COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Public Service Employees Union v. Ontario (Attorney General), 2026 ONCA 74
DATE: 20260206
DOCKET: COA-24-CV-0870

Pepall, Lauwers and Dawe JJ.A.

BETWEEN

Ontario Public Service Employees Union,
R.M. Kennedy and J.P. Hornick

Applicants (Appellants)

and

His Majesty the King in Right of Ontario as represented by
the Attorney General of Ontario

Respondent (Respondent)

and

College Employer Council

Intervener (Intervener)

David Wright, Laura Johnson and Behzad Akhkend, for the appellants

Sean Hanley, Rochelle Fox and Sean Kissick, for the respondent

Frank Cesario and Eleanor Vaughan, for the intervener College Employer Council

Steven Barrett and Colleen Bauman, for the intervener Ontario Federation of Labour

Heard: September 8-10, 2025

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated July 11, 2024, with reasons reported at 2024 ONSC 3644, 561 C.R.R. (2d) 289.

By the Court:

A. INTRODUCTION

[1] In the fall of 2017, Ontario enacted the *Colleges of Applied Arts and Technology Labour Dispute Resolution Act, 2017*, S.O. 2017, c. 21 ("Bill 178") to end a 5-week strike by faculty – full-time academic employees – at Ontario's 24 colleges of applied arts and technology. The union representing the affected bargaining unit, the Ontario Public Service Employees Union ("OPSEU"), applied for a declaration that Bill 178 limited the rights of OPSEU members to freely associate in striking under s. 2(d) of the *Canadian Charter of Rights and Freedoms* in a manner that could not be justified under s. 1 of the *Charter*, and a declaration under s. 52 of the *Constitution Act, 1982* that Bill 178 is of no force and effect. The application judge dismissed the application.[1]

[2] Public sector labour relations are governed by federal and provincial legislation within the constitutional framework set by the Supreme Court in the

[1] The application judge also heard an application brought by the Canadian Union of Postal Workers (CUPW) alleging that a different piece of back-to-work legislation, the *Postal Services Resumption and Continuation Act*, S.C. 2018, c. 25, infringed CUPW members' rights under ss. 2(d) and 2(b) of the *Charter*. The application judge dismissed that application on July 11, 2024: see *Canadian Union of Postal Workers v. Canada*, 2024 ONSC 3787, 560 C.R.R. (2d) 315 ("*CUPW 2024*"). This court's reasons for dismissing CUPW's appeal from the application judge's decision are reported at *Canadian Union of Postal Workers v. Canada (Attorney General)*, 2026 ONCA 75.

2015 labour trilogy: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 ("*MPAO*"); *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 ("*SFL*").

[3] Soon after the trilogy was published, this court addressed that framework in *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590, leave to appeal refused, [2016] S.C.C.A. No. 444 (*Professional Institute of the Public Service of Canada*), and [2016] S.C.C.A. No. 445 (*Gordon*), which considered the constitutionality of public sector wage restraint legislation. More recently, this court returned to the trilogy in *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101, 170 O.R. (3d) 1 ("*OECTA*"), regarding provincial wage restraint legislation, and again in *Amalgamated Transit Union, Local 113 v. Ontario*, 2024 ONCA 407, 172 O.R. (3d) 571 ("*TTC*"), regarding the constitutionality of a complete ban on unionized workers' ability to strike after the expiry of a collective agreement.

[4] The appeal in this case and in *Canadian Union of Postal Workers v. Canada (Attorney General)*, 2026 ONCA 75 oblige this court to address the constitutionality of back-to-work legislation for the first time.

B. ISSUES

[5] OPSEU's appeal raises two principal issues:

(1) By ending the strike, did Bill 178 limit the rights of OPSEU members under s. 2(d) of the *Charter*?

(2) If so, did Ontario demonstrably justify ending the strike under s. 1 of the *Charter*?

[6] We hold, for the reasons that follow, that by ending the strike Bill 178 limited OPSEU members' s. 2(d) right but that Ontario has justified ending the strike under s. 1 of the *Charter*. We therefore dismiss OPSEU's appeal.

[7] We turn to the issues after setting out the factual context.

C. FACTUAL CONTEXT

[8] In the college sector, OPSEU bargains with the College Employer Council ("Council"), which has exclusive statutory responsibility to negotiate collectively on behalf of the colleges as the employer under the *Colleges Collective Bargaining Act, 2008*, S.O. 2008, c. 15 ("*CCBA*"). The *CCBA* also incorporates by reference sections of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A and gives certain responsibilities to the Ontario Labour Relations Board. The Council was an intervener in this appeal.

[9] OPSEU and the Council started bargaining for a new collective agreement in July 2017. Although they agreed on some issues, they could not agree on three OPSEU proposals: (1) that an academic senate be created for each college; (2) that academic freedom for college faculty be guaranteed in the collective

agreement; and (3) that the number of part-time faculty be reduced. The Council objected to the first two OPSEU proposals on the basis that such fundamental governance changes were contrary to the statutory scheme and academic decision-making model under which the colleges operated. The parties were unable to reach an agreement in respect of these proposals. After an unsuccessful conciliation process, the strike began on October 16, 2017, and student instruction in the colleges stopped.

[10] Ontario took the view, which it did not communicate to OPSEU during the strike, that the students' academic term would be compromised if the strike lasted six weeks. In oral argument, OPSEU's counsel accepted that at some point the academic term would be compromised, did not argue that Ontario's six-week figure was unreasonable, and did not propose an alternate timeframe.

[11] On November 6, 2017, OPSEU and the Council each put forward settlement offers. The Council declared that its offer was final and requested that the Ontario Labour Relations Board schedule a vote on the offer by OPSEU members under s. 17(2) of the *CCBA*. The vote was held on November 14-16, 2017, and the Council's offer was rejected by 86% of the voters. OPSEU saw this result as significantly strengthening its bargaining position and creating momentum in its favour. On November 16, the parties met with Premier Kathleen Wynne, who told them that Ontario would use "all of the tools at [its] disposal" if a deal was not reached by 5 p.m. that day. No deal was reached, and the Council advised Ontario

that the parties were deadlocked. Later that day, Ontario announced it would introduce back-to-work legislation.

[12] Bill 178 received Royal Assent on November 19, 2017. The legislation, which came into force after five weeks of strike action, terminated the strike and required all outstanding bargaining disputes to be resolved by binding interest arbitration. On December 20, 2017, the arbitrator issued an award prescribing the terms for the new collective agreement for the period October 1, 2017 to September 30, 2021.

[13] As noted, OPSEU sought a declaration under s. 52 of the *Constitution Act, 1982* that Bill 178 is of no force and effect, on the basis that Bill 178 infringed its members' right to freely associate in striking under s. 2(d) of the *Charter* in a manner that was not justified under s. 1. OPSEU also sought damages under s. 24(1) of the *Charter*.

D. ISSUE 1: BY ENDING THE STRIKE, DID BILL 178 LIMIT THE RIGHTS OF OPSEU MEMBERS UNDER S. 2(D) OF THE *CHARTER*?

[14] The applicable law is set out in the 2015 labour trilogy, which was reaffirmed by the Supreme Court in *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, 491 D.L.R. (4th) 385, at paras. 17-37. The framework for evaluating alleged limits on freedom of association under s. 2(d) asks "whether activities are protected under s. 2(d) and whether the government action has, in purpose or effect, substantially interfered

with those activities": *Casinos*, at para. 20. In the labour context, s. 2(d) protects the right of workers to advance workplace goals through a collective bargaining process and to collectively withdraw their services (in other words, to strike) in pursuit of terms and conditions: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 ("*BC Health Services*"), at para. 87; *SFL*, at paras. 3, 75, 77. The Supreme Court stated in *Meredith*, at para. 24, that the test for determining whether there has been substantial interference remains the test set out in *BC Health Services*. Under that test, the question is "whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted" by the measure being challenged: *BC Health Services*, at para. 92. This is a "contextual and fact-specific" analysis: *BC Health Services*, at para. 92.

[15] This was the approach the application judge took. He noted, at para. 37: "While the timing of the Act may have accelerated the end to the negotiating process, the government assessed that it had reached the point of diminishing and, likely, no returns." He added, at para. 38: "Although that was a judgment call by government, there is nothing in the evidence that, on the balance, contradicts the government's assessment." The application judge concluded, at paras. 38-39, that because the parties had reached an impasse, "the legislation's imposition of

an alternative to stalled negotiations did not amount to a substantial interference with meaningful collective bargaining" and did not limit s. 2(d) of the *Charter*.

[16] The application judge erred by not considering this court's interpretation of the 2015 labour trilogy in *TTC*. At issue in that case was a complete ban on unionized TTC employees' ability to strike after the expiry of a collective agreement. Justice Dawe, speaking for the majority, and following the majority reasons of Abella J. in *SFL*, held that "because of the importance of the right to strike to the collective bargaining process, any complete ban on unionized workers' ability to strike after the expiry of a collective agreement will invariably 'substantially interfere' with their s. 2(d)-protected collective bargaining rights": *TTC*, at para. 40 (emphasis in original). The ban accordingly "does not require a case-specific inquiry into precisely how eliminating the right to strike has affected the collective bargaining process in the particular circumstances": *TTC*, at para. 40.

[17] In our view, the same logic applies to legislation that ends a strike that was properly called under the applicable legislation, as was true for this strike. Justice Abella's comment in *SFL*, at para. 3, must be respected by this court: "[T]he right to strike is an essential part of a meaningful collective bargaining process". Given the importance of the right to strike, "it should come as no surprise that the suppression of legal strike action will be seen as substantially interfering with meaningful collective bargaining": *SFL*, at para. 46. By ending a legal strike action, Bill 178 necessarily and substantially interfered with meaningful collective

bargaining. It removed a “necessary component” of the process – the ability to engage in a collective work stoppage – from OPSEU members’ hands: *SFL*, at para. 75. Even though this prohibition on striking was temporally limited, ending strike action for the duration of the collective bargaining process limited a protected activity under s. 2(d).

[18] Accordingly, by ending the strike, we find Bill 178’s passage limited the rights of OPSEU members under s. 2(d) of the *Charter* to freely associate in striking.

E. ISSUE 2: DID ONTARIO DEMONSTRABLY JUSTIFY ENDING THE STRIKE UNDER S. 1 OF THE *CHARTER*?

[19] Section 1 states that the *Charter* “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

[20] The method for assessing whether a limit on a fundamental freedom is demonstrably justified under s. 1 was prescribed by the Supreme Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7. A flexible, contextual approach has won out over a rigid application of *Oakes*, especially in the wake of *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; and *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906. Indeed, in La Forest J.’s view, the *Oakes* test is not a set of rigid rules to be applied, but “a checklist, guidelines for the

performance" of judicial duties: Gerard V. La Forest, "The Balancing of Interests under the *Charter*" (1992) 2 N.J.C.L. 133, at pp. 145-48.

1. Did the Government Have a Pressing and Substantial Objective in Ending the Strike?

[21] The first step of the *Oakes* test is to determine whether Bill 178's legislative objective was pressing and substantial: *Oakes*, at para. 69. This requirement exists because "not every government interest or policy objective is entitled to s. 1 consideration" – only those that are sufficiently important to warrant overriding constitutionally recognized rights or freedoms: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17, at para. 139.

[22] The first step of the s. 1 analysis is usually 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" (emphasis in original) and a "theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis": *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 25-26, *per* McLachlin C.J. and Major J. (dissenting, but not on this point).

[23] Identifying a sufficiently important objective is not onerous, and this step is more frequently used to properly define the impugned measure's objective for the proportionality analysis that follows: *Bracken v. Niagara Parks Police*, 2018 ONCA 261, 141 O.R. (3d) 168, at para. 70. In *TTC*, Dawe J.A. found the goal of the

impugned measure prohibiting strikes was to prevent serious health and safety, economic, and environmental concerns that would arise from a disruption of transit services in Toronto: at paras. 69, 76-78. He stated the question posed by the first step of the *Oakes* test was "merely whether the goal of preventing these harms can, in theory, justify some infringement of *Charter* rights": at para. 79. Justice Dawe found that averting those harms satisfied the requirement for a pressing and substantial objective: at paras. 76-78. The key question, in view of the potential harm, is whether, in the circumstances, the harm is capable of rising to a level that would justify limiting the right to strike.

[24] The application judge identified Bill 178's legislative objective at para. 44 of his reasons: "resuming classroom instruction at Ontario's 24 colleges, and the consequent mitigation of the harm inflicted on students by a lengthy strike in those institutions". The evidence before him established that the government intervened in the strike to "minimize the risk to the academic term, salvage the school year for students' employment and professional accreditation requirements, and address the substantial financial and personal implications for college students": at para. 44. He found this was a pressing and substantial objective, and OPSEU does not appeal this finding. Accordingly, Ontario has established it had a pressing and substantial objective in legislating an end to the strike.

2. Was There Proportionality Between Bill 178's Objective and the Means Chosen to Achieve It?

[25] The second *Oakes* step is to determine whether there was proportionality between Bill 178's objective of resuming college instruction and the means chosen to achieve it – ending the strike. This step engages three inquiries:

(1) Rational connection: Is there a causal link between the pressing and substantial objective of resuming full operation of the colleges and the limit of ending the strike?

(2) Minimal impairment: Did ending the strike impair collective bargaining no more than was reasonably necessary to accomplish the objective?

(3) Proportionate effects: Is there proportionality between the deleterious effects on collective bargaining of ending the strike and the salutary effects of doing so?

See *Carter*, at para. 94; *K.R.J.*, at para. 58; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at paras. 38-39; and *Hutterian Brethren*, at para. 48.

[26] Although the content of the three inquiries has remained consistent, the relative weight of each has evolved.

(1) Rational Connection

[27] The application judge found, at para. 49, that the "enactment of back-to-work legislation ending the strike and referring all issues to binding arbitration was rationally connected to the government's objectives of resuming college instruction and salvaging the academic year for college students." We agree. This finding was not appealed, nor was it addressed by the interveners.

(2) Minimal Impairment

a. Governing Principles on Minimal Impairment

[28] With the continuing evolution of the *Oakes* test, minimal impairment no longer plays the dominant role, especially in areas where complex social policy is under consideration and significant court deference is accorded to the legislature. The proportionate effects inquiry has become weightier.

[29] The evolution of the law can be seen in the changes in Professor Peter Hogg's longstanding text on constitutional law: Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2007) (loose-leaf 2025-Rel. 1). Professor Hogg originally took the position that the proportionate effects inquiry was "redundant": at § 38:22. Latterly, Professor Wade Wright, the current editor, favours what he calls a "competing view", that "while it may change the outcome only rarely, it nonetheless still has an important role to play, and may change the outcome in some cases": at § 38:22. This evolution is seen in the cases as well: see *Hutterian Brethren*, at paras. 75-78, *per* McLachlin

C.J., and at para. 149, *per* Abella J. (dissenting, but not on this point); and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 46. The idea that the proportionate effects inquiry was redundant was not accepted elsewhere: see Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed. (Toronto: LexisNexis Canada, 2017), at §§ 20.32-20.33; Dwight Newman, *Halsbury's Laws of Canada*, "Constitutional Law (Charter of Rights)", (Toronto: LexisNexis Canada, 2023 Reissue), at HCHR-23; and Michael Plaxton, *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* (Toronto: Irwin Law, 2019), at pp. 64-65.

[30] The governing principles of law on the minimal impairment inquiry are that Parliament or the legislature need not choose the absolutely least intrusive means to attain the pressing and substantial objective; the means selected must come within a range of means that limit the *Charter* right or freedom as little as reasonably possible: *R. v. Swain*, [1991] 1 S.C.R. 933, [1991] S.C.J. No. 32, at para. 64. Justice Wilson held that in circumstances where the legislature must accommodate divergent interests in crafting legislation, as is the case in labour relations, an impugned law would fail the minimal impairment inquiry only where there are alternative measures "clearly superior to the measures currently in use": *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, [1991] S.C.J. No. 52, at para. 170.

[31] Justice McLachlin's (as she then was) formulation of the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, was adopted by the Supreme Court in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 58: "The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator." Accordingly: "If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement" (citations omitted).

[32] Justice Gonthier's caution continues to resonate: "it is not sufficient that a judge, freed from all [policymaking] constraints, could imagine a less restrictive alternative": *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 112. Chief Justice McLachlin and Deschamps J. explained that "[t]he Court will not interfere simply because it can think of a better, less intrusive way to manage the problem": *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 94. They added: "What is required is that the [government concerned] establish that it has tailored the limit to the exigencies of the problem in a reasonable way."

[33] Finally, McLachlin C.J. stated in *Hutterian Brethren*, at para. 53: "In making this assessment, the courts accord the legislature a measure of deference,

particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."

[34] Judicial deference to the legislature at the minimal impairment stage has increasingly taken the form of a flexible approach that is sensitive to the context of the law in issue.

b. The Application Judge's Minimal Impairment Analysis

[35] The application judge recognized, at para. 51, that the burden is on the government to establish that its chosen measure limits the right as little as reasonably possible to achieve the legislative objective. He observed that for a prohibition on the right to strike to qualify as minimally impairing, the government must provide for a process to resolve labour disputes in a fair, effective and expeditious manner: at para. 52. We see no error in the application judge's articulation of the law.

[36] After reviewing the characteristics of the third-party arbitration model that replaced the right to strike under Bill 178, the application judge found, at para. 56, that Bill 178's "implementation of 'an impartial and effective dispute resolution process' in lieu of a strike and direct negotiations satisfies the minimally impairing requirement of section 1 of the *Charter*", citing *SFL*, at para. 92.

c. OPSEU's Arguments

[37] OPSEU argues that the application judge made three errors in his assessment under the minimal impairment inquiry.

(1) He failed to consider that the timing of the government's 3.5 hour "bargaining ultimatum" made its intervention more than minimally impairing.

(2) He failed to notice that "[t]he negative impacts of third party dispute resolution, including interest arbitration, were material to the minimal impairment analysis".

(3) He erred in concluding that "because the interest arbitration model imposed by Bill 178 did not suffer from the same procedural flaws as the interest arbitration model imposed on postal workers in [*Canadian Union of Postal Workers v. Her Majesty in Right of Canada*, 2016 ONSC 418, 130 O.R. (3d) 175 ("*CUPW 2016*")], Bill 178 was necessarily minimally impairing".

[38] Each of these asserted errors is also relevant to OPSEU's arguments on the application judge's analysis of proportionate effects.[2] To avoid repetition, we address them there.

[2] The alternative OPSEU put in oral argument was something short of a total end to the strike, like work-to-rule. It is not clear that this alternative was put to the application judge, and we decline to address it as a new issue on appeal.

[39] As we will explain, the application judge's application of the law on minimal impairment was correct.

(3) Proportionate Effects

a. Governing Principles on Proportionate Effects

[40] The principles governing the proportionate effects inquiry under s. 1 were set out in *Hutterian Brethren*, at para. 73. Chief Justice McLachlin asks the basic question: "[I]s the limit on the right proportionate in effect to the public benefit conferred by the limit?" In answering this question, the court must balance the "salutary and deleterious effects of the law": *Hutterian Brethren*, at paras. 103, 100. The task of balancing "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'": *Hutterian Brethren*, at para. 76. This accounting entails a broad assessment of whether the "benefits of the impugned law are worth the cost of the rights limitation", or whether "the deleterious effects are out of proportion to the public good achieved by the infringing measure": *Hutterian Brethren*, at paras. 77-78. See also *OECTA*, at para. 215, and *TTC*, at paras. 125-26.

[41] The application judge instructed himself correctly on the legal principles. He noted correctly, at para. 57, that in weighing the societal benefits against the law's deleterious effects on the holders of the right, the court "examines the 'practical impact' … of the impugned legislation," citing *JTI-Macdonald*, at para. 45.

[42] In *K.R.J.*, Karakatsanis J. assessed proportionate effects. Speaking for the majority, she observed, at para. 79:

> While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final step permits courts to address the essence of the proportionality enquiry at the heart of s. 1. It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms" (J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 *Osgoode Hall L.J.* 1, at p. 66). In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective. [Footnote omitted.]

[43] The task of balancing must take into account the contextual factors involved and the government's reasons cumulatively, recognizing the possibility that none of them, taken in isolation, would necessarily be sufficient to justify the rights limitation: see *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 85.

[44] As for the standard of appellate review, Dawe J.A. stated in *TTC*, at para. 126, that the "normative and value-laden balancing of the relevant factors is a question of law that is reviewable on a correctness standard." He added:

"However, to the extent that the assessment of the salutary and deleterious effects of legislation depends on factual findings, the findings made by the application judge must be respected unless they are tainted by palpable and overriding error."

b. The Application Judge's Proportionate Effects Analysis

[45] The application judge, at para. 60 of his reasons, identified the salutary effect of Bill 178 as "the respite it delivered to student members of the public disadvantaged due to the OPSEU strike". He then addressed the deleterious effects cited by OPSEU. The application judge rejected the complaint that the legislation was premature and came a week too early: see para. 61. He also rejected the evidence OPSEU offered by Dr. Stephanie Ross as showing that the strike would not "produce lasting negative effects across the board on students"; instead, he found that the relevant harm was the students' loss of a school year and preferred Dr. Paul Grayson's evidence that the correct measure of harm was more immediate: see paras. 62-63.

[46] The core of the application judge's proportionality decision is captured in paras. 64-66 of his reasons. He noted, at para. 64: "Counsel for Ontario submit, and it is difficult not to agree, that the weighing of competing interests here is not amenable to scientific precision." He noted, at para. 65: "This kind of sociological assessment is within the core competence of government," adding that: "In tackling a complex social problem or question, the government is entitled to a degree of deference", citing *JTI-Macdonald*, at para. 43. On the one hand, "[the government]

exercised its responsibility to remedy the students' plight by terminating OPSEU's strike", and, on the other hand, "it exercised its responsibility to ensure a fair replacement process for collective bargaining by creating a neutral arbitral process where, as with direct labour negotiations, no outcomes were off the table": at para. 65 of the application judge's reasons.

[47] The application judge's final assessment, at para. 66 of his reasons, was this: "[T]he government did what it could to ensure that the deleterious effects on OPSEU members of its intervention into the collective bargaining process did not outweigh the broad societal benefits gained through that intervention." He acknowledged that there was interference with the collective bargaining process, "but it was a measured, proportionate interference that was remediated by the appropriate arbitration put in its place": at para. 66. Accordingly, in his view "the government did not engage in a disproportionate undermining of OPSEU members' rights": at para. 66.

c. OPSEU's Arguments

[48] OPSEU argues that the application judge made four errors, all of which are relevant to the proportionate effects analysis:

(1) He did not apply the test articulated by Dickson C.J. in *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, [1987] S.C.J. No. 8.

(2) He accepted the government's evidence of harm.

(3) He gave only "minimal consideration" to the deleterious effects of Bill 178 on members' collective bargaining rights.

(4) He found interest arbitration under Bill 178 to be an adequate substitute for OPSEU's right to strike.

We address each in turn.

i. Did the Application Judge Err by not Applying the Test in *RWDSU*?

[49] OPSEU is seeking a strong finding that it should be very difficult, if not virtually impossible, for a legislature to enact back-to-work legislation, and argues that the test for determining the proportionate balance of salutary and deleterious effects in a right-to-strike context was set by Dickson C.J. in his concurring judgment in the early *Charter* case *RWDSU*, at para. 30. OPSEU submits the test is "whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focussed in its intensity as to justify the limitation": *RWDSU*, at para. 30. But the interpretation of s. 1 of the *Charter* has evolved with time and experience. The governing principles of proportionate effects are as set out above, and there is no uniquely strong labour law test. No appellate court has adopted the *RWDSU* test. The application judge did not err in not applying it.

ii. Did the Application Judge Err in Accepting Ontario's Evidence of Harm?

[50] OPSEU argues that the effect on college students of losing a semester was not so massive and immediate and so focused in its intensity as to justify ending the strike under the *RWDSU* test. Although that test does not apply, in our view, the effect of the strike on college students plainly met it.

[51] The faculty strike paused the education of hundreds of thousands of students at Ontario's 24 colleges. If the strike continued, it threatened to compromise students' ability to complete the academic term and year. Between October 15 and November 19, the Ministry of Training, Colleges and Universities received approximately 700 pieces of correspondence from college students, family members, and members of the public describing the financial, health, and academic impacts of the strike. Students told the Ministry that their ability to cover ongoing expenses, such as child care, rent and residence, fuel and parking, professional association membership, and debt payments, would be in jeopardy if additional instruction was needed in the evenings and on weekends to make up for time lost during the strike. If the length of the school year was extended to make up for the strike, that would limit students' ability to secure summer, co-op and full-time employment. Students' ability to secure accreditation from professional licensing bodies was also at risk because of missed content and hours of instruction during the strike.

[52] The application judge found that it was “self-evident” that the adverse impact on students of a lengthy strike would be severe: at para. 61. In doing so, he agreed with Ontario’s expert witness, Dr. Grayson, that the relevant focal point for assessing the impact of the strike was the harm students would suffer at the time of the strike and loss of the school year: at para. 63. Ontario’s expert opined that it was “highly probable” that the Ontario college strike had “considerable negative academic, economic, and stress consequences” for students, based on his previous research of the impact of a 1997 strike on York University students. The application judge found the expert evidence of Dr. Ross, tendered by OPSEU – that a previous lengthy strike at York University did not cause long-term negative effects – was not relevant, because the government’s concern was the short-term effect of the loss of a school year on students: at para. 62.

[53] The application judge’s deference to Ontario in making the assessment it did was entirely consistent with the authorities. The court may rely on a “reasoned apprehension of [the] harm” the government seeks to address when there is “inconclusive or competing social science evidence” relating to that harm: *Harper*, at para. 77. Ontario was not required to provide scientific studies to document the harm to students. The evidence before the application judge reasonably substantiates Ontario’s concern and the harm it sought to prevent by ending the strike.

[54] We defer to the application judge's factual findings as set out above. OPSEU has not established that he made any palpable and overriding errors.

iii. Did the Application Judge Give Only Minimal Consideration to Bill 178's Deleterious Effects on OPSEU Members?

[55] OPSEU argues that the application judge gave only "minimal consideration" to the deleterious effects of Bill 178 on members' collective bargaining rights in two respects. First, he "gave little or no consideration to the deleterious effects of the Government's bargaining ultimatum and interference in the strike," particularly that Bill 178 "prematurely intervene[d] in bargaining more than a week before its self-declared six-week deadline".

[56] It was especially galling to OPSEU that Bill 178's advent was announced immediately after the union membership overwhelmingly rejected the Council's final offer, which it claims gave the union momentum it hoped to bring into the bargaining process. Instead, the Premier gave the parties 3.5 hours to reach a settlement before the legislative process would begin.

[57] OPSEU argues that Ontario could have provided the parties with additional time to bargain in the wake of the members' rejection of the Council's offer, while still achieving its objective of resuming instruction at Ontario's colleges prior to the semester's six-week "critical tipping point". OPSEU argues that the intervention via the ultimatum and Bill 178 were accordingly not minimally impairing.

[58] The application judge addressed the issue of prematurity at paras. 30-31:

> According to the government's evidence, at the six-week point legislative action would have been too late to save the academic year and to prevent the turmoil that the year's loss would cause to college students. At the five-week point, the result is less clear. Legislative action may have interfered with collective bargaining, or, perhaps, it may have just ended the ongoing standoff between OPSEU and the Council. That assessment is inevitably speculative.
>
> It is arguable that in these circumstances the benefit of the doubt should be given to the government as the policy-making authority. After all, the government's prompt resort to legislative intervention had the effect of cutting short the negotiating period, but it also ensured that the school year would be saved. The evidence is indeterminate as to whether the government acted precipitously in interfering with collective bargaining, or acted responsibly in getting the students back to the classroom in the face of stalled collective bargaining.

[59] In support of its argument, OPSEU picks out the application judge's comment, in para. 31, that "[t]he evidence is indeterminate as to whether the government acted precipitously", and argues that the application judge's reasoning was internally inconsistent. With respect, this selective quote decontextualizes the application judge's observation, which was made while he was discussing whether the strike should have been stopped later at the six-week mark, instead of the five-week mark. On the precise timing of Bill 178, he rightly gave "the benefit of the doubt" to the government "as the policy-making authority": at para. 31. His reasoning was internally consistent.

[60] OPSEU's prematurity argument is an invitation to this court to micromanage Ontario's response. We decline the invitation. As we noted earlier, where the government can point to a pressing and substantial objective rooted in the evidence, as it did in this case as found by the application judge, courts should defer to that policy choice rather than engage in an overly technical analysis of the evidence to assess and second-guess the validity of the policy choice.

[61] This is consistent with the deference owed to governments in setting policy objectives, particularly in the area of labour relations, which engages core government competencies of making complex policy decisions, allocating resources in society, and responding to situations of crisis: see *OECTA*, at paras. 170-71; *Gordon*, at paras. 224-25, 232-34, 293. Courts should defer to reasonable policy choices made by government rather than engage in an overly technical analysis of the evidence to assess the validity of the policy choices: see *OECTA*, at para. 182.

[62] OPSEU's second argument is that the application judge gave only minimal consideration to Bill 178's deleterious effects on its members by not taking into account the "detrimental impacts of interest arbitration on the collective bargaining relationship between the parties". OPSEU builds on a point made in *SFL*, at para. 60, that "[a]lternative dispute resolution mechanisms … are generally not associational in nature and may, in fact, reduce the effectiveness of collective bargaining processes over time" (citation omitted).

[63] OPSEU quoted from the lower court's decision in *TTC*, citing the evidence in that case, which is similar to the evidence summarized below by the Ontario Federation of Labour ("OFL"), an intervener in this appeal, in a quote we excerpt. We note that, speaking for the majority in this court's judgment in *TTC*, Dawe J.A. observed, at para. 140: "Legislation that requires workers to return to work, and to submit outstanding bargaining issues to binding arbitration, raises different concerns than are presented by legislation that eliminates the right to strike from the outset." He added: "When (or if) a constitutional challenge to back-to-work legislation arises, it will have to be decided on its own particular facts and its own particular circumstances."

[64] OPSEU's argument is put most succinctly by OFL:

> The evidence of experts in both the *CUPW 2024* and *OPSEU* cases, together with numerous academic articles and studies, have demonstrated the extent to which resort to imposed binding interest arbitration can have both a chilling and narcotic effect on bargaining parties, who become dependent upon it and who are as a result less able to achieve mutually acceptable outcomes through the hard work of free collective bargaining. For example, one study examined contract data from three sectors (police, firefighters and hospitals) in Ontario over a thirty-year period, and confirmed the existence of a significant narcotic effect (defined as "increased reliance on the use of arbitration or positive state dependence") arising from the use of interest arbitration. [Footnotes omitted.]

[65] The issue was raised by OPSEU's expert, Dr. Ross, and was reviewed by the application judge who commented on her evidence and did not accept it, although he did not address this specific point. Ontario explains:

> [T]here is no evidence in the Record that the Act's termination of the strike and referral of issues to interest arbitration created any chilling or narcotic effect on collective bargaining. There is no historical pattern of back-to-work legislation as in *TTC*. This was the first strike by OPSEU Academic staff in the four rounds of bargaining since the current collective bargaining legislation came into force in 2008. The Application Judge found, and the evidence supports, that the government did not even suggest the possibility of legislation until after full and exhaustive collective bargaining.

[66] The Council adds that "there is no air of reality to the Union's speculative suggestion that interest arbitration could have had a 'chilling effect' on the parties."

[67] We do not fault the application judge for not addressing this issue directly. He was clearly in command of all the evidence and the arguments and found this one not to be compelling. This is no surprise. The bargaining pattern in the college sector gives no support, on the evidence, to the proposition that possible interest arbitration imposed a chilling or narcotic effect on the parties' bargaining relationship in the circumstances of this case or in the future.

iv. Did the Application Judge Err in Finding that Interest Arbitration Under Bill 178 was an Adequate Substitute for OPSEU's Right to Strike?

[68] OPSEU argues that the application judge erred in considering whether interest arbitration was an adequate substitute for OPSEU's ability to exercise the right to strike in his s. 2(d) analysis, rather than in his s. 1 analysis, as required by *TTC*, at para. 60. To the contrary, he addressed the argument both in his s. 2(d) analysis and in proportionate effects. The application judge found, at para. 65, in the section of his reasons on proportionate effects, that the government "exercised its responsibility to ensure a fair replacement process for collective bargaining by creating a neutral arbitral process where, as with direct labour negotiations, no outcomes were off the table", that is, "appropriate arbitration".

[69] We reject OPSEU's argument that the application judge's analysis was simplistic, because, having found that the interest arbitration procedure imposed in Bill 178 "did not suffer the same flaws as the procedure before the [Superior] Court in *CUPW 2016*, [the application judge] erroneously assumed that this renders the legislation minimally impairing." This does not characterize his analysis fairly. He noted, at para. 55, that the "form of arbitration imposed by the Act does not dictate an outcome or skew the process in the same rights-infringing way." Bill 178 "did not dictate any specific terms, it imposed a neutral form of arbitration, and it resulted in a 'historic' achievement for OPSEU in reaching a new collective agreement": at para. 55. Interest arbitration prescribed by Bill 178 met the test

stipulated in *SFL*, at para. 93, of being a "meaningful alternative mechanism for resolving bargaining impasses". The fact that Bill 178 did not replicate the lack of neutrality in the impugned legislation in *CUPW 2016*, which the application judge noted at para. 33, supported his conclusion that Bill 178 was a "meaningful alternative mechanism" for resolving bargaining impasses, but was not its foundation.

[70] The application judge did not simply compare a less damaging approach with a more damaging alternative, as OPSEU argues, citing *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, 384 D.L.R. (4th) 385, at para. 386, *per* Donald J.A. (dissenting), rev'd substantially for the reasons of Donald J.A., 2016 SCC 49, [2016] 2 S.C.R. 407. Rather, the application judge engaged with the characteristics of the arbitration model selected and concluded that the limit on OPSEU members' s. 2(d) right, and the deleterious effects that flowed, were mitigated by the substitution of interest arbitration for strike activity, consistent with the Supreme Court's guidance. His findings support both his conclusion that Bill 178 was minimally impairing of the *Charter* right and that its effects were proportionate.

[71] We observe that OPSEU took no issue with the substantive approach to interest arbitration taken by Bill 178, or even with a single phrase in it. Indeed, it is hard to imagine, in both preamble and text, a more generous form of unrestricted

interest arbitration. The application judge did not err in finding that interest arbitration under Bill 178 was an adequate substitute for OPSEU members' strike.

F. DISPOSITION

[72] The appeal is dismissed with costs set at $50,000, payable by OPSEU to Ontario, as agreed by the parties. No costs will be awarded in respect of the interveners.

Released: February 6, 2026 "S.E.P."

"S.E. Pepall J.A."
"P. Lauwers J.A."
"J. Dawe J.A."