.05.0001, at paras. 1-2, p. 9; Exhibit A to Dodge, August 12, 2021, EXB A.1.05.0002.
[67] Application Decision at para. 275.
[68] Application Decision at para. 17.
[69] Dodge Affidavit, August 12 ,2021, A.1.05.0001, at para. 17, p. 17.
[70] Dodge Affidavit, August 12, 2021, A.1.05.0001, at paras. 17-43, pp. 17-29.

significantly weaker economic environment.[71] There is a consensus that downside risks predominated for the short-term due to important global risks. Projected real growth in Ontario's November 2019 Economic Outlook and Fiscal Review (the "FES") was 1.5% in both 2020 and 2021 and 1.9% in 2022. Consistent with these reasonable assumptions, growth of nominal GDP was projected to be 3.3% per annum over the next two years and 3.6% in 2022. This compares with 4.4% over 2014-2018 and an estimated 3.4% in 2019.[72]

54. Dr. Dodge opined that these nominal growth projections formed a reasonable basis on which to plan future revenues and expenditures. Further, given the predominance of downside risks, Ontario had to be prepared to deal with adverse financial outcomes and the need for further difficult expenditure restraint and/or very broad-based revenue enhancements.[73]

(ii) Fiscal Environment as of 2019: Significant Deficits and Need for Fiscal Consolidation

55. Following the June 2018 election, there was a change in government. Before coming into office, the newly elected government had made several public commitments, including that (i) it would return to a balanced budget on a responsible timeframe, (ii) it would engage in a detailed program review, (iii) it would not raise taxes, (iv) it would not cut critical frontline services, and (v) it would avoid involuntary BPS job cuts.[74]

56. After assuming office, the government appointed an Independent Financial Commission of Inquiry (the "Commission") to retrospectively assess government accounting practices and

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[71] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 21, pp. 18-19.
[72] Dodge Affidavit, August 12, 2021, A.1.05.0001, at paras. 39-40, 42, pp. 27-29.
[73] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 43, p. 29.
[74] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 16, pp. 14-15.

review the Province's budgetary position as compared to the position presented in the 2018 Budget, in order to establish the baseline for future fiscal planning. The Commission delivered its report ("Commission Report") on August 30, 2018.[75]

57. As recommended by the Commission, the government implemented accounting changes proposed by the Auditor General. The result was a provincial budget deficit of $3.7 billion for 2017-2018 rather than a surplus of $0.6 billion.[76] The Commission revised the 2018/19 Budget projection of a deficit of $6.7 billion upward to $15 billion, with a net-debt-to-GDP ratio at 40.5%.[77] The Commission emphasized the importance of fiscal sustainability and taking steps to reduce the net debt-to-GDP ratio.[78]

58. The new government's FES introduced in November 2018 provided updated fiscal projections. The FES revised the 2018/19 deficit projection to $14.5 billion.[79]

59. These large deficits created significant risks for Ontario. As explained by Dr. Dodge, borrowing to finance the ongoing deficit threatened Ontario's fiscal sustainability for three reasons. First, continuing significant deficits might reduce the scope of traditional fiscal stimulus to respond to changes in the business cycle. Second, it would raise Ontario's credit risk, causing markets to increase the risk premium on Ontario debt. That would increase borrowing costs and reduce the scope for fiscal intervention in response to a negative shock. Third, rising debt forces government to spend more interest costs.[80] Concerns about Ontario's fiscal state had already been

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[75] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 18, p. 15.
[76] Porter Affidavit, March 4, 2022, A.1.01.0001, at paras. 21-22, p. 16.
[77] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 23, p. 17.
[78] Porter Affidavit, March 4, 2022, A.1.01.0001, at paras. 24-25, pp. 17-18.
[79] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 38, p. 27.
[80] Dodge Affidavit, August 12, 2021, A.1.05.0001, at paras. 9-23, 45, 65-74, pp. 13-19, 31-32, 41-50.

raised in contemporaneous reports, including the Commission's Report and commentary from external agencies.[81]

(iii) Expenditure and Compensation Management Steps Pursued by Ontario

60. In its November 2018 FES, the government accepted many of the Commission's recommendations and announced that it would be taking steps to address Ontario's significant deficit and debt.[82]

61. The government implemented several measures before turning to compensation restraint. 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*.[83] This covered approximately 33,600 employees and annual compensation costs of $2.6 billion.[84] The government (i) froze hiring in the OPS and discretionary spending as of summer 2017, (ii) implemented efficiencies, and (iii) reduced the size of the OPS through voluntary attrition and implementing a Voluntary Exit Program.[85]

62. The 2019 Budget focused on controlling spending, balancing the budget, reducing the net debt to GDP ratio, and restoring accountability. Through the 2019 Budget the government took "a measured and responsible approach to balancing the budget, with a view to ensure long-term sustainability of the Province's finances that did not rely on tax increases, one-time solutions, or cuts that undermine critical programs and services."[86] The Budget provided for growth in program

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[81] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 43, pp. 29-30.
[82] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 40, pp. 27-28.
[83] R.S.O. 1990, c. M. 1.
[84] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 48, p. 32.
[85] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 44, pp. 30-31.
[86] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 13, pp. 13-14.

expense limited to 1% per year, on average, for five years. This had clear implications for the growth of compensation expense since compensation is a very large proportion of the government's program expense.[87]

(iv) Compensation is a Significant Government Expense and a Necessary Part of Any Plan for Fiscal Consolidation

63. A very large proportion of the government's total operational spending (more than half overall and ranging from 50% to over 70% depending on the sector) is used for employee compensation, either: (a) directly paid to government employees as wages and benefits (or to physicians as fees), or (b) paid from the transfer payments to BPS employers.[88] As a result, the government's fiscal position is highly sensitive to changes in compensation growth rates. Based on 2018 figures, an annual growth rate of 1% in compensation-related spending would translate into $720 million in added budgetary pressure.[89]

64. The large role of compensation costs, including in the BPS, has been noted in several reports and documents. It was highlighted in a report prepared by Ernst & Young, which was commissioned to conduct a line-by-line review of government expenses in July 2018 ("EY Report").[90] The EY Report highlighted that compensation cost growth in the BPS is a significant part of the total growth in government expenditures in its review period:

> A striking finding is shown by the breakdown of expenditures that reveals real operating expenditure in the OPS has remained flat … while operating expenditure through Transfer Payments (TP) including to the Broader

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[87] Porter Affidavit, March 4, 2022, A.1.01.0001, at paras. 11-12, pp. 13; Ontario, Ministry of Finance, 2019 Ontario Budget: Protecting What Matters Most (Queen's Printer for Ontario, April 11, 2019), N.1.01.0012.
[88] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 33, p. 25.
[89] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 58, p. 36.
[90] Porter Affidavit, March 4, 2022, A.1.01.0001, at paras. 26-27, 30-35, pp. 18-26; Exhibit C to Porter, March 4, 2022, EXB A.1.01.0004.

> Public Service (BPS) has grown $46.3B or 99.8% of total real growth in operating expenditures. …
>
> Of the real growth in transfer payments, approximately 37% ($17.3 billion) went to individuals and business supports, and the remaining 63% ($29.0 billion) to various operations, *of which 50% was spent on employee-related costs.*[91]

65. The November 2018 FES highlighted the challenge of managing compensation costs.[92] Unmanaged compensation growth poses several risk factors for the government. First, it has a direct impact on the Province's fiscal position given that it comprises 50% to over 70% of provincial spending depending on the sector. Second, increased compensation costs risk crowding out investments in front-line services. Third, salary increase in collective agreements and non-bargaining compensation plans can lock-in compensation expenditures for years and set trends that are replicated across Ontario's BPS.[93]

66. The Application Judge held that moderating compensation growth is not a concern in the university or electricity sector.[94] However, growth in compensation costs will crowd out other expenditures if they exceed revenue growth. In such entities, it is the government that supports a significant portion of revenues. Colleges and universities generally attribute approximately 60% to 65% of their expenditures to salary, wages, and benefits. Ministry funding represents approximately 29% of college total operating revenue and 23% of total university operating revenue in 2019-20. Tuition fees themselves are partly government-funded, as student financial supports consume $1.4 billion of $10.2 billion spending in the post-secondary education and

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[91] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 30, pp. 19-20.
[92] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 41, pp. 28-29.
[93] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 46, p. 31.
[94] Application Decision at paras. 301-318.

training sector and a substantial portion thereof flows to universities and colleges as tuition. The government exerts control over allowable tuition fee changes.[95]

67. Considerations about compensation growth arise in relation to Crown-owned regulated enterprises such as OPG, Liquor Control Board of Ontario ("LCBO"), and OLG, which substantially contribute to the government's fiscal position. In 2018, OPG had net income of $1.12 billion attributable to Ontario as a sole shareholder, LCBO contributed over $2.2 billion, and OLG contributed over $2.4 billion.[96] An increase in compensation expense reduces net incomes payable to Ontario.

68. Dr. Dodge opined that given that compensation is such a large proportion of Ontario's provincial government program expense and the risks posed by unmanaged compensation cost growth, moderating compensation growth is a critical element of any fiscal consolidation strategy for the Ontario government in 2019.[97]

(v) Dr. Dodge's Expert Evidence Regarding Ontario's Fiscal Plans and Need for Moderation of Compensation Growth

69. Dr. Dodge's expert opinion is:

> My judgment in 2019 was (and remains) that the 2019 plan to bring the ratio of net debt to GDP to less than 40% of GDP (and even more importantly to keep the ratio of debt service costs to revenues at significantly less than 10% even if borrowing rates in 2019 FES rise significantly from their current low levels) would assure a sustainable financial future for Ontario. Most importantly, sustainable public finances would provide the base for sustainable capital investments and program expenditures for future generations.[98]

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[95] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 59, pp. 36-37.
[96] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 60, p. 37.
[97] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 73, p. 49
[98] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 61, p. 39.

70. He opined that while achieving fiscal sustainability imposes some *initial* costs on Ontario residents, over the longer term the costs would be far greater if public debt were allowed to grow continuously relative to the fiscal capacity of the Province and public debt charges were to eat up an ever-growing share of government revenues.[99]

71. Dr. Dodge explained that to reduce its deficit, Ontario faces constraints in relying on increased tax rates, particularly on personal and corporate incomes. Tax rates cannot be easily increased without undermining Ontario's future economic growth and long-run revenue sustainability. The projections of own-source revenue growth over 2019–2023 included in the 2018 FES and the 2019 Budget were reasonable. Assumed levels of transfers from the federal government were also reasonable.[100]

72. Therefore, in order to eliminate the deficit by 2023-2024, program spending growth from 2019-2020 to 2023-2024 has to be constrained to 1.4% per year. Since demand for public services was anticipated to grow much faster than 1.4% per year, the only way to meet this demand, given revenue constraints while also reducing the deficit to ensure fiscal sustainability, is to reduce the unit cost of producing public services. Over time, unit costs are to be reduced through increased efficiencies, but such efficiencies would take time and major investment to realize. In the short run, some reduction in unit costs requires a degree of restraint on compensation growth, which is the largest component of unit cost of services and has been growing relatively quickly over the previous decade.[101]

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[99] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 73, p. 49.
[100] Dodge Affidavit, August 12, 2021, A.1.05.0001, at paras. 67-68, p. 42.
[101] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 69, pp. 42-43.

73. Given the outlook for growth of revenues and expected growth of demand for public services, achieving the deficit reduction needed to ensure long term fiscal sustainability is, in Dr. Dodge's view, a "herculean challenge" for the Ontario government. Reducing the unit cost of providing services was preferable to reducing the quantity or quality of services provided or to raising investment-inhibiting taxes. Achieving fiscal balance by FY 2023-2024 requires a combination of measures. In Dr. Dodge's expert view, compensation restraint is a critical element of any fiscal consolidation strategy.[102]

74. Dr. Dodge also took into account the impact of the pandemic on the economic outlook up to 2024, the spending policies of the government to mitigate the impact of the pandemic, and huge increase in public borrowing in 2020 and 2021 all of which created an unprecedented increase in public debt. Dr. Dodge concluded that the effort to contain unit costs, including through temporary wage moderation in Bill 124, is even more critical to ongoing fiscal sustainability than it was in 2019.[103]

(vi) Decision to Pursue Compensation Growth Moderation through Bill 124

75. As part of the effort to achieve the Province's fiscal goals, the Treasury Board Secretariat ("TBS") was tasked with finding immediate and longer-term options for greater oversight of collective bargaining and compensation for BPS employers that are provincially funded, funded by electricity ratepayers, or that contribute to the government's fiscal position.[104]

76. The thrust of that evidence is to "act now", not wait for a crisis to overtake Ontario.

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[102] Dodge Affidavit, August 12, 2021, A.1.05.0001, at paras. 72-73, p. 49.
[103] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 87, p. 57.
[104] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 47, p. 32.

77. In November 2018, the government 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*. However, this was insufficient to meet the government's fiscal goals, and in early 2019 TBS was tasked with the challenge of managing compensation growth in the immediate to medium term.[105] Given the government's commitment to not raise taxes or cut critical front-line services and to avoid involuntary job cuts, this mandated efforts to manage growth in compensation costs.

78. While TBS considered options for greater oversight over bargaining in the BPS, 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.[106] This is supported by Ernst & Young in its report, in which it highlights that the government's control over bargaining in the BPS is fragmented but cautions that pursuing any of the options for resolving that "would take a significant amount of time to come into effect with the BPS and transfer payment recipients – where control is weakest now – taking the longest amount of time, due to the structural reforms required in those areas."[107] TBS conducted research about different models of bargaining oversight in different jurisdictions, including in particular the model employed in British Columbia.[108]

79. The fact that the government cannot begin exercising greater control over BPS bargaining in the short-term is reinforced by the expert evidence of Ms. Henderson and Mr. Doney, who described the efforts in B.C. to exercise greater oversight over bargaining in that province's BPS.

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[105] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 48, 52, pp. 32-34.
[106] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 49, 53, pp. 32, 34.
[107] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 35, pp. 25-26.
[108] Transcript, Cross of Porter, June 17, 2022, L.1.21.00001, at QQ 1565-1568, pp. 239-240; Transcript, Cross of Porter, August 11, 2022, L.1.31.0001, at Q 3283, p. 287-288.

Both witnesses, from the backdrop of their senior positions in the B.C. government, were well qualified to provide this evidence.[109] Both provided unchallenged evidence that it took B.C. many years to build and implement its model.[110]

80. While establishing greater BPS bargaining oversight may have been an option for the government in the long-term, it cannot help in achieving the government's fiscal goals. Ontario must manage compensation costs in the short run.[111]

81. To moderate compensation growth, the government initiated a process of consultation with BPS employers and bargaining agents.[112] The Application Judge found that there was no constitutional obligation in Ontario to consult before enacting Bill 124.

82. Bill 124 was introduced in the Legislature on June 6, 2019. The government invited further feedback from stakeholders (including bargaining agents) over the summer of 2019 to continue the consultations.[113] Prior to its enactment, six amendments to Bill 124 were moved and adopted. These amendments were informed by comments received during the consultation and feedback period after introduction of Bill 124. Bill 124 was passed in November 2019.[114]

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[109] Henderson Affidavit, February 22, 2022, A.1.03.0001, at paras. 1-6, pp. 8-9; Doney Affidavit, February 22, 2022, 1.04.0001, at paras. 2-7, pp. 8-10.

[110] Henderson Affidavit, February 22, 2022, A.1.03.0001, at paras. 16-17, pp. 12-13; Doney Affidavit, February 22, 2022, 1.04.0001, at paras. 29-39, pp. 16-20.

[111] Porter Affidavit, March 4, 2022, A.1.01.0001, at paras. 49, 53, pp. 32, 34.

[112] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 62, p. 38.

[113] Porter Affidavit, March 4, 2022, A.1.01.0001, at paras. 78-79, pp. 41-42.

[114] Porter Affidavit, March 4, 2022, A.1.01.0001, at para. 47, p. 32.

D. THE COLLECTIVE BARGAINING PROCESS FOLLOWING PASSAGE OF BILL 124

83. Before the Application Judge were confirmatory updates and communications from unions to their members demonstrating that bargaining agents continued to have access to a meaningful process used to achieve gains or to resist concessions sought by employers since the passage of Bill 124.

(i) Primary and Secondary Education

84. The Ontario English Catholic Teachers' Association ("OECTA") provided a comprehensive update to its members in its April 2020 publication of "Catholic Teacher".[115] It reported that it was able to push back against the concessions and obtain a "fair agreement":

> 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 per cent 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.*[116]

85. OECTA illustrated what it was able to achieve in a table comparing the government's opening position with what was included in the final agreement, including wages and benefits as

[115] Transcript, Cross of Doyle, May 26, 2022, L.1.04.0001, at Q 101, p. 47. See also Transcript, Cross of Doyle, May 26, 2022, L.1.04.0001, at Q 104, p. 48, where Mr. Doyle confirmed that OECTA uses the magazine to communicate with its membership.
[116] Exhibit 3 to Transcript, Cross of Doyle, May 26, 2022, EXB L.1.04.0004. [Emphasis added.]

well as significant non-monetary issues, such as increase in the ATB wage increases, reduced secondary class size averages, and the new Supports for Student Fund.[117]

86. The Ontario Secondary School Teachers' Federation ("OSSTF") and the Elementary Teachers' Federation of Ontario ("ETFO") issued similar updates celebrating their success in bargaining.[118]

(ii) Health Sector

87. SEIU Healthcare provided an update about bargaining with an employer subject to moderation under Bill 124 entitled "Circle of Care Members Bargain "Life Changing" Access To Benefits Package".[119] The update noted that access to health benefits was one of the members top priorities and was achieved in negotiations. The update stated:

> 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.
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> "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. …"
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> 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

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[117] Exhibit 3 to Transcript, Cross of Doyle, May 26, 2022, EXB L.1.04.0004.

[118] Exhibit 8 to Transcript, Cross of Bennett, May 26, 2022, EXB L.1.03.0009; Exhibit 5 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0006; Transcript, Cross of DeQuetteville, June 22, 2022, EXB L. 1.26.0001, QQ 114-129; Exhibit 6 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0007.

[119] Transcript, Cross of McKenzie, May 24, 2022, L.1.01.0001, at Q 18, p. 20; Exhibit 1 to Transcript, Cross of McKenzie, May 24, 2022, EXB L.1.01.0002.

> their voices cannot be ignored, we can win together and create meaningful change in your workplaces.

88. The Ontario Nurses' Associations ("ONA") updates regarding centralized bargaining and arbitration decisions in the hospital and long-term care ("LTC") sectors advised that ONA was able to identify its members' interests, advocate for those interests in bargaining and arbitration, and obtain improvements in both monetary and non-monetary matters. [120]

89. 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.[121]

(iii) Post-secondary Education

90. CUPE 3902 (which represents academic and contract faculty at the University of Toronto) posted a video update after concluding a tentative agreement.[122] A member of the bargaining committee noted 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."[123] The bargaining committee then took turns highlighting examples of its achievements, which included

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[120] Transcript, Cross of Mathers, June 1, 2022, L.1.08.0001, at QQ 42-48, 69-79, 84-85, pp. 30-33, 41-47, 49-51; Exhibit 2 to Transcript, Cross of McKenzie, May 24, 2022, EXB L.1.01.0003; Exhibit 6 to Transcript, Cross of McKenzie, May 24, 2022, EXB L.1.01.0007; Exhibit 5 to Transcript, Cross of McKenzie, May 24, 2022, EXB L.1.01.0006; Exhibit 8 to Transcript, Cross of McKenzie, May 24, 2022, EXB L.1.01.0009.

[121] Exhibit 1 to Transcript, Cross of Pike, June 14, 2022, EXB L.1.18.0002.

[122] This was video transcribed during the Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 21-38.

[123] Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 34-35.

(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.[124] The agreement was ratified with more than 94% in favour.[125] CUPE issued similar updates highlighting gains for locals at the University of Toronto[126] and Queen's University.[127]

91. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") issued similar updates for bargaining units at the University of Toronto [128] and Victoria University.[129] The Carleton University Academic Staff Association ("CUASA") issued updates highlighting that CUASA was able to advance proposals on several monetary and non-monetary issues that were not restricted by Bill 124[130] and that the parties had "engage[d] in productive and respectful conversations, and your Negotiating Team is pleased with how things have proceeded."[131] The Ontario Confederation of University Faculty Association ("OCUFA") issued several reports on bargaining successes by many faculty associations.[132]

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[124] Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 27-33.
[125] Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 43-44.
[126] Exhibit 1 to Transcript, Cross of Cox, June 1, 2022, EXB L.1.10.0002.
[127] Exhibit 3 to Transcript, Cross of Cox, June 1, 2022, EXB L.1.10.0004.
[128] Transcript, Cross of Burke, May 25, 2022, L.1.02.0001, at Q 50, pp. 29-30; Exhibit 1 to Transcript, Cross of Burke, May 25, 2022, EXB L.1.02.0002; Exhibit 3 to Transcript, Cross of Burke, May 25, 2022, EXB L.1.02.0004.
[129] Transcript, Cross of Burke, May 25, 2022, L.1.02.0001, at Q 105, pp. 44-45; Exhibit 4 to Transcript, Cross of Burke, May 25, 2022, EXB L.1.02.0005.
[130] Exhibit 2 to Transcript, Cross of Mingarelli, June 22, 2022, EXB L.1.28.0003.
[131] Exhibit 4 to Transcript, Cross of Mingarelli, June 22, 2022, L.1.28.0005.
[132] Transcript, Cross of Wurtele, June 1, 2022, L. 1.11.0001, at QQ 27-28, p. 24; Exhibit 1 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0002; Exhibit 2 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0003; Exhibit 3 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0004; Exhibit 4 to

92. The Ontario Public Service Employees Union ("OPSEU") released updates on bargaining for part-time college support workers, which was subject to Bill 124.[133] After the parties reached tentative agreement, OPSEU issued an update that stated:

> "I'd like to congratulate the bargaining team for keeping a laser-focus on the priorities of their members and negotiating some solid improvements," said OPSEU/SEFPO President Warren (Smokey) Thomas. "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.
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> …
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> "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," said Lisa Lavigne, the chair of the part-time college support bargaining team. "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."

93. OPSEU issued a bargaining bulletin noting that the bargaining team was "proud" to recommend ratification, noting improvements achieved such as job security.[134] The tentative agreement was overwhelmingly approved.[135]

(iv) Ontario Public Service

94. OPSEU issued a November 26, 2021 bulletin shortly after it commenced bargaining. It highlighted the union's determination to achieve the best possible deal while subject to Bill 124 moderation.[136] In a December 22, 2021 update, OPSEU announced a tentative agreement. Along

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Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0005; Exhibit 9 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0010; Exhibit 10 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0011; Exhibit 11 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0012; Exhibit 16 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0017; Exhibit 17 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0018; Exhibit 18 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0019; Exhibit 19 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0020.

[133] Transcript, Cross of Saysell, May 27, 2022, L.1.06.0001, at Q 63, p. 35.

[134] Exhibit 3 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0004.

[135] Exhibit 4 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0005.

[136] Exhibit 5 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0006.

with the annual 1% wage increase, the deal included increases to paramedical benefits and a healthcare spending account as well as non-monetary improvements include seniority calculations for fixed-term employees, job security language, and equity related gains.[137] OPSEU issued a January 11, 2022 statement:

> This tentative contract is a good deal in these difficult times; it comes with plenty of gains – in wages, benefits and other contract language improvements. It's a deal we can all be proud of. …
>
> [T]his deal is a win-win. It guarantees three years of stability, during one of the most challenging times in modern history, all while ensuring that wage talks can reopen. It's a good deal that OPS Unified members can continue to build on for many years to come. … That's why I'm proud to support the bargaining team, and their unanimous endorsement of this tentative deal – because it's a good deal, and that's good news."[138]

95. The Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") issued updates emphasizing that, while the parties were subject to moderation under Bill 124, wages and compensation were only one area and that AMAPCEO would focus on achieving gains in other areas.[139]

(v) Other Sectors

96. The Society of United Professionals, Local 160 of the International Federation of Professional and Technical Engineers ("Society") issued a September 29, 2021 update noting that it had engaged in extensive negotiations but was proceeding to arbitration.[140] In a December 16, 2021 update about the arbitration award, the Society emphasized the union's monetary and non-

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[137] Exhibit 6 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0007.

[138] Transcript, Cross of Saysell, May 27, 2022, L.1.06.0001, at QQ 122-123, pp. 52-53; Exhibit 7 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0008; Exhibit 8 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0009.

[139] Exhibit 4 to Transcript, Cross of Hill, June 3, 2022, EXB L.1.12.0005; Exhibit 7 to Transcript, Cross of Hill, June 3, 2022, EXB L.1.12.0008; Exhibit 8 to Transcript, Cross of Hill, June 3, 2022, EXB L.1.12.0009.

[140] Exhibit 1 to Transcript, Cross of Travers, June 22, 2022, EXB L.1.27.0002.

monetary gains, as well as employer-sought concessions defeated in arbitration.[141] The Power Workers' Union ("PWU") issued an update noting all the improvements negotiated in an agreement in addition to a 1% pay increase.[142]

97. An April 29, 2021 OPSEU bulletin on bargaining for employees at the LCBO reported to membership that it was a perfect time to focus on non-monetary issues given moderation under Bill 124 and emphasized that ""non-monetary" bargaining is incredibly important, too. "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."[143] After the parties reached a tentative agreement, 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."[144]

(vi) The Application Judge's Treatment of the Respondents' Own Communications

98. The Application Judge referred only briefly to these communications. Despite being contemporaneous documents, in which bargaining agents celebrated their bargaining process and their successes, the Application Judge found 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.[145]

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[141] Exhibit 2 to Transcript, Cross of Travers, June 22, 2022, EXB L.1.27.0003.
[142] Transcript, Cross of Dassios, June 21, 2022, L.1.24.0001, at Q 12, pp. 18-19; Exhibit 1 to Transcript, Cross of Dassios, June 21, 2022, EXB L.1.24.0002.
[143] Exhibit 9 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0010.
[144] Exhibit 10 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0011; Exhibit 11 to Transcript, Cross of Saysell, May 27, 2022, EXB L.1.06.0012.
[145] Application Decision at para. 161.

99. However, on cross-examination, the bargaining unit representatives confirmed that they provided accurate updates under a responsibility that they took seriously. [146] There is no obligation on bargaining agents to "sell" an agreement, either by statute or contract.

(vii) Strikes Following Passage of Bill 124

100. Bill 124 does not limit the Respondents' ability to strike. The record shows bargaining units engaging in strikes or holding strike votes and using those to secure gains in bargaining after the passage of Bill 124.

101. OECTA members began to engage in administrative job action starting on January 13, 2020.[147] They fully withdrew services on January 21, 2020 and February 4, 2020,[148] and were on strike on March 5, 2020 the day before a settlement was reached with the Crown and the trustees' association.[149] The record contains evidence of similar sustained job actions and strikes by OSSTF, AEFO, and ETFO members.[150] In their updates to their members, both OECTA and OSSTF

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[146] Transcript, Cross of McKenzie, May 24, 2022, L.1.01.0001, at QQ 4-15, pp. 17-19; Transcript, Cross of Burke, May 25, 2022, L.1.02.0002, at QQ 26-32, pp. 22-24; Transcript, Cross of Bennett, May 26, 2022, L.1.03.0001, QQ 176-179, p. 66; Transcript, Cross of Doyle, May 26, 2022, L.1.04.0001, at QQ 96-107, pp. 46-48; Transcript, Cross of Saysell Cross, May 27, 2022, L.1.06.0001, at QQ 23-45, pp. 24-28; Transcript, Cross of Mathers Cross, June 1, 2022, L.1.08.0001, at QQ 28-31, pp. 25-26; Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at QQ 2-11, pp. 16-19; Transcript, Cross of Wurtele, June 1, 2022, L.1.11.0001, at QQ 27-35, 41-47, pp. 24-25, 26-28; Transcript, Cross of Hill, June 3, 2022, L.1.12.0001, at QQ 49-65, pp. 29-32; Transcript, Cross of Pike, June 14, 2022, L.1.18.0001, at QQ 4-20, pp. 17-21; Transcript, Cross of Dassios, June 21, 2022, L.1.24.0001, at QQ 1-4, 12, pp. 16, 18-19; Transcript, Cross of DeQuetteville, June 22, 2022, L.1.26.0001, at QQ 43-62, pp. 30-34; Transcript, Cross of Mingarelli, June 22, 2022, L.1.28.0001, QQ 6-26, pp. 16-20.

[147] Doyle Affidavit, January 12, 2021, B.1.01.0001, at para. 80, p. 23.

[148] Doyle Affidavit, January 12, 2021, B.1.01.0001, at para. 81, p. 23.

[149] Transcript, Cross of Doyle, May 26, 2022, L.1.04.0001, at Q 152, p. 62.

[150] Bennett Affidavit, January 14, 2021, C.1.01.0001 at paras. 97-107, 126, pp. 34-37; Léonard Affidavit, February 11, 2021, D.1.02.0001, at paras. 133-135, pp. 41-42; DeQuetteville, January 14, 2021, D.1.01.0001, at paras. 103, 121, pp. 27, 32; Transcript, Cross of DeQuetteville, June 22, 2022, L.1.26.0001, at QQ 68, 96-105, pp. 35-36, 44-48; Exhibit 2 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0003; Exhibit 3 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0004.

highlighted their job actions and organizing as a factor that helped them push back against concessions sought by the government in central bargaining.[151]

102. During negotiations with Ontario Tech University, on October 22, 2021, Ontario Institute of Technology Faculty Association ("UOITFA") members voted 90% in favour of a strike.[152] The parties failed to reach an agreement and UOITFA engaged in a two-week strike, after which the parties reached a settlement. An OCUFA report noted that the settlement 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.[153]

103. Other examples are: (i) a university bargaining unit represented by OSSTF,[154] (ii) a USW bargaining unit at Victoria University,[155] (iii) multiple CUPE university bargaining,[156] (iv) multiple UNIFOR bargaining units in the university sector;[157] (v) the Ontario Council of

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[151] Exhibit 3 to Transcript, Cross of Doyle, May 26, 2022, EXB L.1.04.0004; Exhibit 8 to Transcript, Cross of Bennett, May 26, 2022, EXB L.1.03.0009.
[152] Exhibit 12 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0013.
[153] Exhibit 16 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0017. See also Exhibit 14 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0015.
[154] Bennett Affidavit, January 14, 2021, C.1.01.0001, at para. 126, p. 42.
[155] Transcript, Cross of Burke, May 25, 2022, L.1.02.0001, at QQ 91-94, p. 42.
[156] Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 21-38; Exhibit 1 to Transcript, Cross of Cox, June 1, 2022, EXB L.1.10.0002.
[157] Fortier Affidavit, March 8, 2021, H.1.01.0001, at paras. 143, 156, pp. 46-47, 51-52; Braganza Affidavit, June 28, 2021, H.2.02.0001, at para. 32, p. 9.

Educational Workers; [158] (vi) UNIFOR-represented employees in the community care sector;[159] (vii) an IBEW Local 636 bargaining unit;[160] and (vii) multiple faculty associations.[161]

104. Many bargaining units represented by the Respondents work in sectors where they do not have the ability to legally strike and (either by legislation or agreement) must proceed to interest arbitration in the event of an impasse. The Application Judge's analysis again incorrectly focused on interest arbitration *outcomes*, likening arbitral awards to reflecting a "state fiat",[162] and not on the existence of the collective bargaining process, which remains unimpaired.

105. The evidence demonstrates that bargaining agents continued to engage in strikes and strike votes, where the right exists, and have used this to gain leverage in collective bargaining following the passage of Bill 124.[163]

E. THERE WAS A REASONABLE BASIS FOR THE LEGISLATURE'S ACTION

106. As noted above, evidence was provided from collective bargaining experts. The Respondents relied on evidence from Dr. Hebdon. Ontario relied on expert evidence from Dr. Riddell. The Application Judge found both experts qualified but preferred the evidence of Dr.

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[158] Fortier Affidavit, March 8, 2021, H.1.01.0001, at para. 156, pp. 51-52.
[159] Atkins Affidavit, June 29, 2021, H.2.03.0001, at para. 58, p. 12.
[160] Murdaca Reply Affidavit, April 8, 2022, F.1.26.0001, at paras. 17-36, pp. 6-10.
[161] Wurtele Affidavit, January 20, 2021, F.1.07.0001, at paras. 86, p. 19; Wurtele Reply Affidavit, April 14, 2022, F.1.24.0001, at para. 24, pp. 9-10.
[162] Application Decision at para. 139.
[163] Exhibit 16 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0017; Exhibit 14 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0015; Fortier Affidavit, March 8, 2021, H.1.01.0001, at paras. 143, 156, pp. 46-47, 51-52; Braganza Affidavit, June 28, 2021, H.2.02.0001, at para. 32, p. 9; Murdaca Reply Affidavit, April 8, 2022, F.1.26.0001, at paras. 17-36, pp. 6-10; Bennett Affidavit, January 14, 2021, C.1.01.0001 at para. 126, p. 45; Transcript, Cross of Burke, May 25, 2022, L.1.02.0001, at QQ 91-94, p. 42; Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 21-38; Atkins Affidavit, June 29, 2021, H.2.03.0001, at para. 58, p. 12; Wurtele Affidavit, January 20, 2021, F.1.07.0001, at paras. 86, p. 19; Wurtele Reply Affidavit, April 14, 2022, F.1.24.0001, at para. 24, pp. 9-10.

Hebdon. The Application Judge then used the one expert's evidence to second guess the Legislature's policy choices. Rather, he should have asked if there was a reasonable basis for the Legislature's action.[164]

107. Government does not need to lead conclusive evidence before acting. It is for the Legislature to conclude if it had sufficient basis for acting.[165] In *Cochrane* v. *Ontario (Attorney General)*, the Applicant challenged Ontario's law banning pit bulls. The parties filed competing expert evidence on whether pit bulls posed a risk to public safety. Justice Herman held that it was not the court's role to resolve the conflicting evidence.[166]

108. The Application Judge should have restricted himself to asking if the evidence provided a sufficient basis for the Legislature's judgement that Bill 124 imposed required and time-limited restraint measures that preserved a meaningful collective bargaining process. Some, like the Respondents and their experts, may disagree with that approach. However, Ontario's evidence (including evidence from an expert the Application Judge found to be qualified) shows that the Legislature had a reasonable basis for its policy choice.

109. Leaving aside this legal error, Dr. Hebdon's evidence could not support the Application Judge's second guessing of the Legislature's decision to enact Bill 124, because Dr. Hebdon misunderstood how Bill 124 operates, testifying that "everything that is a cost issue [to the

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[164] *Manitoba Federation of Labour* at paras. 99-100, 109-110.
[165] *Cochrane v. Ontario (Attorney General)*, 2007 CanLII 9231 (Ont. Sup. Ct.) ["***Cochrane***"], aff'd 2008 ONCA 718.
[166] *Cochrane v. Ontario (Attorney General)*, 2008 ONCA 718, at paras. 20-30.

employer] is a compensation issue subject to Bill 124",[167] Bill 124 does not limit negotiation of non-compensation matters.

110. In *Manitoba Federation of Labour*, the Manitoba Court of Appeal rejected the legal consequences of Dr. Hebdon's evidence as running contrary to *Meredith* and the related appellate decision.[168]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

111. The issues for determination on this appeal are whether:

(a) The Application Judge erred in his s. 2(d) analysis;

(b) The Application Judge erred in his s. 1 analysis; and

(c) Even if the Application Judge was correct in his s. 2(d) analysis, his remedy was overly intrusive.

A. STANDARD OF REVIEW

112. The constitutionality of legislation raises a question of law and is reviewed on a standard of correctness. As affirmed by the majority of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov:*

> The application of the correctness standard for [constitutional] questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for

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[167] Dr. Hebdon is incorrect in his belief that compensation and all other monetary issues are "predetermined" by Bill 124. See Exhibit A to Hebdon Affidavit, February 25, 2021, EXB B.2.01.0002, at paras. 2, 3, 6-17, pp. 2, 4-8; Transcript, Cross of Hebdon, June 6, 2022, L.1.13.0001, at QQ 57, 75-77, 82, 106, 150, 158-167, 203, 213, 258-268, pp. 27-28, 32, 34, 41, 63, 65-68, 75, 77, 87-91.

[168] *Manitoba Federation of Labour* at paras. 98-100.

> which the rule of law requires consistency and for which a final and determinate answer is necessary.[169]

113. Even where constitutional analysis may be contextual and fact-specific, legislation is constitutional, or it is not. The rule of law and principle of universality require there to be on correct answer regarding the constitutionality of legislation.[170] Therefore, despite requiring a contextual analysis, questions of constitutional interpretation, like statutory interpretation, are questions of law that are reviewed on the correctness standard.[171]

B. NO INFRINGEMENT OF SECTION 2(D)

114. The Application Judge erred in law in finding that Bill 124 in its entirety infringed s. 2(d) of the *Charter*. The Application Judge declared the entire *Act* unconstitutional. In doing so, he extended s. 2(d) of the *Charter* beyond the protection of associational activity and a process of meaningful collective bargaining, turning it into a guarantee of substantive labour relations outcomes.

115. It is well established that it was the Respondents' burden to establish a *Charter* infringement.[172]

116. A claimant alleging that a measure has substantially interfered with the associational rights of employees must establish the following:

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[169] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 53.
[170] *Manitoba Federation of Labour* at paras. 40-42.
[171] *Manitoba Federation of Labour* at para. 45.
[172] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at paras. 107-113.

(a) That the impact of the measure is so important or significant that it discourages or undermines the capacity of employees to pursue workplace goals collectively; **and**

(b) That the measure does not respect the fundamental precept of collective bargaining, being the duty to consult and negotiate in good faith.

117. The Application Judge made the following overriding legal errors in concluding that the Applicants had met this onus:

(a) He failed to apply a substantial body of jurisprudence upholding public sector wage restraint legislation;

(b) He failed to appropriately consider and apply the principle that s. 2(d) as it applies to labour relations protects collective bargaining as a process as opposed to protecting outcomes of that process;

(c) He misinterpreted the *Act* which did not deprive anyone of a right to strike, as reflected in the evidence before him. He concluded:

(i) that Bill 124 substantially interfered with the associational rights of employees based on an incorrect inference that the inability to achieve substantive outcomes is by itself a substantial interference with collective bargaining; and

(ii) accordingly failed to consider whether there was substantial interference with employees' ability to associate to pursue workplace goals effectively,

or to their ability to participate in meaningful, good faith consultation and negotiation;

(d) He gave undue weight to the 1% cap, having concluded that the government could have engaged in "hard bargaining" based on a 1% cap position;

(e) He failed to appreciate the significance of unions' ability to seek a Ministerial exemption from the wage cap;

(f) He failed to consider the *Act*'s preservation of the right to strike, which would be meaningful associational activity that could put pressure on the Minister to grant such an exemption; and

(g) The specific factors he considered as substantial interference with collective bargaining reflected his overriding failure to apply the principle that 2(d) protects a process and not outcomes.

118. The protection afforded to collective bargaining under s. 2(d) of the *Charter* protects a process and does not guarantee substantive outcomes. Maintaining this distinction is critical to the functioning of a constitutional democracy.

(i) Section 2(d): Freedom of Association Guarantees a Process, Not an Outcome

119. The trial judge's reasons go beyond a generous approach to *Charter* rights, transforming the protection for freedom of association into a constitutional right to the achievement of goals that association fosters.

120. In *Mounted Police Association of Ontario v. Canada (Attorney General)*, the Supreme Court observed that in assessing whether the purpose of s. 2(d) has been achieved, regard must be

had to "*the associational activity* in question in its full context and history."[173] The focus is on associational activity, not outcomes.

121. Indeed, the Supreme Court has repeatedly held that it is the collective bargaining *process* which is protected by s. 2(d) of the *Charter*. The Court has also repeatedly emphasized that what is *not* protected or guaranteed is "the particular objectives sought through this associational activity."[174] The right to collective bargaining "thus conceived is a limited right. … As the right is to a process, it *does not guarantee a certain substantive or economic outcome*."[175] Section 2(d) does not guarantee a particular model of labour relations.[176]

122. As the Manitoba Court of Appeal observed in *Manitoba Federation of Labour*,[177] the Supreme Court of Canada describes s. 2(d) as "a limited right" in that it is restricted in three important ways:

(a) **It is a procedural right**. 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

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[173] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ["***Mounted Police***"] at para. 47.
[174] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ["***Health Services***"] at para. 89; see also para. 91.
[175] *Health Services* at para. 91 [Emphasis added]; see also paras. 19, 92, 107, 109,129; *Meredith* at para. 47.
[176] *Mounted Police* at para. 67.
[177] *Manitoba Federation of Labour* at para. 23.

good faith"; and (c) "a means of recourse should the employer not bargain in good faith".[178]

(b) **It is general in nature**. The associational right does not protect "all aspects of 'collective bargaining'".[179] 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.[180]

(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.[181]

123. The onus was on the Respondents to demonstrate that the *Act* substantially interfered with a process of meaningful collective bargaining, not its fruits. They cannot meet this threshold.

124. To establish a breach of s. 2(d) of the *Charter*, the Respondents must prove on a balance of probabilities that Bill 124 "substantially interferes with a meaningful process of collective bargaining."[182] The Supreme Court describes a meaningful process as the right of employees to join together to pursue workplace goals, to make collective representations to their employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.[183]

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[178] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ["***Saskatchewan Federation of Labour***"] at paras. 1, 29.
[179] *Health Services* at para. 19.
[180] See *Mounted Police* at para. 67.
[181] *Health Services* at para. 90.
[182] *Mounted Police* at paras. 71-75.
[183] *Saskatchewan Federation of Labour* at para. 29.

125. The Application Judge acknowledged these principles but failed to apply them.

(ii) Public Sector Wage Restraint Jurisprudence

126. The Application Judge's ruling is inconsistent with the line of jurisprudence affirming the constitutionality of public sector wage restraint legislation which reflects the principle that s. 2(d) protects associational activity as such, and does not guarantee substantive outcomes.

127. This jurisprudence concerns two specific pieces of public sector wage restraint legislation:

(a) The federal *ERA*, which was considered and upheld in the following appellate jurisprudence:

(i) *Meredith v. Canada (Attorney General)*, 2015 SCC 2;

(ii) This Court's decision in *Gordon v. Canada (Attorney General)*, 2016 ONCA 625;

(iii) *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163;

(iv) *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156; and

(b) *The Public Services Sustainability Act*, CCSM, c. P272 ("*PSSA*"), which was considered and upheld by the Manitoba Court of Appeal in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85.

128. Each of these decisions is founded upon the principle that collective bargaining does not constitutionalize the outcomes of labour relations such that legislation that caps public sector wages does not by that fact alone infringe s. 2(d) of the *Charter.*

129. The Application Judge distinguished both *Meredith*, and this Court's decision in *Gordon*, on three grounds:

(a) *Meredith* and other *ERA* cases all noted that the wage cap it imposed "was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes";[184]

(b) There was no evidence in the *ERA* cases that the salary cap was behind the rate of inflation and thereby deprived employees of the right to negotiate compensation increases to keep up with increases in the cost of living;[185] and

(c) "The ERA was introduced in the context of a world-wide financial crisis that led banks to fail, lending markets to freeze and forced governments around the world to provide massive injections of liquidity into the financial system and take substantial ownership interests in banks, insurance companies, automobile manufacturers and other businesses to prevent the world economy from collapsing."[186]

130. These grounds are not a sufficient basis to distinguish the *ERA* cases. Each depends upon the inappropriate weight the Application Judge placed on collective bargaining outcomes in assessing whether the right to bargain collectively has been substantially interfered with.

131. As to the first ground, there is no suggestion in either *Meredith* or *Gordon* that the compatibility of the *ERA* caps with contemporary negotiated collective agreements was decisive in the courts' determination that the process of collective bargaining was not substantially

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[184] Application Decision at para. 202.
[185] Application Decision at para. 207.
[186] Application Decision at para. 208.

interfered with. Indeed, as this Court observed in *Gordon*, one public sector union claimed that it was negotiating with a "legislative gun" to its head.[187] This reality demonstrates that substantive outcomes do not drive the analysis as to whether employee freedom of association *as such* has been interfered with.

132. As to the second ground—that there was no evidence that the *ERA* cap was behind the rate of inflation—this claimed basis for distinguishing *Meredith* and *Gordon* reflects the Application Judge's erroneous assumption that the right to collective bargaining protects outcomes.

133. Moreover, the third basis relied on—the existence of a financial crisis—is irrelevant to whether a finding of a breach of s. 2(d) should be made. The existence of a financial crisis in both *Gordon* and *Meredith* was properly considered at the s. 1 stage of the analysis but should not form part of the s. 2(d) analysis since it only provides context for the outcomes. Considering it at the s. 2(d) stage impermissibly assumes that s. 2(d) protects bargaining outcomes.

134. The Application Judge erred in distinguishing the most recent appellate authority on the issues before him. In *Manitoba Federation of Labour*, the Manitoba Court of Appeal considered the Manitoba *PSSA*, legislation that is substantially indistinguishable from Bill 124. That statute concerned wage restraint legislation that was passed in 2017 and set wage caps of 0%, 0%, 0.75%, and 1% over a four-year period, covering almost 20% of Manitoba's public workforce.

135. The Manitoba Court of Appeal held that the *PSSA* was constitutional because: (1) the wage restraint legislation was broad-based and time-limited; and (2) it did not preclude a meaningful

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[187] *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 ["***Gordon***"] at para. 70.

collective bargaining process from occurring on other important workplace matters.[188] The only material factor relied on by the Application Judge for distinguishing the *Manitoba Federation of Labour* case from the case before him was his erroneous assessment that a strike seeking the granting of an exemption from the *PSSA* would be unlawful in Ontario.

136. As described below, this assessment is wrong. It misapprehends the impact of Bill 124 on the "powerhouse" of collective bargaining—the right to strike. If one extracts from the Application Judge's reasons this principal error, there is no underpinning to support it. The Application Judge's decision must be set aside.

(iii) The Meaning of "Substantial Interference"

137. The Application Judge erred in finding that there was a "substantial interference" with collective bargaining as associational activity.

138. Government action or legislation violates s. 2(d) only if it substantially interferes with a meaningful process of collective bargaining. *Mounted Police* affirmed that the s. 2(d) test of "substantial interference" has remained consistent since *Dunmore v. Ontario (Attorney General)*,[189] through *Health Services*, and *Ontario (Attorney General) v. Fraser*,[190] and into the 2015 labour trilogy of *Mounted Police*, *Meredith* and *Saskatchewan Federation of Labour*.

139. The critical question is whether the Respondents have proven that Bill 124 substantially interferes with a meaningful process of collective bargaining. Mere interference with either

[188] *Manitoba Federation of Labour* at paras. 125-126.
[189] *Dunmore v. Ontario (Attorney General)* 2001 SCC 94 ["***Dunmore***"].
[190] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ["***Fraser***"].

collective bargaining or a collective agreement is not enough.[191] Section 2(d) "does not protect all aspects of the associational activity of collective bargaining"[192] and it does not protect against all interferences with collective bargaining or collective agreements.[193] To find that any interference with collective bargaining or a collective agreement inevitably constitutes substantial interference with the ability to negotiate of those who enjoy freedom of association would mean that the contents of collective agreements and the right to an outcome in bargaining "take on a sort of immutable constitutional status through the effect of s. 2(d), which is an approach clearly rejected by the Court."[194]

140. It is necessary to identify an interference with the process of collective bargaining. And it is also essential that "the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(d)." The impugned measure must by intent or effect "seriously undercut or undermine" the activity of workers coming together to pursue common goals.[195]

141. While the Application Judge referred to these principles, he failed to apply them. In a general assessment of the impact of the legislation on collective bargaining,[196] the Application Judge largely accepted the Respondents' position as justification for a sweeping conclusion that

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[191] *Health Services* at paras. 90, 92, 96, 129; *Saskatchewan Federation of Labour* at paras. 2, 78; *Meredith* at para. 24; *Mounted Police* at paras. 72-77; *Fraser* at paras. 31, 33,46-48; *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163 ["***Syndicat canadien #2***"], at paras. 30-31, 41.
[192] *Health Services* at paras. 90, 94, 129.
[193] *Fraser* at para. 76; *Gordon* at para. 175 citing *Health Services* at paras. 94, 129; *Syndicat canadien #2* at paras. 31, 47; *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156 ["***Dockyard Trades***"], at paras. 79-83.
[194] *Syndicat canadien #2* at paras. 29, 31.
[195] *Health Services* at para. 92.
[196] Application Decision at paras. 60-159.

the entirety of the *Act* was unconstitutional because, in the Application Judge's words, it "easily amounts to substantial interference with collective bargaining."[197]

142. As the Manitoba Court of Appeal observed in *Manitoba Federation of Labour*, "the Supreme Court of Canada has held that before courts can intervene, the legislative interference must be "substantial". The term "substantial interference" was not chosen without purpose. It was judiciously selected by the Supreme Court of Canada in order to allow legislatures some freedom to move within permissible constitutional limits."[198]

143. The Respondents argued that the anti-avoidance provision in s. 24 extended the *Act*'s impact by limiting future bargaining from making up for the effects of the moderation. That argument was squarely rejected by this Court in *Gordon* in respect of the *ERA*'s[199] similar anti-avoidance provision.[200]

(iv) The Application Judge Placed Undue Weight on the 1% Cap

144. The Application Judge's focus on outcomes as opposed to process is apparent at paragraph 118 of his reasons. The Application Judge held:

> Although Ontario could have taken the position in any collective bargaining negotiation that it would not pay any more than 1% in salary increases, Jay Porter explained during his cross-examination that if the government did so, this "could have impacted service delivery and ultimately could have impacted the sustainability of public services" because that position could have led to "labour disruptions." In other words, it could have led to strikes or work-to-rule by teachers, something that was described by the Supreme Court in Saskatchewan Federation of Labour as an "indispensable component" of meaningful collective bargaining. Although Ontario denies that it was trying to render strikes

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[197] Application Decision at para. 61.
[198] *Manitoba Federation of Labour* at para. 111.
[199] *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ["***ERA***"].
[200] *Gordon* at paras. 165-174.

> futile, the effect of Mr. Porter's evidence is to the contrary. The advantage of legislation capping salaries at 1% meant that Ontario could avoid the "labour disruptions" that might arise if Ontario took a hard-line position during collective bargaining.[201]

145. By this paragraph, it is apparent that Ontario was entitled to take a "hard-line" position in collective bargaining that it was not in a position to agree to increases above the 1% cap. Seen from this perspective, it is apparent that the cap is not the issue—Ontario publicly and openly took responsibility for its bargaining position by placing it in a public statute. Further, strikes did occur in the face of Bill 124.

(v) Failure to Give Weight to the Act's Preservation of Ministerial Discretion to Allow Increases Above the Cap

146. This inconsistency in the Application Judge's reasons obscured his analysis of whether Bill 124 attacked the process of collective bargaining. Had the Application Judge focused on this material issue, he would have appreciated that the terms of Bill 124 plainly do not frustrate union members' collective ability to band together to advance their interests, even with respect to capped wage increases:

(a) Subsection 6(2) of the *Act* expressly authorizes the President of the Treasury Board by Regulation to specify that the *Act* does not apply to certain employees or classes of employees;

(b) Section 27 of the *Act* provides that the President of the Treasury Board may, by regulation, exempt a collective agreement from the application of the *Act*; and

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[201] Application Decision at para. 118.

(c) While the *Act* allows the President of the Treasury Board to make an order declaring that a collective agreement is inconsistent with the *Act*, ss. 26(1) provides that such a determination is in the "sole discretion" of the President of the Treasury Board. Nothing in the *Act* prohibits employees from making collective representations seeking to persuade the President of the Treasury Board not to make such an order.

147. The *Act* – like the legislation at issue in *Manitoba Federation of Labour* – allows the 1% cap to be exceeded when the President of the Treasury Board promulgates a regulation to that effect. The Application Judge addresses this reality only by erroneously speculating that employees would be powerless to exercise their right to strike to put pressure on the government to grant a wage increase:

> Ontario notes that Dr. Hebdon also provided an expert's report in *Manitoba Federation of Labour et al v. The Government of Manitoba*, and that the Manitoba Court of Appeal rejected his opinion that strikes would, in all likelihood, be "futile" under the Manitoba legislation. In doing so the Court noted that Manitoba's legislation, like Ontario's, gave the Treasury Board the ability to exempt individual collective agreements from its scope. The Court then noted that nothing precluded a union from striking to compel the Treasury Board to grant an exemption. That, however, is not a possibility in Ontario. Numerous Labour Relations Board panels have held that a strike to obtain a right that one is not legally entitled to is an illegal strike that can be prohibited by the Board and that can result in heavy fines against the union and the union representatives who instigated the strike.[202]

148. The Application Judge concluded that the exercise by employees of their collective right to strike to seek an increase above the cap "is not a possibility in Ontario." The *Act* expressly and explicitly says that "***Nothing in this Act*** affects the right to engage in a lawful strike or lockout."

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[202] Application Decision at para. 120.

Whether this means that a strike seeking an increase above the cap *under the Act* is unlawful or not is an issue of statutory interpretation.

149. On the Application Judge's own reasoning, the constitutionality of the *Act* was directly impacted by the interpretation of this section. It was incumbent on the Application Judge to resolve that issue of interpretation. Instead, the Application Judge issued a sweeping order declaring the whole *Act* to be invalid based on speculation that the Ontario Labour Relations Board ("OLRB" or "Board") would interpret a strike seeking increases above the cap as an unlawful strike.

150. The Application Judge's error—and the speculation upon which it is founded—is aggravated by his rejection of Ontario's concession that the legislation "would not prohibit people from striking to earn more than 1%."[203] The reasons offered by the Application Judge for rejecting this concession do not withstand scrutiny:

(a) The first reason—that many employers are not bound by the government's position—is not relevant to the question of whether a strike seeking increases above 1% would be unlawful or not—that question is an issue of law; and

(b) The second reason—that Ontario never informed the Respondents that a strike seeking increases above the cap is lawful—is also irrelevant. The question is whether the Respondents retained the power to collectively assert their interests by engaging in a strike.

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[203] Application Decision at para. 121.

151. Had the Application Judge interpreted s. 4 of the *Act* in accordance with the presumption that the legislature does not intend to interfere with *Charter* rights, the basis for any speculation about what labour relations boards might do disappears. A court of competent jurisdiction will have made a finding that the *Act* does not prevent strikes seeking wage increases above Bill 124's cap. There would be no basis to speculate that a labour relations tribunal would disregard that finding.

(vi) Incorrect Interpretation of the Continued Right to Strike

152. The Application Judge incorrectly held that Bill 124 limits the right to strike. Nothing in the *Act* removes the right to strike. Section 4 expressly preserves it and states that "[n]othing in this *Act* affects the right to engage in a lawful strike or lockout."

153. The Application Judge found that Bill 124 indirectly limits the right to strike because it imposes limits on compensation increases and it is 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 the *Act*.[204]

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[204] Doyle Affidavit, January 12, 2021, B.1.01.0001, at paras. 80-81, p. 23; Transcript, Cross of Doyle, May 26, 2022, L.1.04.0001, at Q 152, p. 62; Bennett Affidavit, January 14, 2021, C.1.01.0001 at paras. 97-107, 126, pp. 34-37, 45; Léonard Affidavit, February 11, 2021, D.1.02.0001, at paras. 133-135, pp. 41-42; DeQuetteville Affidavit, January 14, 2021, D.1.01.0001, at paras. 103, 121, pp. 27, 32; Transcript, Cross of DeQuetteville, June 22, 2022, L.1.26.0001, at QQ 68, 96-105, pp. 35-36, 44-48; Exhibit 2 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0003; Exhibit 3 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0004; Exhibit 12 to Transcript, Cross of Wurtele, June 1, 2022, EXB L. 1.11.0013; Exhibit 16 to Transcript, Cross of Wurtele, June 1, 2022, EXB L. 1.11.0017; Transcript, Cross of Burke, May 25, 2022, L.1.02.001, at QQ 91-94, p. 42; Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 21-38. Exhibit 1 to Transcript, Cross of Cox, June 1, 2022, EXB L.1.10.0002; Fortier Affidavit, March 8, 2021, H.1.01.0001, at paras. 143, 156, pp. 46-47, 51-52; Braganza Affidavit, June 28, 2021, H.2.02.0001, at para. 32, p. 9; Murdaca Reply Affidavit, April 8, 2022, F.1.26.0001, at paras. 17-36, pp. 6-10; Wurtele Affidavit, January 20, 2021, F.1.07.0001, at paras. 86, p. 19; Wurtele Reply Affidavit, April 14, 2022, F.1.24.0001, at para. 24, pp. 9-10; Atkins Affidavit, June 29, 2021, H.2.03.0001, at para. 58, p. 12.

154. The Application Judge interpreted Bill 124 as indirectly limiting the Respondents' ability to strike for an increase above the legislated caps. He referenced decisions of the OLRB holding that a strike to obtain a right that one is not legally entitled to is an illegal strike that can be prohibited by the Board.[205] The Application Judge assumed that the OLRB would hold that any strike to seek compensation increases above 1% is illegal and issue an order prohibiting such a strike. He is wrong. There is no binding authority to that effect. This speculation was an error.

155. First, Bill 124 provides a route for employees to obtain compensation increases above 1%. It includes an exemption power. The case law relied upon by the Application Judge is inapplicable. That is supported by *Manitoba Federation of Labour* where the Manitoba Court of Appeal held that *PSSA* (Manitoba's compensation restraint law) did not limit the right to strike for compensation increases above legislated caps because unions could strike to compel the government to exercise a statutory power to exempt their agreement.[206]

156. Second, the Application Judge's ruling itself—had it concluded that a strike seeking to persuade the Minister to grant an exemption would be lawful—would be binding on the OLRB as a pronouncement of this province's highest Court on an issue of statutory interpretation.

157. Third, if making such a ruling would have rendered the *Act* constitutional, the judge should have made it instead of speculating about what a labor relations board might do. Canadian constitutional jurisprudence has long accepted that it should not be assumed that legislatures intend to exceed their powers.[207] In the *Charter* context, as McLachlin C.J. held in *R. v. Sharpe*, "[i]f a

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[205] Application Decision at para. 120.
[206] *Manitoba Federation of Labour* at para. 103.
[207] *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 at p. 535.

legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted."[208] The Application Judge's approach offends this principle. Instead of presuming that the legislature by expressly protecting the right to strike intended to respect the constitutional guarantee of freedom of association, the Application Judge inverted the presumption, speculated that an administrative tribunal would assume an *unconstitutional* intention, and struck down the entirety of Bill 124 based on that speculation.

158. The Respondents remain able to take steps to act in concert and apply pressure in bargaining: (i) striking to convince the employer to jointly request an exemption from Bill 124, (ii) protesting or engaging in other communications to pressure the government to grant an exemption; and (iii) striking on any item other than compensation.

159. The Application Judge's outcome-focused analysis failed to appreciate the legal significance of the evidence of many bargaining units exercising their right to strike under the *Act* and the preservation of the collective bargaining process that resulted. The evidence before him actually demonstrated that the collective bargaining process is alive and well.

160. This Court should intervene. The Application Judge's reasoning hinged in a critical respect on a mistaken finding—that (notwithstanding the *Act*'s clear statement to the contrary) the *Act* interfered with the right to strike. As the Application Judge rightly noted, the Supreme Court of Canada in *Saskatchewan Federation of Labour* found that the right to strike is the "powerhouse" of collective bargaining.[209] The Application Judge went on to cite the Supreme Court of Canada's

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[208] *R. v. Sharpe*, 2001 SCC 2 at para. 33.
[209] Application Decision at para. 116, citing *Saskatchewan Federation of Labour* at para. 55.

observation in *Saskatchewan Federation of Labour* that the possibility of a strike … enables workers to negotiate with their employers on terms of approximate equality" and that without it "bargaining risks being inconsequential — a dead letter."

161. Giving full weight to the *Act*'s preservation of the right to strike—which, on the Application Judge's own reasoning "enables workers to negotiate with their employers on terms of approximate equality"—leaves little support for the Application Judge's conclusion that the *Act* substantially interferes with the right to bargain collectively. Employees retain the ability to give full effect to their freedom to associate to pursue common goals. The most substantial element of the *process* that allows them to effectively act collectively remains available to them. To say that their freedom of association has still been substantially impaired in the fact of the *Act*'s preservation of the right to strike is to say that s. 2(d) protects more than the right to associate—it provides some protection to expected outcomes.

(vii) Erroneous Analysis of Substantial Interference with Meaningful Collective Bargaining

162. These errors in principle undermine the Application Judge's consideration of the ten aspects of the impact of Bill 124's wage cap that he considered as justifying his finding of substantial interference with collective bargaining. These are all interlaced with his mistaken impression that the right to collective bargaining protects outcomes, not the right to a process:

(a) The financial impact of the wage cap;

(b) The impact on trading salary against other issues;

(c) The impact on staffing;

(d) The impact on wage parity between public and private sector employees;

(e) The impact on employee self-government;

(f) The impact on freely negotiated agreements;

(g) The impact on the right to strike;

(h) The impact on interest arbitration;

(i) The impact on the relationship between unions and their members; and

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

163. The Application Judge's sweeping conclusion flowing from his assessment of these factors is unsound:

(a) **Financial impact of the wage cap**

(i) In considering the financial impact of the wage cap, the Application Judge erred by looking to the potential outcomes if there had been free collective bargaining. In so doing, the Application Judge asked the wrong question. The question is not whether Bill 124 allows for unions to arrive at the same wage agreements as under free collective bargaining, but rather whether Bill 124 substantially interferes with the ability of unions to negotiate and consult on wages. [210]

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[210] *Health Services* at para. 99; *Meredith* at paras. 25, 30.

(ii) The impact of the wage cap is not an "arbitrary" outcome that interferes with meaningful collective bargaining in the relevant sense. As the uncontradicted evidence of Dr. Dodge demonstrates, there were substantial policy reasons for the government's decision to consider a 1% wage cap.

(iii) The Application Judge erred in treating the salary cap in isolation from other provisions of Bill 124. It had to be read with the *Act*'s preservation of the right to strike and ministerial exemption power, which temper its impact.

(iv) Any "reduction in bargaining power" arising from the wage cap is not a matter of procedure. The Respondents' reduced ability to seek wages above a particular quantum (subject, importantly, to the exemption), is not a procedural impairment. Quantum is a matter of substance that is not protected by s. 2(d).[211]

(v) Moreover, as discussed above,

  (1) the Application Judge himself acknowledged that the government could have adopted the cap as a hard bargaining position;

  (2) employees could have exercised the right to strike preserved by the *Act* to achieve a ministerial exemption contemplated by the *Act*. There is no reasonable basis for the Application Judge's argument

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[211] *Health Services* at para. 104.

of "illegal strike" or to speculate that any exemption request was futile.

(3) Actual experience prior to Bill 124 demonstrated that in at least 27 instances wage settlements were below 1%;[212] and

(4) Union communications discussed by the Application Judge[213] show that certain unions internally communicated that they had achieved meaningful results notwithstanding the cap.

(b) **The Impact on Trading Salary Against Other Issues**

(i) In analyzing the impact of Bill 124 on trading salary against other issues, the Application Judge erroneously delved into the actual results available under the *Act*. He concluded that "[t]he reduction in negotiating power that the *Act* has brought about prevents employees from having their views heard in the context of a meaningful process of consultation that could lead to an improvement of working conditions."[214]

(ii) The Application Judge cited no authority suggesting that specific union bargaining strategies are entitled to constitutional protection.

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[212] Application Decision at para. 69.
[213] See Application Decision at paras. 160-162.
[214] Application Decision at para. 86.

(c) The Impact on Staffing

(i) In considering whether the 1% wage cap prevented the applicants from obtaining substantive concessions regarding staffing, the Application Judge again dove into the actual results of collective bargaining.[215]

(ii) Moreover, staffing issues (and particularly shortages) are issues of broader public policy. The Application Judge suggests that wage increases above 1% would help attract employees into under-serviced areas. However, s. 2(d) has nothing to do with the optimization of staffing and employment opportunities.

(d) Impact on Wage Parity Between Public and Private Sector Employees

(i) The Application Judge observed that "[i]t is therefore highly probable that in the absence of the *Act*, wage settlements at not-for-profit homes would have tracked those of municipal and for-profit homes."[216]

(ii) The implication that there is a constitutional right to achieve wage parity is without any support in the jurisprudence.

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[215] Application Decision at paras. 87-101.
[216] Application Decision at para. 104.

(e) **Impact on Employee Self Government**

(i) The Application Judge observed that Bill 124 undermines the self-government of unions by preventing them from advocating for measures beyond the 1% limit.[217]

(ii) This consideration is simply another way of framing an entitlement to outcomes—moreover there is no basis in the reasons or the evidence to infer that Bill 124 interfered with unions' ability to democratically solicit their members' views.

(f) **Impact on Freely Negotiated Agreements**

(i) The Application Judge's consideration that the Treasury Board's authority to override "freely negotiated collective agreements" is circular.

(ii) If Bill 124 is valid, then the power to override agreements inconsistent with it is necessarily incidental to it as legislation. Moreover, a power to override collective agreements existed in the *ERA*[218] that was upheld by multiple appellate courts.

(g) **Impact on the Right to Strike**

(i) As discussed above this factor is based on a fundamental misapprehension that the *Act*'s express preservation of the right to strike would be

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[217] Application Decision at para. 108.
[218] See *Gordon* at para. 140.

disregarded by a labour relations board. Section 4 states that "[n]othing in this *Act* affects the right to engage in a lawful strike or walkout".

(ii) This was a key factor driving the Application Judge's decision and correctly interpreted, the foundation for the overall conclusion of substantial interference is undermined.

(h) **Impact on Interest Arbitration**

(i) The Application Judge's analysis of the impact of Bill 124 on interest arbitration also erroneously focused on the outcomes of arbitrations under Bill 124. In *Saskatchewan Federation of Labour*, the Supreme Court held that "[w]here strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations."[219]

(ii) Because Bill 124 expressly protects the right to strike, s. 2(d) does not require Ontario to also provide access to an adequate, impartial, and effective alternative mechanism for resolving collective bargaining impasses. Nonetheless, Ontario did. Bill 124 does not add or remove interest arbitration mechanisms available to unions.

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[219] *Saskatchewan Federation of Labour* at para. 25.

(iii) In considering this factor, the Application Judge did not evaluate the dispute resolution mechanisms available, but instead concentrated on the quantum of wage increases available. This is pure outcome analysis. At no point did the Application Judge make any finding that there was no adequate, impartial, and effective alternative mechanism for resolving collective bargaining impasses.

(iv) Critically, Bill 124 did not itself remove any right to strike in sectors subject to interest arbitration. The impact of Bill 124 on interest arbitration (particularly considering the availability of a ministerial exemption from the wage cap) is an issue to be resolved in specific cases of interest arbitration awards. It does not justify a sweeping finding that the entire *Act* is invalid.

(i) Impact on the Relationship Between Unions and Their Members

(i) This factor has nothing to do with collective bargaining. It relates primarily to the role outcomes play in intra-union relationships. There is no authority suggesting that s. 2(d) extends so far as to require a government to avoid conducting itself in a way that might cause friction within a union. Unconstitutionality cannot be based on an erroneous allocation of blame.

(j) Impact on the Power Balance Between Employers and Employees

(i) Considering the impact of Bill 124 on the power balance between employers and employees assumes that there is a constitutional right to a particular

power balance—as opposed to the right to associate and thereby increase the relative power of employees vis a vis their employer.

(ii) The Application Judge's approach would invalidate any legislation affecting employment terms because it assumes a constitutional right to a particular relative power balance between employers and employees.

(iii) By focussing on the quantum of the wage cap, the Application Judge failed to consider whether unions are able to engage in meaningful dialogue with Ontario on wages and other collective bargaining issues. He also failed to note that there are still many benefits that unions can negotiate under the *Act*—including compensation (either up to 1%, or above 1% with an exemption).

164. Bill 124 does not substantially interfere with the right to bargain collectively:

(a) The law is time-limited;

(b) It does not re-open collective agreements or arbitral awards settled prior to introduction of the *Act*;

(c) It does not prescribe any compensation levels or foreclose compensation increases;

(d) It applies broadly across OPS and BPS workplaces and does not single out any particular union or sector;

(e) It does not replace existing bargaining structures; and

(f) In comparison with the federal *ERA* and the Manitoba public sector restraint legislation, which were both upheld as discussed further above, it cannot be concluded that Bill 124 substantially interferes with s. 2(d).

(viii) Bill 124 Reasonably Bears an Interpretation Consistent with Its Constitutionality

165. Taken as a whole, the *Act* was constitutional. All of its provisions, not simply the 1% wage cap, needed to be carefully considered to assess whether the *Act* substantially interfered with employees' right to bargain collectively. The *Act*'s preservation of the right to strike, coupled with its express codification of a mechanism for workers to exercise their collective power to seek relief from Bill 124, did not substantially interfere with employees' right to bargain collectively.

166. It has been observed that "the *Charter* has now put into judges' hands a scalpel instead of an axe."[220] Nevertheless, the Application Judge's reasons fixated on the 1% cap as justification for a sweeping ruling setting aside the entirety of the *Act*. This sweeping ruling transformed constitutional protection for associational activity *as a process* into a substantive right of employees seeking to judicially review fiscal policy. This result is wrong and should be set aside.

C. IN THE ALTERNATIVE, ANY INFRINGEMENT IS JUSTIFIED UNDER SECTION 1

167. The Application Judge erred in his s. 1 analysis as he reframed and mischaracterized the pressing and substantial objective advanced by the *Act,* and he required there to be a financial crisis to justify an infringement of s. 2(d). He applied too stringent a standard for a "pressing and

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[220] See *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 69.

substantial objective", especially in the context of having to address complex fiscal problems. These errors coloured his entire s. 1 analysis.

168. The framework under s. 1 is well established. The Crown must show on a balance of probabilities that the legislative goals 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.[221] There must also be proportionality between the Legislature's objectives and its chosen means. Proportionality is understood to have three components: (i) rational connection to the objective, (ii) minimal impairment of the right, and (iii) proportionality between the effects of the measure (including a balance of its salutary and deleterious effects) and the stated legislative objective.[222]

169. As outlined by Peter Hogg and Wade Wright, minimal impairment is typically at the centre of the inquiry:

> 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 (step 1). It is an even rarer case where the law is not rationally connected to the objective (step 2). And the inquiry into disproportionate effect (step 4) is normally, if not always, precluded by the judgment that the law's objective is sufficiently important to justify the impact on the Charter right (step 1). What is left for serious inquiry is the question whether the law has impaired the Charter right no more than is necessary to accomplish this objective (step 3). … [N]early all the s. 1 cases have turned on the answer to this inquiry.[223]

[221] *Frank v. Canada (Attorney General)*, 2019 SCC 1 ["***Frank***"] at para. 38.
[222] *R v. Oakes*, [1986] 1 S.C.R. 103, at paras. 67-70; *Frank* at para. 38.
[223] Peter W. Hogg and Wade K. Wright, Constitutional Law of Canada, loose-leaf, 5th ed. suppl. (Toronto: Thomson Reuters Canada Ltd., 2022) ["**Hogg & Wright**"] at s. 38:11.

(i) Importance of Judicial Deference

170. The proper course under s. 1 is judicial deference in cases where the government faces complex economic and social issues, mediates the interests of competing groups, evaluates conflicting social science or economic opinion, distributes public resources, or promulgates solutions which concurrently balance benefits and costs for different parties.[224] The Supreme Court emphasized this point in *Alberta v. Hutterian Brethren of Wilson Colony*:

> Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis … The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate.[225]

171. As this Court outlined in *Gordon*, "[c]ourts have recognized, through a series of limiting principles, that judicial deference to governmental policy decisions 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."[226] Relevant limiting principles include the constitutional principle of separations of powers, the court's recognition of the respective institutional capacities of each branch, and that the "core competencies" of the government include

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[224] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 993-994; *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at para. 79; *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 104-105; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 85; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 at paras. 65-66; *Cameron v. Nova Scotia (Attorney General)*,1999 NSCA 14 at paras. 218-245, leave to appeal to SCC ref'd [1999] SCCA No. 531; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 287-288; *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 ["***RJR-MacDonald***"] at paras. 63, 131-138.
[225] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ["***Hutterian***"] at para. 37.
[226] *Gordon* at para. 224.

the determination of economic policy, budgeting decisions, the proper distribution of resources in society, labour relations regulations, and how best to respond to situations of crisis.[227]

172. Each of the factors militating in favour of judicial deference is present. The Supreme Court has recognized resource distribution and the regulation of labour relations as core government competencies. As Lauwers JA noted in *Gordon*, "[i]n general terms, the closer the decision under review is to the core competency of Parliament, the higher the degree of judicial deference."[228]

(ii) The Objective is Pressing and Substantial

173. The first step of the *Oakes* test requires the government to establish that the limit on *Charter* rights was undertaken in pursuit of an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom".[229] At minimum, the objective must relate to concerns that are pressing and substantial in a free and democratic society.[230]

174. This stage of the s. 1 analysis is not 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."[231] The courts should generally accept Parliament's objectives at face value, absent "an attack on the good faith of the assertion of those objectives or on their patent irrationality."[232]

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[227] *Gordon* at paras. 225-228; *Ontario v. Criminal Lawyers' Association of Ontario,* 2013 SCC 43 at paras. 27-30; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 ["***N.A.P.E.***"] at para. 83.
[228] *Gordon* at para. 236.
[229] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 139.
[230] *Health Services* at para. 142.
[231] *Harper v. Canada (Attorney General)*, 2004 SCC 33 ["***Harper***"] at paras. 25-26.
[232] *Gordon* at para. 242.

(A) Defining the Objective

175. The objective of the *Act*, as clearly articulated in the *Act* itself, is to moderate the rate of growth of compensation increases for public sector employees so as to manage the Province's finances in a responsible manner and to protect the sustainability of public services.[233] This is a pressing and substantial objective.

176. The Application Judge erred by mischaracterizing the pressing and substantial objective advanced by the *Act* and taking it upon himself to reframe the objective as the responsible management of Ontario's finances and the protection of sustainable public services. He incorrectly perceived that Ontario's characterization of the objective was simply the means to achieve a sub-objective. This error coloured the Application Judge's entire s. 1 analysis.

177. As the jurisprudence emphasizes, it is critically important to articulate the legislative purpose at an appropriate level of generality[234] because "[t]he relevant objective is that of the infringing measure."[235] If the purpose is stated too broadly without a view to the infringement, "the balancing exercise at the core of the s. 1 analysis risk losing their *raison d'être*.[236] Conversely, if the measure's purpose is not sufficiently precise, its articulation may simply reiterate the means chosen to achieve it.[237]

178. The relevant objective is that of the infringing measure, not, more broadly, its underlying objectives.[238] Here, the infringing measure is moderating the rate of growth of compensation for

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[233] Bill 124, Preamble, s. 1.
[234] *Frank* at para. 46; *R v. Moriarity*, 2015 SCC 55, at para. 28.
[235] *Frank* at para. 46.
[236] *R. v. Brown*, 2022 SCC 18 at para. 116.
[237] *R. v. K.R.J.*, 2016 SCC 31 at para. 63.
[238] *Frank* at para. 46; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 at para. 20; *RJR-MacDonald* at para. 144.

public sector employees. The more general purpose behind the *Act* – the preservation of the public services upon which Ontario residents depend and the responsible management of the Province's financial health – informs the specific rationale. Ontario's objective is stated in terms of one main objective (enabling responsible financial management and preservation of the public services) pursued by way of a particular sub-objective (compensation moderation). Similar to the government's objective in *Health Services*, "the more precise aims of the government are made clear in the sub-objective[]."[239] The 1% salary cap is the means to effect the objective and sub-objective – which are distinct.

(B) Scrutiny of Pressing and Substantial Objective

179. After re-formulating the *Act*'s objective, the Application Judge held that given Supreme Court jurisprudence that states that when the government invokes budgetary restraint as a reason for infringing *Charter* rights, the court has to evaluate this assertion.

180. Two distinct errors flow from his assertion:

(a) This Court in *Gordon* held that courts should generally accept the Legislature'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."[240] None of the Respondents' arguments could be reasonably framed as an attack on the good faith assertion of the objectives or that they are patently irrational. The Application Judge erred by

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[239] *Health Services* at para. 146.
[240] *Gordon* at para. 242.

going beyond the parties' submissions and inviting an "evidentiary contest" over Ontario's financial situation, directly contrary to Supreme Court jurisprudence; and

(b) Within the improper "evidentiary contest" analysis, the Application Judge erred in law by requiring a level of "financial emergency", elevating the threshold required to have budgetary considerations attain dimensions amounting to a pressing and substantial objective under s. 1.

181. As the Application Judge noted,[241] courts have found that budgetary considerations have amounted to a pressing and substantial objective (including *Gordon*, *N.A.P.E.*, *Meredith*, *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*,[242] and *Dockyard Trades*) despite *Martin*'s cautionary statement that "[b]udgetary considerations in and themselves cannot normally be invoked as a free-standing pressing and substantial objective".[243]

182. With respect to the scale of the budgetary crisis, the scale of the fiscal crisis is relevant, but a dire situation elevating to a level of emergency is not required in the jurisprudence. Dickson C.J. was clear in *P.S.A.C.*: "[a] "pressing and substantial concern" need not amount to an emergency."[244] While *N.A.P.E.* dealt with Newfoundland's "severe financial crisis", this is not the standard required in every instance. Deference must be given to the Legislature to take steps to avert a dire financial situation which, in this case, arose from the "fundamentally unsustainable" gap between spending and debt, among other things, which would leave the Ontario government

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[241] *Application Decision* at para. 155.
[242] *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*, 2014 QCCA 1068 ["***Syndicat canadien #1***"]; See also *Syndicat canadien #2*, at paras. 70-71.
[243] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 ["***Martin***"], at para. 109.
[244] *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424 ["***P.S.A.C.***"], at para. 32.

unable to deal with a severe negative shock to the economy in the short run and render funding of social services such as health and education in the future unsustainable.[245]

183. If the Application Judge was required to assess the evidence of a pressing and substantial objective, the correct threshold is a "serious problem" (as per *P.S.A.C.*[246]), framed in *N.A.P.E.* as a "serious financial situation".[247]

184. The Application Judge seemingly acknowledges this when identifying that "[t]he question then becomes whether the financial situation of Ontario in 2019 was sufficiently serious to justify"[248] the infringement to collective bargaining. Yet, the Application Judge's analysis improperly required that Dr. Dodge's evidence speak to a "severe financial crisis"[249] or demonstrate that the economic conditions in 2019 were of "a sufficiently critical nature".[250] He then undertook his own analysis of whether the Legislature's financial priorities were appropriately, from his perspective, explained.

185. The record demonstrates that the law's pressing and substantial objective is real. Dr. Dodge provided extensive evidence on the serious financial situation facing Ontario in 2019, including the following:

(a) "achieving the deficit reduction needed to ensure longer term fiscal sustainability was a herculean challenge for the Ontario government in 2019";

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[245] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 12, p. 14.
[246] *P.S.A.C.* at para. 30.
[247] *N.A.P.E.* at para. 73.
[248] Application Decision at para. 273.
[249] Application Decision at para. 269.
[250] Application Decision at para. 297.

(b) "the government needed to make a major effort to reduce the expected rate of program spending increase over the period to 2023-2024"; and

(c) Compensation restraint constituted a critical element of any fiscal consolidation strategy".[251]

186. Dr. Dodge's expert opinion sets out that this fiscal consolidation is more than simply fiscal prudence; the Ontario government was facing a serious financial situation in 2019 which required action to ensure a sustainable fiscal path to meet the growing demand for public services and help mitigate the impact of future economic crises.[252] Taking into account the impact of the pandemic after 2019, he concluded 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."[253]

187. While mindful of the warning of this Court in *Gordon* that judges ought not to see themselves as finance ministers,[254] the Application Judge did just that:

(a) dismissing Dr. Dodge's opinion as "merely advocat[ing] for fiscal prudence";[255]

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[251] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 38, p. 17: "it was critical that unit labour cost increases in Canadian dollars were well contained." And "[i]t equally required that public policy be oriented to facilitating public and private investment to raise productivity in the private sector and to containing public sector costs, including labour compensation, so that the government had enough room to invest meaningfully in the economy even in the low-growth environment expected in the years ahead."
[252] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 16, pp. 16-17.
[253] Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 87, p. 57.
[254] *Gordon* at para. 224.
[255] Application Decision at para. 280.

(b) discounting the analysis and opinion of the Independent Financial Commission of Inquiry appointed to review government accounting practices which resulted in revising the 2017/18 budget deficit from $0.6 billion to $3.7 billion;[256]

(c) discounting the EY Report as there was no explanation provided as to how large the sector of the BPS was over which the government did not exercise significant wage control, including transfer payment recipients, and there was no indication of how long it would take for the government to exercise such control by other means including a centralized bargaining regime;[257]

(d) stating, without evidence, that "as of 2019, Ontario had experienced, and was continuing to experience a long period of growth after its emergence from the world financial crisis";[258] and

(e) requiring an explanation about "why it was necessary to infringe on constitutional rights to impose wage constraint at the same time as it was providing tax cuts or license plate sticker refunds that were more than 10 times larger than the savings obtained from wage restraint measures".[259]

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[256] Application Decision at para. 282.
[257] Application Decision para. 284.
[258] Application Decision at para. 294. In conflict with Dodge's evidence that "In the decade since 2009 the Ontario government has had to cope with the fiscal consequences of a significantly weaker economic environment than in the preceding 15 years" in Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 21, pp. 18-19.
[259] Application Decision at para. 289. He questions the failure of Dr. Dodge to evaluate these revenue-reducing measures, which are identified in the affidavit as including "canceling the cap and trade program, paralleling the federal changes to the corporate income tax and introducing LIFT, the low-income tax credit" and discounts Dr. Dodge's view that they appear to relate to "increasing the North American-wide competitiveness of Ontario's business taxation to induce increased investment in Ontario", Dodge Affidavit, August 12, 2021, A.1.05.0001, at para. 52, p. 35.

188. The Application Judge erred in applying too stringent a standard for the "pressing and substantial objective". He went beyond the good faith assertions of the government, and the record itself, to substitute his own opinion for the views of the elected government and financial experts on these polycentric and policy-laden matters of economic and public finance. To require this is to abandon any deference to the Legislature which is democratically accountable for its economic and fiscal decisions.

(iii) The Law is Rationally Connected to its Objective

189. To establish a rational connection, the government "must show that it is reasonable to suppose that the limit may further the goal, not that it will do so."[260] This test is "not particularly onerous."[261] Where the legislation at issue has more than one goal, any of them can be relied upon to meet the s. 1 test.[262] The Application Judge erred in applying too stringent a test, requiring a direct causal connection.

190. Hogg and Wright suggest that "the requirement of a rational connection has very little work to do.[263] 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.[264] Logic and reason, combined with available evidence, can establish a rational connection.[265]

191. The Application Judge held that moderating compensation rate increases is logically related to the responsible management of the Province's finances and the protection of the

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[260] *Hutterian* at para. 48.
[261] *Mounted Police* at para. 143.
[262] *Hutterian* at paras. 44-45.
[263] Hogg and Wright, s. 38:18.
[264] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 ["***Taylor***"] at paras. 55-56.
[265] *R v. Bryan*, 2007 SCC 12, at para. 41; see also *RJR-Macdonald* at paras. 156-158.

sustainability of public services insofar as it concerns wages that Ontario pays for directly. However, the Application Judge held that there is no rational connection between the government's objective and workers in the energy sector or the university sector, and any rational connection between the objective and the long-term care sector is remote at best.[266]

192. The Application Judge incorrectly assessed whether the *Act* would achieve its goals, rather than whether the *Act* could achieve its goals. Instead of considering whether the temporary 1% wage cap could further the goals of managing Ontario's finances in a fiscally responsible manner and protecting the sustainability of public services, the Application Judge analyzed whether the *Act* would be successful in achieving its goals, in all instances, and for all those to whom it applied. In essence, the Application Judge conducted an overbreadth analysis. He erred in doing so.

193. Further, the Application Judge erred by demanding too stringent a level of proof, in essence, by requiring the Crown to establish an empirical connection and direct causal relationship. This unduly narrow approach, focusing exclusively on the wages, failed to consider "on the basis of reason or logic" indirect ways that wage control in these entities would benefit the responsible fiscal management of the Province and protect the sustainability of public services.

194. The Appellants' interest in reducing the growth of expenditures in entities that are provincially funded (with respect to the university and long-term care sectors) or wholly provincially-owned (with respect to the electricity sector) is self-evident. While the government is not directly paying the wages of these employees *per se*, it stands to reason that instituting a wage limitation would further the ability for these entities to main a sustainable financial position. For

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[266] Application Decision at paras. 301-302, 322.

instance, as the Application Judge stated himself, in the case of long-term care, increased wages could lead care homes to demand higher daily fees for each patient to cover the increased operating costs.[267] Or, in the case of the energy sector, a wage restriction would allow for OPG to generate more profits, which is not insignificant for the government's fiscal health. OPG substantially contributes to the government's fiscal position; in 2018, OPG had net income of $1.12 billion attributable to Ontario as a sole shareholder. A larger dividend for the Province as sole shareholder directly contributes to the fiscal health of the Province.

195. With respect to the university sector, Bill 124 is rationally connected insofar as the provincial government is a significant source of funding for universities. In *Syndicat canadien #1*, the Quebec Court of Appeal accepted that it was rational for Parliament to limit salary growth at the CBC even though the federal government is only one source of CBC's funding and even though the federal government had other alternatives:

> As for Parliament's decision to include the CBC in the schedule to the Act, nothing shows that it was irrational. On the contrary, the evidence indicates that the wage increases granted by the CBC are funded in part by the State. By limiting the possible wage increases, Parliament limited one of the reasons for the CBC to ask for more public funding.[268]

196. When analyzed through the appropriate framework, the impugned law meets the low rational connection threshold. In accordance with *Hutterian* and *Taylor*, it is reasonable to suppose that the rate cap imposed is logically related to compensation moderation, which is logically related and can be said to further in a general way the responsible management of the Province's finances

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[267] Application Decision at para. 320.
[268] *Syndicat canadien #1* at para. 80 with translation in *Syndicat canadien #2* at para. 78. See also *Syndicat canadien #2* at para. 75.

and the protection of the sustainability of public services, regardless if Ontario pays for the wages directly or indirectly.

(iv) The Law is Minimally Impairing

197. At the minimal impairment stage, the "government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives."[269] The impugned measures need not be the least impairing option.[270] 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, especially given that the Crown is not an employer in all instances or even at the bargaining table.

198. A measure of deference is particularly important at this stage. As the Supreme Court noted in *Canada (Attorney General) v. JTI-Macdonald Corp.*:

> There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament … Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives.[271]

If legislation falls within a range of reasonable alternatives, a court will not find it unconstitutional merely because it can conceive of an alternative that might better tailor objective to

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[269] *Mounted Police* at para. 149.
[270] *Harper* at para. 110.
[271] *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 ["***JTI-Macdonald***"] at para. 43.

infringement.[272] In keeping with *RJR-MacDonald*, the "tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator".[273]

199. The considerations that have been invoked by courts in support of a degree of deference to the legislative choice within a margin of appreciation include where the law deals with a "complex social issue", where the law reconciles the interests of competing groups, and where the law allocates scarce resources.[274]

200. Here, where evaluating whether the Legislature's chosen means fell within a range of reasonable alternatives, the Application Judge failed to accord sufficient deference to the Legislature. The Application Judge's failure to recognize the "complex interests involved in labour legislation" and defer to the Legislature's chosen means disregarded the Supreme Court's warning against "the abuse of hindsight":[275] "it is not sufficient that a judge, freed from all such constraints, could imagine a less restrictive alternative".[276]

201. The Application Judge erred in holding that voluntary wage restraint, which is an *executive* measure, would be a reasonable and less-impairing alternative to a *legislative* measure. The *Act* has plain effects beyond the Crown's position in bargaining including, for example, where the Crown is not the employer or not even at the bargaining table at all. In these instances, hard bargaining is not an alternative at all. And even where the Crown can bargain, it may not achieve its legislative objective as an arbitrator might impose a different award.

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[272] *RJR-MacDonald* at para. 160.
[273] *RJR-MacDonald* at para. 160.
[274] Hogg and Wright, s. 38:21.
[275] *Gordon* at para. 267 paraphrasing *JTI-Macdonald* at para. 43.
[276] *Martin* at para. 112 quoted in *Gordon* at para. 260.

202. The alternative advanced by the Application Judge does not reasonably meet the Legislature's objective, and therefore ought not to be considered at the minimal impairment stage.[277]

203. Also voluntary wage restraint is a bargaining position that can be taken by the *executive* branch. The correct framing of this stage of the *Oakes* analysis asks if the *legislature* has pursued its objective by the least drastic means. As the Supreme Court held in *Dunmore*:

> I turn to the question of whether the legislature has impeded the appellants' associational activity more than is reasonably necessary to achieve its stated objectives. … It is also submitted that legislatures are entitled to a margin of deference when balancing complex matters of economic policy.[278]

Voluntary wage restraint – an executive measure – is not capable of being an alternative legislative measure.

204. The fallacy of the Application Judge's minimal impairment analysis is evident when viewed through the lens of public transparency. For the Application Judge, the minimal impairment analysis would have been satisfied if the wage cap was an internal position decided upon by the executive and conveyed at the bargaining table, but not satisfied when this same position is taken in a transparent and accountable fashion through the legislative process. The perverse incentives that flow from this reasoning should be rejected as a matter of public policy. It is arguably less politically convenient – using the Application Judge's words – for the government to publicly announce its position in good faith through legislation.

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[277] *Hutterian* at para. 60.
[278] *Dunmore* at para. 59; see also para. 61.

205. The Application Judge's analysis flows from the erroneous assumption that one of the rationales for the *Act* is to avoid strike activity. The *Act* does not interfere with the right to strike.[279] The record contains evidence of bargaining units engaging in strikes or holding strike votes and using those to secure gains after the passage of Bill 124.[280] The *Act* provides a legal route for employees to obtain compensation increases above 1% as it includes an exemption power. Similarly, Manitoba's compensation restraint law in *Manitoba Federation of Labour* was found to not limit the right to strike for compensation increases above legislated caps because unions could strike to compel the government to exercise a statutory power to exempt their agreement.[281]

206. Given the other legislative options available, the impugned law is minimally impairing. The record reveals that the government considered various options for limiting public spending growth associated with salaries and chose a measure that was both effective and less fraught with consequences such as involuntary layoffs and mandatory unpaid days.[282] It also chose a measure that sought to be fair. Existing collective agreements and arbitral awards were not re-opened and

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[279] It is stated specifically in Bill 124, s. 4.

[280] Doyle Affidavit, January 12, 2021, B.1.01.0001, at paras. 80-81, p. 23; Transcript, Cross of Doyle, May 26, 2022, L.1.04.0001, at Q 152, p. 62; Exhibit 3 to Transcript, Cross of Doyle, May 26, 2022, EXB L.1.04.0004; Bennett Affidavit, January 14, 2021, C.1.01.0001 at paras. 97-107, 126, pp. 34-37, 45; Exhibit 8 to Transcript, Cross of Bennett, May 26, 2022, EXB L.1.03.0009; DeQuetteville Affidavit, January 14, 2021, D.1.01.0001, at paras. 103, 121, pp. 27, 32; Transcript, Cross of DeQuetteville, June 22, 2022, L.1.26.0001, at QQ 68, 96-105, pp. 35-36, 44-48; Exhibit 2 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0003; Exhibit 3 to Transcript, Cross of DeQuetteville, June 22, 2022, EXB L.1.26.0004; Exhibit 12 to Transcript, Cross of Wurtele, June 1, 2022, EXB L. 1.11.0013; Exhibit 16 to Transcript, Cross of Wurtele, June 1, 2022, EXB L.1.11.0017; Exhibit 14 to Transcript, Cross of Wurtele, June 1, 2022, EXB L. 1.11.0015; Transcript, Cross of Burke, May 25, 2022, L.1.02.0001, at QQ 91-94, p. 42; Transcript, Cross of Cox, June 1, 2022, L.1.10.0001, at Q 25, pp. 21-38; Exhibit 1 to Transcript, Cross of Cox, June 1, 2022, EXB L.1.10.0002; Fortier Affidavit, March 8, 2021, H.1.01.0001, at paras. 143, 156, pp. 46-47, 51-52; Braganza Affidavit, June 28, 2021, H.2.02.0001, at para. 32, p. 9; Murdaca Reply Affidavit, April 8, 2022, F.1.26.0001, at paras. 17-36, pp. 6-10; Wurtele Affidavit, January 20, 2021, F.1.07.0001, at paras. 86, p. 19; Wurtele Reply Affidavit, April 14, 2022, F.1.24.0001, at para. 24, pp. 9-10; Atkins Affidavit, June 29, 2021, H.2.03.0001, at para. 58, p. 12.

[281] *Manitoba Federation of Labour* at para. 103.

[282] See e.g. Porter Affidavit, A.1.01.0001. at paras. 16, 51, 168, pp. 14-15, 33, 69.

the moderation period imposed by the *Act* is temporary.[283] The evidence shows that the government previously undertook alternative measures, such as a requirement for government approval of tentative collective agreements, but these measures were insufficient to meet the government's fiscal goals.[284]

207. Crafting legislative solutions to complex problems is necessarily a complex task. Utilizing the Supreme Court's words in *JTI-Macdonald*, the minimal impairment requirement has been met, as the evidence shows that the government undertook the complex task of crafting legislative solutions to complex problems, and chose one of several reasonable alternatives. Deference ought to be accorded.

(v) The Law is Proportionate in its Salutary and Deleterious Effects

208. The final stage of the proportionality analysis requires the Court to weigh the salutary and deleterious effects of the measure. As noted by the Application Judge, "[t]he real world always requires trade-offs and compromises. The question is whether the trade-offs here were a proportionate or disproportionate choice."[285]

209. As stated by the Supreme Court in *JTI-Macdonald Corp*, the inquiry in the fourth branch of the s. 1 analysis "focuses on the practical impact of the law. 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?"[286]

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[283] See e.g. Porter Affidavit, A.1.01.0001. at paras. 16, 51, 168, pp. 14-15, 33, 69.
[284] Porter Affidavit, A.1.01.0001. at paras. 47-48, 52, pp. 32, 33-34.
[285] Application Decision at para. 338.
[286] *JTI Macdonald Corp.* at para. 45.

210. The Application Judge's balancing of the salutary and deleterious effects was driven by his errors on the other stages of the *Oakes* test, set out above. Had he not made the foregoing errors, he would have reached a different conclusion at this balancing stage.

211. The Application Judge erred in his proportionality analysis by re-incorporating the improper "emergency" standard from the pressing and substantial analysis. He held that "[a]n infringement may well be justified if it arises in a true emergency that requires radical intervention to safeguard the public interest. The breach may not be justified if it arises in routine administration".[287] By framing the government's objective as a day-to-day government duty and finding that the *Act* arose in an "ordinary, unremarkable environment"[288] and was a "routine policy preference[]"[289] the Application Judge framed his proportionality analysis so narrowly that the possibility of upholding the *Act* was all but removed.

212. The Application Judge went beyond his proper role and made value judgments that permeated his proportionality analysis, including:

(a) Intimating that publicly debated legislation passed by democratically-elected representatives is less accountable and transparent than positions taken at the bargaining table, "hamper[ing] the development of public consensus on the issue";[290] and

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[287] Application Decision at para. 346.
[288] Application Decision at para. 347.
[289] Application Decision at para. 355.
[290] Application Decision at para. 350.

(b) Requiring the government to explain its taxation policies, including why their "billions of dollars in tax cuts"[291] could not have been a bit smaller.

213. Any deleterious effects of the *Act* are outweighed by the significant salutary effects of protecting the Province's financial health and preserving the sustainability of public services. In view of competing interests and policy constraints, and in the face of the Province's fiscal health being threatened, the government acted – moderating a significant government expense to protect its path to longer-term sustainability. Judicial deference to this governmental policy decision, as stated by this Court in *Gordon*, is "prudent as a matter of institutional capacity and the constitutional legitimacy of judicial review."[292] Deference was not accorded. The Application Judge fell into error.

214. Accordingly, the *Act* should be upheld as a demonstrably justified limit in a free and democratic society.

D. THE APPLICATION JUDGE DID NOT APPLY THE LEAST INTRUSIVE REMEDY

215. The Application Judge failed to apply the principle that the Court should adopt the least intrusive remedy necessary to give effect to the legislation while protecting *Charter* rights. He failed to consider how the *Act* applied to non-associating employees in the broader public sphere, which did not give rise to any s. 2(d) rights or constitutional concerns.

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[291] Application Decision at para. 350.
[292] *Gordon* at para. 224.

216. The jurisprudence affirms that courts "must determine whether a tailored remedy would be appropriate, rather than a declaration of invalidity applying to the whole of the challenged law."[293] Tailored remedies "should be employed when possible so that the constitutional aspects of legislation are preserved" for the benefit of the public.[294]

217. Tailored remedies, including severance, constitute a doctrine of judicial restraint where the impact of a successful *Charter* attack on a law should be minimized in order to ensure that the court's intrusion into the legislative process goes no further than is necessary to vindicate the *Charter* right.[295] As Karakatsanis J. described in *Ontario v. G*, "tailored remedies" (this includes reading in, but also reading down and severance) rather than full nullification "should be employed when possible so that the constitutional aspects of legislation are preserved".[296]

218. Contrary to this accepted approach, the Application Judge determined that it was appropriate to declare the entire *Act* void and of no effect because its "entire purpose" was to implement the 1% limitation on wage increases.[297] He failed to consider, by way of example, how the *Act* applied to employees who do not associate or collective bargain within the broader public sphere, and whether a tailored remedy would be appropriate to the sectors that have no right to strike and are governed by interest arbitration. Alternatively, if the court concluded that for some sectors (e.g., electricity) the law was not rationally connected to its legislative objective, the *Act*'s application to such sectors could be severed.

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[293] *Ontario (Attorney General) v. G*, 2020 SCC 38 ["***Ontario v. G***"] at para. 163.
[294] *Ontario v. G* at para. 112; Hogg and Wright, s. 40:5.
[295] Hogg and Wright, s. 40:5.
[296] *Ontario v. G* at para. 112.
[297] Application Decision at para. 363.

219. Non-bargaining employees do not bargain in association. No s. 2(d) *Charter* right arises for them. Nothing in the Application Judge's analysis justifies any finding that the *Act* is unconstitutional in its application to them. His broad declaration has untold application to such employment relationships without any constitutional basis.

220. Regarding the sectors that have no right to strike, and are governed by interest arbitration, the Application Judge found that the *Act* interfered with the impartial decision-making of the arbitrators. He noted that the object of interest arbitration was to replicate collective bargaining, and the *Act* imposed a limit which failed to reflect such results.[298] He held that the arbitration could not be impartial and fair.

221. Regardless, the application of the *Act* to the distinct context of interest arbitration (as opposed to collective bargaining) should have been considered by the Application Judge in relation to a less intrusive means of upholding the legislation. An arbitration, for example, might conclude that a freely bargained collective agreement would have adopted increases above 1%. This decision could be used as a basis to request an exemption from the Minister. Any denial of the request might be judicially reviewed, and the reasonableness of the decision challenged in the proper context. It was incumbent on the Application Judge to consider less intrusive remedies in this context.

222. The Application Judge erred in failing to consider at all how to read down the *Act* in a way to limit the "substantial interference" found in the collective bargaining process, including, for example, how the scope of "compensation" definition might be read down to apply only to salary

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[298] Application Decision at paras. 139-140.

or wages, thereby preserving the value of negotiating other non-wage benefits (such as vacation days or bereavement leave).

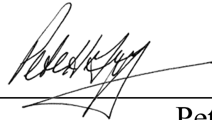
223. The Application Judge's conclusion that the entire *Act* was void failed to follow the doctrine of judicial restraint and consider the constitutional aspects of the *Act*. The entire *Act* should not have been struck down.

PART IV - ORDER REQUESTED

224. The Appellants respectfully submit that the Order of the Application Judge be set aside and in its place an Order be granted dismissing the Applications in their entirety.

225. In the event that the Application Judge's decision on s. 2(d) of the *Charter* is upheld and is found to be not saved under s. 1 of the *Charter*, the Appellants request that the *Act* be read down to preserve it as far as possible.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2023.



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Lawyers for the Respondents (Appellants)

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37

2. *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30

3. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892

4. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

5. *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*, 2014 QCCA 1068

6. *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163

7. *Cameron v. Nova Scotia (Attorney General)*,1999 NSCA 14

8. *Cochrane v. Ontario (Attorney General)*, 2007 CanLII 9231 (Ont. Sup. Ct.), aff'd 2008 ONCA 718

9. *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94

10. *Egan v. Canada*, [1995] 2 SCR 513

11. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

12. *Ernst v. Alberta Energy Regulator*, 2017 SCC 1

13. *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156

14. *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912

15. *Frank v. Canada (Attorney General)*, 2019 SCC 1

16. *Gordon v. Canada (Attorney General*), 2016 ONCA 625

17. *Harper v. Canada (Attorney General),* 2004 SCC 33

18. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27

19. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927

20. *Manitoba Federation of Labour et al v. The Government of Manitoba,* 2020 MBQB 92 reviewed in 2021 MBCA 85

21. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229

22. *Meredith v. Canada (Attorney General*), 2015 SCC 2

23. *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6

24. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1

25. *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66

26. *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54

27. *Ontario v. Criminal Lawyers' Association of Ontario,* 2013 SCC 43

28. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20

29. *Ontario (Attorney General) v. G.*, 2020 SCC 38

30. *Ontario English Catholic Teachers Association v. His Majesty,* 2022 ONSC 6658

31. *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424

32. *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295

33. *R v. Bryan*, 2007 SCC 12

34. *R. v. Brown*, 2022 SCC 18

35. *R. v. K.R.J.,* 2016 SCC 31

36. *R v. Moriarity*, 2015 SCC 55

37. *R. v. Oakes*, [1986] 1 S.C.R. 103

38. *R. v. O'Connor*, [1995] 4 S.C.R. 411

39. *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199

40. *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4

41. *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21

42. *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Canadian Charter of Rights and Freedoms*, s. 2(d), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.**

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms
Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* 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.

Fundamental Freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

***Protecting a Sustainable Public Sector for Future Generations Act, 2019*, S.O. 2019, c. 12.**

Preamble
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.

The Government believes that the public interest requires the adoption, on an exceptional and temporary basis, of the measures set out in this Act.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PURPOSE

Purpose

1 The purpose of this 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.

INTERPRETATION

Interpretation

2 In this Act,

"collective agreement" includes,

(a) a collective agreement within the meaning of the *Labour Relations Act, 1995*, and

(b) any agreement, whether negotiated or the result of an arbitration award, between an employer or an employers' organization and a bargaining organization to which this Act applies, in respect of compensation for employees; ("convention collective")

"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; ("rémunération")

"compensation plan" means the provisions, however established, for the determination and administration of an employee's compensation; ("régime de rémunération")

"directive" means a directive made under this Act; ("directive")

"employers' organization" means an organization of employers, or an organization that represents employers, that negotiates terms and conditions of employment relating to compensation; ("association patronale")

“Minister” means the President of the Treasury Board or such other member of the Executive Council to whom responsibility for the administration of this Act may be assigned or transferred under the *Executive Council Act*; (“ministre”)

“moderation period” means a moderation period determined in accordance with section 9 or 17; (“période de modération”)

“non-represented employee” means an employee to whom this Act applies who is not represented by a bargaining organization or is excluded from being represented by a bargaining organization to which this Act applies; (“employé non représenté”)

“regulations” means regulations made under this Act; (“règlements”)

“salary rate” means 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. (“taux de traitement”)

Right to bargain collectively

3 Subject to the other provisions of this Act, the right to bargain collectively is continued.

Right to strike

4 Nothing in this Act affects the right to engage in a lawful strike or lockout.

APPLICATION

Application to employers

5 (1) This Act applies to the following employers, unless a Minister’s regulation specifies otherwise:

1. The Crown in right of Ontario, every agency thereof and every authority, board, commission, corporation, office or organization of persons, a majority of whose directors, members or officers are appointed or chosen by or under the authority of the Lieutenant Governor in Council or a member of the Executive Council.
2. Every board within the meaning of the *Education Act*.
3. Every university in Ontario and every college of applied arts and technology and post-secondary institution in Ontario, whether or not affiliated with a university, the enrolments of which are counted for purposes of calculating annual operating grants and entitlements.
4. Every hospital within the meaning of the *Public Hospitals Act* and the University of Ottawa Heart Institute/Institut de cardiologie de l’Université d’Ottawa.
5. Every licensee under the *Long-Term Care Homes Act, 2007*, other than a licensee that carries on its activities for the purpose of gain or profit to its members or shareholders.
6. Ornge.
7. Children’s aid societies.

8. Every authority, board, commission, corporation, office or organization of persons, other than one described in paragraphs 1 to 7, that satisfies the following conditions:

    i. It does not carry on its activities for the purpose of gain or profit to its members or shareholders.

    ii. In 2018 (or in such later year as may be specified by regulation) it received at least $1,000,000 in funding from the Government of Ontario, as determined for the purposes of the *Public Sector Salary Disclosure Act, 1996*.

9. Subject to subsection (2), every other authority, board, commission, committee, corporation, council, foundation or organization that may be prescribed by regulation for the purposes of this section.

Exceptions

(2) This Act does not apply to the following employers:

1. A municipality.
2. A local board as defined in subsection 1 (1) of the *Municipal Act, 2001*.
3. A local board as defined in subsection 3 (1) of the *City of Toronto Act, 2006*.
4. Every authority, board, commission, corporation, office or organization of persons, a majority of whose members, directors or officers are appointed or chosen by or under the authority of the council of a municipality.
5. An Indigenous community.
6. Every authority, board, commission, corporation, office or organization of persons, including a council of the band within the meaning of the *Indian Act* (Canada), a majority of whose members, directors or officers are appointed or chosen by or under the authority of one or more Indigenous communities.
7. A police governing authority referred to in section 54 of the *Police Services Act*.
8. Unless otherwise specifically provided for in the regulations, an organization that undertakes its activities for the purpose of profit to its shareholders.

Moderation period — represented employees

9 (1) For the purposes of sections 10 to 16, the moderation period shall be determined in accordance with the following rules:

1. If a collective agreement is in operation on June 5, 2019, the moderation period in respect of the class of employees covered by the collective agreement begins on the day immediately following the day the collective agreement expires and ends on the day that is three years later.

2. If no collective agreement is in operation on June 5, 2019 and the previous collective agreement has expired, the moderation period in respect of the class of employees covered by the expired collective agreement begins on the day immediately following the day that the previous collective agreement expired and ends on the day that is three years later.
3. If the parties are bargaining for a first collective agreement on June 5, 2019, the moderation period in respect of the class of employees covered by the collective agreement begins on the commencement date of the collective agreement and ends on the day that is three years later.
4. If no collective agreement is in operation on June 5, 2019 and the parties are, or have been, in arbitration to resolve all matters necessary to conclude a collective agreement,

   i. if the arbitration award has not been issued on or before June 5, 2019,

      A. the moderation period in respect of the class of employees subject to the award begins on the commencement date of the collective agreement that gives effect to the arbitration award, once issued, and ends on the day that is three years later, or

      B. if, during arbitration proceedings, the parties settle a collective agreement, the moderation period in respect of the class of employees subject to the collective agreement begins on the commencement date of the collective agreement and ends on the day that is three years later, or

   ii. if the arbitration award has been issued on or before June 5, 2019, the moderation period in respect of the class of employees subject to the award begins on the day immediately following the day on which the collective agreement that gives effect to that award expires and ends on the day that is three years later.

Same, certain written agreements on or before June 5, 2019

(2) Despite subsection (1), if, on or before June 5, 2019, the parties have, in good faith, entered into an agreement in writing specified in subsection (3), the moderation period in respect of the class of employees covered by that agreement begins on the day immediately following the day the collective agreement that gives effect to that agreement expires and ends on the day that is three years later.

Same

(3) The following agreements are specified for the purposes of subsection (2):

1. A memorandum of settlement for a collective agreement ratified after June 5, 2019.
2. A collective agreement ratified on or before June 5, 2019 that comes into operation after that date.

3. An agreement to renew a collective agreement that is in operation on June 5, 2019 for a single specified term.

Maximum increases in salary rates

10 (1) No collective agreement or arbitration award may provide for an increase in a salary rate applicable to a position or class of positions during the applicable moderation period that is greater than one per cent for each 12-month period of the moderation period, but they may provide for increases that are lower.

Exception, certain increases

(2) Subsection (1) does not prohibit an employee's salary rate from increasing in recognition of the following matters, if the increase is authorized under a collective agreement:

1. The employee's length of time in employment.
2. An assessment of performance.
3. The employee's successful completion of a program or course of professional or technical education.

Maximum increases in compensation

11 (1) 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.

Same

(2) For greater certainty, an increase in a salary rate under subsection 10 (1) is an increase to compensation entitlements for the purposes of subsection (1).

Effect of cost increases

(3) If the employer's cost of providing a benefit as it existed on the day before the beginning of the moderation period increases during the moderation period, the increase in the employer's cost does not constitute an increase in compensation entitlements for the purposes of subsection (1).

Conflict with this Act

16 This Act prevails over any collective agreement or arbitration award and, if the Minister makes an order under subsection 26 (1) declaring that a collective agreement or arbitration award is inconsistent with this Act, the collective agreement or arbitration award is void and deemed never to have had effect.

Minister's order

26 (1) The Minister may, in the Minister's sole discretion, make an order declaring that a collective agreement or an arbitration award is inconsistent with this Act.

Same, certain multi-employer agreements

(2) If a collective agreement or arbitration award applies to both employers to whom this Act applies and employers to whom this Act does not apply, an order made under subsection (1) in respect of the collective agreement or arbitration award applies only with respect to the employers to whom this Act applies.

Opportunity for submissions

(3) Before the Minister makes an order under subsection (1),

(a) the Minister shall provide notice to the parties of their opportunity to provide written submissions to the Minister regarding whether the collective agreement or arbitration award is consistent with this Act; and

(b) the parties may provide written submissions to the Minister no later than 20 days after the Minister's notice is issued under clause (a).

Timing of Minister's order

(4) Upon the expiry of the 20-day period referred to in clause (3) (b), the Minister may, without further notice, issue an order under subsection (1).

Where collective agreement inconsistent with Act

(5) If the Minister makes an order under subsection (1) that a collective agreement is inconsistent with this Act,

(a) the parties shall return to the same stage in bargaining as they were at immediately before they settled the collective agreement that was the subject of the order under subsection (1);

(b) the terms and conditions of employment that applied to the employees immediately before the parties settled the collective agreement that was the subject of the order under subsection (1) apply to the employees, subject to any changes permitted by this Act and which may otherwise be lawfully made; and

(c) the parties shall conclude a new collective agreement that is consistent with this Act.

Where arbitration award inconsistent with Act

(6) If the Minister makes an order under subsection (1) that an arbitration award is inconsistent with this Act,

(a) the arbitrator or arbitration board that issued the award that was the subject of the order under subsection (1) remains seized to make an award that is consistent with this Act;

(b) the terms and conditions of employment that applied to the employees immediately before the date of the arbitration award that was the subject of the order under subsection (1) apply to the employees, subject to any changes permitted by this Act and which may otherwise be lawfully made; and

(c) the parties shall conclude a new collective agreement that is consistent with this Act.

APPLICATION

Exemption from application of this Act

27 The Minister may, by regulation, exempt a collective agreement from the application of this Act.

O. Reg. 659/20: Exemptions Under Section 27 of the Act.

Exemption

1. The collective agreement between Participation House Project Durham and Canadian Union of Public Employees Local 2936.01, which was reached after June 5, 2019 and is in operation from April 1, 2018 to March 31, 2022, is exempt from the application of the Act.

Exemptions, Brant Family and Children's Services and CUPE

2. (1) The collective agreement between Brant Family and Children's Services and the Canadian Union of Public Employees, Local 181.02, which is in operation from April 1, 2021 to March 31, 2022, is exempt from the application of the Act. O. Reg. 505/22, s. 1.

(2) The collective agreement between Brant Family and Children's Services and the Canadian Union of Public Employees, Local 181.15, which is in operation from April 1, 2021 to March 31, 2022, is exempt from the application of the Act. O. Reg. 505/22, s. 1.

ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION et al.

Applicants
(Respondents in Appeal)

-and-

THE CROWN IN RIGHT OF ONTARIO, as represented by THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD et al.
Respondents
(Appellants)

Court File No. COA-23-CV-0010

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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