SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Union of Public Employees (CUPE) v. Nova Scotia (Attorney General)*, 2026 NSSC 57

Date: 20260225
Docket: HFX No. 498647
Registry: Halifax

Between:

Canadian Union of Public Employees, Canadian Union of Public Employees, Local 1867, Canadian Union of Postal Workers, Nova Scotia Government and General Employees Union, Nova Scotia Nurses' Union, Nova Scotia Teachers Union, Service Employees' International Union Local 2, Unifor, International Union of Operating Engineers Local 727

Applicants

v.

Attorney General of Nova Scotia representing His Majesty the King in right of the Province of Nova Scotia

Respondent

DECISION - CONSTITUTIONAL CHALLENGE

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated March 5, 2026.

Judge: The Honourable Justice Ann E. Smith

Heard: June 2, 3, 4 & 5, 2025, in Halifax, Nova Scotia

Counsel: Jillian Houlihan, for the Applicants
Adam Goldenberg, for the Defendant

By the Court:

INTRODUCTION

[1] This decision concerns the constitutionality of provincial wage restraint legislation passed by the Provincial Government of then Premier Stephen McNeil in 2017. The dispute before the Court concerns the impact of that legislation on the section 2(d) *Charter* rights of unionized employees.

[2] The Supreme Court of Canada has written decisions in this area of the law since 2005, as have appellate level courts in various Canadian provinces. In that regard, the Supreme Court of Canada has set out a test for Courts to follow when considering such wage restraint legislation in the context of section 2(d) rights. The test and the analysis which it necessitates is context driven and fact specific.

BACKGROUND

[3] On December 14, 2015, the Government of Nova Scotia introduced wage restraint legislation in the form of the *Public Services Sustainability (2015) Act* ("Bill 148", the "PSSA", or "the *Act*"). The Legislature passed Bill 148 on December 18, 2015. It was not proclaimed into force until August 22, 2017.

[4] Bill 148 was enacted during a round of public sector collective bargaining that began in or around 2014. Bill 148 mandated a wage freeze in the first two years of all public sector collective agreements negotiated during the applicable round of collective bargaining. Bill 148 also ended the accrual of public service awards, a long-standing monetary benefit found in many public sector collective agreements.

The Position of the Applicants

[5] The Applicants of (the "Unions"), nine public sector unions in Nova Scotia, say Bill 148 violated s. 2(d) of the *Canadian Charter of Rights and Freedoms* by substantially interfering with the rights of tens of thousands of public sector workers to pursue their collective interests through free and fair collective bargaining. The Applicants say the *Act* cannot be saved under s. 1.

The Position of the Government

[6] The Attorney General of Nova Scotia (the "Province" or "the Government") says Bill 148 merely provided a framework for collective bargaining on wage issues and public service awards. This framework, which was part of the Government's response to serious fiscal circumstances, reflected compromises that the Government had reached in free collective bargaining with multiple public sector bargaining

units. The Province says that Bill 148 did not completely prohibit wage increases; it left room for meaningful negotiation and allowed for a process of exemption.

[7] According to the Province, Bill 148 did not undermine the Government's ability to engage in good faith collective bargaining or substantially interfere with the process by which public sector workers could – and in fact did – associate with one another to pursue common aims in relation to their working conditions. In other words, the *Act* did not limit the freedom of association guaranteed by s. 2(d) of the *Charter.* In the alternative, even if it did, the Province submits that any such limit would be reasonable and demonstrably justifiable in a free and democratic society.

The Applicant Unions

[8] The Nova Scotia Government and General Employees Union ("NSGEU") is the largest public sector union in Nova Scotia. NSGEU represents over 30,000 members, including civil servants, nurses, health care workers, long-term care and community care workers, police officers, and education workers in public education and post-secondary education, among others.

[9] The Canadian Union of Public Employees ("CUPE") represents approximately 15,000 public sector workers in Nova Scotia, including employees

caring for people in acute care, long-term care, and home care, as well as employees providing community services, housing services, and educational services.

[10] CUPE Local 1867 represents approximately 1,000 highway workers responsible for maintaining, clearing, and constructing Nova Scotia's 26,000 kilometers of highways.

[11] The Nova Scotia Teachers Union ("NSTU") represents approximately 10,000 teachers, speech language pathologists, school psychologists, and school social workers at public schools across the province.

[12] The Nova Scotia Nurses' Union ("NSNU") represents approximately 9,000 Registered Nurses, Licensed Practical Nurses, and Nurse Practitioners in acute care, long-term care, and community care facilities throughout Nova Scotia.

[13] Unifor represents approximately 3,500 public sector employees in Nova Scotia, including employees at the IWK Health Centre ("IWK") and other acute care health facilities, employees at long-term care facilities, and residential counsellors.

[14] Service Employees' International Union ("SEIU") Local 2 represents employees working in nursing home and residential care facilities, as well as employees in the education sector across Nova Scotia.

[15] International Union of Operating Engineers (“IUOE”) Local 727 represents paramedics and flight critical care nurses who provide air and ground emergency and non-emergency ambulance services.

[16] Canadian Union of Postal Workers (“CUPW”) represents the employees working at the Emergency Medical Care Inc. communications centre in Dartmouth, including paramedic communications officers, communications officers, and transfer administrators.

[17] The members of the Applicant Unions have varying employment relationships with the Province. Civil servants and highway workers are employed directly by the Province via the Public Services Commission. Teachers are employed by both the Province, via the Minister of Education and Early Childhood Development, and the applicable Regional Centre for Education or Conseil Scolaire Acadien Provincial. Other public sector employees are employed by independent employers who receive funding from the Province. In every case, the Province as the funder dictates bargaining positions on monetary items such as wages.

The Evidence

[18] The Applicant Unions filed 17 affidavits, including 4 rebuttal affidavits. Two of the affiants were experts who attached their respective reports as exhibits. The Province filed three affidavits, including one from its expert attaching his report.

[19] I have reviewed each of these affidavits, even if I do not refer to a specific affidavit in this decision.

The Structure of Public Sector Labour Relations in Nova Scotia

[20] The structure of public sector labour relations in Nova Scotia is described in the affidavit of Roland King, filed by the Province. Mr. King began working for the Province as the Director of Health Sector Labour Relations and Compensation in spring of 2013, before becoming the Executive Director of Labour Relations in the fall of 2013. He became the Associate Deputy Minister of Labour Relations in January 2018. From the time of his appointment as Executive Director, Mr. King was responsible for the overall coordination of public sector labour relations for the Province.

[21] The Province, through the Public Service Commission ("PSC"), is the employer with a direct bargaining relationship with two unions: the NSGEU with respect to a bargaining unit composed of civil servants, and CUPE with respect to a bargaining unit of road workers (CUPE Local 1867). The PSC is also in a direct

employment relationship with other groups of employees, including Crown attorneys, medical residents and non-unionized employees. Although not performed under the auspices of any specific legislative labour regime, the PSC bargains collectively with each of these groups (although the Nova Scotia Health Authority ("NSHA") leads the bargaining with the medical residents).

[22] The NSTU represents teachers in the public school system throughout the Province. However, there are two employers for the single bargaining unit of teachers:

(a) the Province, through the Minister of Education and Early Childhood Development, is the employer with a direct bargaining relationship with NSTU for certain matters, including teacher salaries, insurance plans and general conditions of employment across the Province; and

(b) the individual education entities are the employers with a direct bargaining relationship with the NSTU for other matters, such as staffing provisions, sick leave and other leaves.

[23] The rest of the public sector labour relations is conducted between independent, arm's length employers and unions certified as bargaining agents to represent employees of those arm's length employers. Although these employers are

independent from the Province, they receive direct funding from it. In addition, those arm's length employers may themselves have more than one bargaining unit, represented by more than one union. For example, the NSHA and the IWK both have four bargaining units each, while other employers, such as education entities and long-term care facilities, may have two, three or even four bargaining units with different unions.

[24] In total, there were approximately 325 collective agreements in the broader public sector in Nova Scotia during Mr. King's tenure with the Province.

[25] Mr. King explained that within the broader public sector, the types of leverage available to parties to obtain a particular result during bargaining is constrained by the legislative scheme applicable to the particular bargaining unit. For instance, the *Civil Service Collective Bargaining Act*, R.S.N.S. 1989, c. 71, and the *Highway Workers' Collective Bargaining Act*, S.N.S. 1997, c. 1, provide that in the event of the failure to reach an agreement during collective bargaining, the Province cannot lockout its employees, nor can the unions take their members out on strike. The issues in dispute must instead be referred to a third-party interest arbitrator to impose an agreement on the parties.

[26] The *Essential Health and Community Services Act*, S.N.S. 2014, c. 2, allows for strikes and lockouts in the broader health sector (including health authorities, nursing homes and other long term care facilities), provided the affected employer and union have reached an agreement which provides for the continuation of essential services in the event of a strike or lockout.

[27] For all other bargaining units covered by either the *Teachers' Collective Bargaining Act*, R.S.N.S. 1989, c. 460, or the *Trade Union Act*, R.S.N.S. 1989, c. 475, there are full strike and lockout rights for unions and employers.

Expert Evidence

[28] The Applicant Unions filed expert reports prepared by Robert Hebdon and Donald Savoie. The reports were originally drafted in December 2017 in the context of *Reference re Bill 148*, *supra*. Dr. Hebdon updated his report in July 2024, while Dr. Savoie prepared an addendum to his report in July 2023.

[29] The Province filed an expert report by Trevor Tombe. Dr. Tombe drafted his report in January 2025.

i) *Hebdon report*

[30] Robert Hebdon is an Emeritus Professor in the Organizational and Behaviour Area, Desautels Faculty of Management, McGill University. He has previously

authored reports opining on the impact of similar wage and compensation restraint legislation on collective bargaining in Manitoba and Ontario.

[31] Dr. Hebdon described the "central question" he was asked to address in his report as "the impact of Nova Scotia's *Public Services Sustainability (2015) Act* (PSSA) on collective bargaining" (Hebdon report, para. 1).

[32] Dr. Hebdon opined that "[a]ttempts by Government to legislate issues off the bargaining table or to directly take them out of the collective agreement are abuses of employer power in collective bargaining" (Hebdon report, para. 51.) He noted that "wages and other monetary issues play a vital role in virtually all aspects of collective bargaining", and that when those issues have been pre-determined, "the union is left with almost no ability to exercise bargaining power on non-monetary issues" (Hebdon report, paras. 23, 42). Expanding on this point, Dr. Hebdon wrote:

> 60. With such key issues as wages and service awards unilaterally removed from the bargaining table, meaningful collective bargaining is all but impossible. The union has suffered a significant loss in bargaining power since wages cannot be used to tradeoff for other priority issues. For example, if the union's highest priority was job security it would have no leverage to achieve this goal in bargaining because wages have been predetermined. In other words, a tradeoff between wages concessions and job security improvements is almost impossible under the PSSA.

[33] In addition to the loss of bargaining power, taking monetary issues off the table damages the essential democratic processes between the union and its members:

> 43. Collective bargaining is more complex than just across-the-table negotiations between management and labour. A critical element, as discussed above, is the democratic involvement of the union membership in formulating proposals, setting priorities, electing bargaining team members that represent various member interests, resetting priorities as negotiations progress through team caucuses, and finally voting on the final package. By removing the key monetary issues from the scope of bargaining, the PSSA damages these political sub-processes of collective bargaining. Under the PSSA restrictions, the union members can no longer voice their true preferences or if they do the union cannot satisfy their demands. This builds frustration and cynicism on the part of union members in the institution of collective bargaining and can lead to internal union conflict including the rejection of tentative settlements. These rejected settlements may damage both the relationship between the union and its members but also between the union and management.

[34] According to Dr. Hebdon, the process of meaningful collective bargaining is not preserved by s. 17, which purports to create a mechanism to allow unions to apply a portion of realized cost savings to fund wage increases subject to the approval of the Treasury Board:

> …55. The process as explained is problematic for several reasons. First, as indicated above, the union has lost much of its bargaining power or leverage because wages have been unilaterally predetermined by Government and the key issue of service awards has been unilaterally taken off the bargaining table. It is questionable, therefore, whether the process can reach the necessary level of intensity to qualify as negotiations. Collective bargaining assumes that labour and management have relatively equal bargaining power. Second, the Treasury and Policy Board is part of the same bureaucracy that introduced and administers the PSSA. It is an arm of the employer in collective bargaining and as such is neither neutral nor impartial. Thus, the dispute settlement mechanism in the event of an impasse in these 'negotiations' is biased and unfair. Third, the savings must be realized before an approved portion can be used to fund improvements in monetary

> issues. It could take years for the savings to be realized and at the end of this vague process, the employees only get an unspecified fraction of the savings. An unknown fraction to be determined by the Government's Treasury and Policy Board. It is hard to imagine how this process could ever work. In any case, it is not a process of viable collective bargaining.

[35] Dr. Hebdon further opined that Bill 148 prevents interest arbitration from achieving its fundamental purpose as a substitution for the right to strike, which is to replicate the outcome that would be achieved through free collective bargaining. As a result of Bill 148's restrictions on arbitral awards, "interest arbitration has become an instrument of Government restraint policy" (para. 59).

ii) *Savoie report*

[36] Donald Savoie holds the Canada Research Chair in Public Administration and Governance – Level 1 at the Université de Moncton. Dr. Savoie was asked to opine on the accuracy of several claims made by the Nova Scotia Government to justify introducing Bill 148. These claims included that Nova Scotia spends 52% of its budget on compensation, that it has the slowest economic growth in real GDP of any province since 1990, and that its expenses have exceeded its revenues in 20 out of the last 30 years. Dr. Savoie was also asked for comment on how the Government's finances differed from December 2015 (when the legislation was passed) and August 2017 (when the legislation was proclaimed), and whether the Government's financial situation in December 2015 to August 2017 differed from the 2008-2009

global financial downturn that led the federal Government to introduce the *Expenditure Restraint Act*.

[37] After reviewing the available data, Dr. Savoie could not conclude that the Nova Scotia Government was wrong when it claimed that 52% of its budget went to compensation for public servants. He stated at page 11 of his report:

> In calculating compensation for employees as a percentage of the total expenditure budget, some provincial governments will include employees with provincial government enterprises (Crown corporations) while others do not. In arriving at the 52 percent figure, the Government of Nova Scotia included "all employees – provincial government employees, health and social service institutions, local school boards and provincial government business enterprises."
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> …
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> In brief, depending on what you count, Nova Scotia only spends 40 percent of its provincial budget on employee compensation … This suggests that five provincial governments spend a higher percentage of their budget on employee compensation than does Nova Scotia. But if you include provincial government employees broadly defined, the percentage is considerably higher for Nova Scotia.

[38] Dr. Savoie concluded that between 1990-91 and 2015-2016 (25 years), Nova Scotia operated 16 years in deficit and 10 years in surplus. While Manitoba outperformed Nova Scotia, Nova Scotia outperformed both Newfoundland and Labrador and New Brunswick. Dr. Savoie's research confirmed that Nova Scotia has had the slowest economic growth in real GDP of any province since 1990.

[39] As to the difference, if any, between the Government's finances in December 2015 and its finances in August 2017, Dr. Savoie noted that in September 2017, the Finance Minister told the Legislature that the Government was tabling its second

balanced budget, which projected a surplus of $131.6 million, with a positive net position of $21.3 million. The Minister also announced the Government was cutting income taxes by increasing the tax-free basic personal amount by $3,000 for those with taxable income under $75,000. Dr. Savoie wrote that this information "makes the case that, in recent years, the Nova Scotia Government is doing substantially better than its peers" (Savoie report, p. 11). Dr. Savoie further stated that "[t]he Government of Nova Scotia's fiscal situation is also doing substantially better than it did in 2014-15" when the Finance Minister declared that the Government was projecting a deficit of $279 million (Savoie report, p. 12).

[40] Dr. Savoie opined that there was no comparison between the fiscal challenge facing Nova Scotia in 2014-15 and the crisis faced by the federal Government in 2008-2009:

> … [T]he Nova Scotia Government was facing a far more important fiscal challenge in 2014-15. It was facing another deficit on the heels of a $677 million deficit in fiscal year 2013-14, which, at the time, was higher than the deficits in New Brunswick, Manitoba and Newfoundland and Labrador (according to the Department of Finance Fiscal Reference Tables).
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> Though the challenge was demanding, it does not compare to what some Canadian governments were confronting in the immediate aftermath of the 2008-09 economic downtown. The federal government was looking at a $55,598 billion deficit in 2009-10 (the largest deficit to date for the federal government). The then federal Minister of Finance labelled the situation a "crisis" and told the House of Commons that on November 28, 2008, "Forecasters around the world did not predict and could not have predicted the full force of this economic crisis. It is affecting Canada."
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> (p. 12)

[41] As to whether the Government of Nova Scotia could have addressed the province's structural deficit without resorting to Bill 148, Dr. Savoie concluded:

> The answer is "yes, but…" (I note that other jurisdictions have), Quebec, for example, did it without resorting to Nova Scotia-like legislation. I also note that two governments, the federal and New Brunswick governments, did away with retirement allowances without resorting to legislation. However, the "but" is an important "but." The "but" is that governments wishing to address a structural deficit have to make difficult political decisions on both the revenue and expenditure sides – there is simply no other way. Nova Scotia could have increased taxes to deal with its structural deficit, the province has access to a dozen revenue sources from personal and corporate income tax, tobacco tax, HST to Motive Fuel Tax. To be sure, no easy political decisions when looking at increasing taxes. It could have introduced more spending cuts in over a dozen sectors or departments and agencies from Agriculture, Education and Wellness, Labour and Advanced Education to Assistance to Universities. Again, to be sure, no easy political decisions.
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> (p. 15)

iii) *Tombe report*

[42] Trevor Tombe is a professor in the Department of Economics at the University of Calgary. Dr. Tombe was engaged by the Province to answer the following question:

> Under what conditions would it be sound fiscal policy for a provincial government to intervene to reduce its public sector labour costs?

[43] In answering this question, Dr. Tombe was asked to comment on the following:

a) To what extent, if any, is it relevant that the government is facing a structural deficit or a cyclical deficit?

b) To what extent, if any, is it relevant to take into account the demographics of the province?

c) What other factors would be relevant?

d) Are they any features of Nova Scotia's financial situation in 2015 that would be relevant?

[44] Dr. Tombe summarized the "key messages" of his report at page ii:

- Fiscal policy decisions to reduce public sector labour costs can be consistent with long-term sustainability when demographic trends and rising expenditure pressures, such as healthcare costs, threaten future fiscal capacity.
- The presence of a structural rather than cyclical deficit may heighten the need for long-term corrective measures, but forward-looking fiscal planning remains essential regardless of the deficit's nature.
- Nova Scotia's constrained revenue-raising capacity, due to its highly elastic tax base and high tax rates, limited the government's ability to address fiscal challenges through taxation, making expenditure restraint a more viable option.
- Public sector compensation, which constituted nearly 60% of total program spending in 2015, was a key area for fiscal adjustment, given the scale of its impact on budget outcomes.
- Broader macroeconomic implications, such as the effect of public sector wage decisions on private sector wages and employment, are relevant considerations when assessing fiscal policy choices.

Relevant Case Law

[45] Section 2(d) of the *Charter* protects the right of unions and union members to collectively bargain. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*Health Services*") the Supreme Court of Canada held that while s. 2(d) protects the process of collective bargaining, it does not guarantee the result achieved in that bargaining. Further, the constitutional guarantee only protects against "substantial interference" with the right to associate. The Court concluded on the evidence in that case that the infringement under s. 2(d) was not justified under s. 1 of the *Charter* because the

legislation at issue was found to be not minimally impairing of the s. 2(d) right to bargain.

[46] In *Health Services*, the Supreme Court set out a two-part test for substantial interference with collective bargaining. The first step asks if the subject matter of the interference is sufficiently important to affect the ability of members to collectively pursue their common goals. The second step asks whether the legislative measure or government conduct at issue respected the fundamental concept of good faith collective bargaining.

[47] In a 2015 decision, *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*") the Supreme Court of Canada concluded that "[a] process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d)" (para. 71). The companion decision to *MPAO* was *Meredith v. Canada (Attorney General)*, 2015 SCC 2 ("*Meredith*") where the Supreme Court of Canada considered the constitutionality of federal wage restraint legislation, the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA"*) in the context of s. 2(d). The *ERA* had the effect of rolling back previously negotiated and scheduled wage increases for RCMP

members, among others. The RCMP argued that the *ERA* violated members' constitutional right to collective bargaining.

[48] The background to the *ERA* was the global financial crisis of 2007 and 2008 and the federal government's stated need to curb public spending. The government's two-pronged response to the crisis was to take steps to stimulate the economy and to mitigate the significant negative impact the recession was having on its ability to balance the budget.

[49] The majority analysis upholding the constitutionality of the *ERA* notes that a comparison between the impugned legislation in *Health Services* and *Meredith* was instructive. *The Health and Social Services Delivery Improvement Act*, introduced radical changes to significant terms covered by collective agreements previously concluded. By contrast, the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents both inside and outside of the core public service, and so reflected an outcome consistent with actual bargaining processes. The majority decision concluded that the process followed to impose the wage restraints therefore did not disregard the substance of the former procedure. The *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future.

[50] Furthermore, the *ERA* did not prevent the consultation process from moving forward. Most significantly in the case of RCMP members, the *ERA* permitted the negotiation of additional allowances as part of "transformation[al] initiatives" within the RCMP.

[51] Importantly, the majority decision states that the record indicated that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing process. Service pay was increased from 1% to 1.5% for every five years of service — representing a 5% increase — and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved.

[52] The Supreme Court in *Meredith* reiterated that while actual outcomes are not determinative of a s. 2(d) analysis, in the case before the Court, the evidence of outcomes supported a conclusion that the enactment of the *ERA* had a minor impact on the RCMP's associational activity.

[53] The Court concluded that the *ERA* and the government's course of conduct could not be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members.

[54] In *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, leave to appeal denied, [2016] S.C.C.A. No. 444, the *ERA* was also alleged to have violated the s. 2(d) *Charter* rights of members of the Public Service Alliance of Canada ("PSAC") and the Professional Institute of the Public Service of Canada ("PIPSC").

[55] The appellant unions represented approximately 88% of unionized employees in the federal public service. The appellants sought declarations that provisions of the *ERA* limited their members' freedom of association under s. 2(d). They also challenged the government's conduct in collective bargaining, before and after the *ERA*'s enactment. They argued that the government's conduct and provisions in the *ERA* substantially interfered with their right to a meaningful collective bargaining process by interfering with bargaining on wages, overriding freely negotiated wage increases, capping wage increases during the restraint period, and preventing bargaining for catch-up after the restraint period.

[56] During the relevant time, PIPSC represented six bargaining units, within separate agencies, five units Crown corporations, and two bargaining units at the Senate and House of Commons.

[57] PSAC, the largest public sector union in Canada, was the bargaining agent for five bargaining units, 11 within separate agencies, ten units at Crown corporations and three bargaining units at the Senate and House of Commons.

[58] On November 19, 2008, the Speech from the Throne set out the government's position on its response to the economic crisis. It advised that legislation directed at restraining public sector wage increases was forthcoming.

[59] On November 23, 2008, four of five PSAC units reached collective agreements with the Treasury Board, which included wage increases consistent with the final offers. These agreements were ratified on January 23, 2009.

[60] Between November 24 and November 27, 2008, all of the PSAC bargaining agents in the separate agencies, negotiated agreements consistent with the wage increase limits. Nine of 13 PIPSC units in the separate agencies also negotiated agreements consistent with the wage increase limits in November 2008.

[61] On November 27, 2008, the Minister of Finance delivered an Economic and Fiscal Statement to Parliament. It projected budget deficits for fiscal years 2009-2010, 2010-2011, and 2011-2012. The Statement also specified the maximum permitted wage increases in the public service for fiscal years 2007-2008 to 2010-

2011: 2.3% for 2007-2008 and 1.5% for each of the other three years for groups negotiating new collective agreements.

[62] Parliament was prorogued on December 4, 2008. The government tabled the Budget on January 27, 2009, after Parliament resumed. The *Budget Implementation Act*, 2009, S.C. 2009, c. 2, contained the *ERA*. The *ERA* was introduced in Parliament on February 6, 2009, and received Royal Assent on March 12, 2009. It imposed wage caps consistent with the Statement but, to the unions' surprise, also capped wage increases for the fiscal year 2006-2007, except for collective agreements concluded or arbitral awards issued before December 8, 2008.

[63] There were a total of 62 bargaining units represented by the appellant unions, which were each at different stages of collective bargaining in the fall of 2008. Many of the bargaining units represented by the appellants were able to reach collective agreements that were not challenged in the proceedings. It was common ground that the large majority of unionized federal civil servants reached such settlements before the *ERA*'s enactment.

[64] The *ERA* did not freeze wages, reduce wages or eliminate existing merit or similar types of increases. Rather, for the fixed restraint period, it implemented an upper limit on wage increases, prohibited the restructuring of pay rates, and

prohibited any increase in additional remuneration, with certain limited exceptions. It also prevented unions from making up any losses in bargaining after the end of the restraint period.

[65] The Ontario Court of Appeal concluded that neither the ERA nor the government's conduct before or after its enacted limited the appellant's s. 2(d) rights:

> [176] The Government engaged in permissible hard bargaining during a period of economic crisis and government austerity. And by enacting the ERA, the Government capped wage increases for a limited period. The ERA did not completely prohibit any wage increases, the cap was in place for a limited period of time, and the limit imposed was in line with the wage increases obtained through free collective bargaining. Moreover, the appellant unions were able to make progress on matters of interest to some of the bargaining units they represented. They were still able to participate in a process of consultation and good faith negotiations. As such, neither the ERA nor the Government's conduct before or after the enactment of ERA limited the appellants' s. 2(d) rights.
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> [Emphasis added]

[66] The Court of Appeal then conducted a section 1 *Charter* analysis where the court must determine whether limits established on s. 2(d) rights are "reasonably justified in a free and democratic society".

[67] The Court of Appeal identified limits to be assessed as the imposition of wage increase caps in bargaining and arbitration during the restraint period, the retrospective application of the wage increase limits to fiscal year 2006-2007, the imposition of wage increase rollbacks on previously negotiated collective

agreements and arbitral awards, and the prohibition on negotiating catch-ups in bargaining after the restraint period.

[68] The Court was required to determine first, whether the objectives of the *ERA* were pressing and substantial, and second, whether the means by which those objectives were advanced were proportionate. The Court stated that the proportionality analysis asks three questions: (1) is the limit rationally connected to the purpose; (2) does the limit minimally impair the right; and (3) is there proportionality between the deleterious and salutary effects of the law?

[69] The Ontario Court of Appeal held that the application judge did not err in finding that the government had asserted pressing and substantial objectives. Those objectives were: 1) to provide leadership by showing restraint and respect for public money; 2) reducing upward wage pressure on private sector wages; and 3) ensuring the ongoing soundness of the Government's fiscal position.

[70] The majority of the Court of Appeal stated that the court should generally accept Parliament's objectives at face value, unless there is an attack on the good faith of the assertion of those objectives or on their patent irrationality.

[71] In terms of proportionality, that is, whether the limits were rationally connected, the Court of Appeal stated:

> [255] It is self-evident that all of the measures attacked by the appellants would have positive impacts on expenditures and would meet the rational connection test with respect to ensuring the ongoing soundness of the Government's fiscal position, and the Government's objective of demonstrating leadership and reassuring Canadians in a perilous economic climate.

[72] With respect to whether the measures were minimally impairing, the Court of Appeal stated:

> [291] I agree with the application judge that the minimal impairment issue must be considered in light of the unprecedented global economic crisis then gripping the world and Canada, to which the Government needed to fashion a response. The evidence, both in the record and in the arena of judicial notice, amply justifies his approach. The Government's two-fold response of stimulus spending, coupled with cost restraints to maintain fiscal soundness, was amply explained. The application judge properly instructed himself to view economic justifications for *Charter* infringements with strong skepticism. He found the Government made efforts to minimize the *ERA*'s impacts. And, ultimately, he properly deferred to the Government's selection of measures to achieve its objectives, given the severity of the crisis, the complexity of the issues, and the need to respond with alacrity.
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> [292] The application judge rightly rejected the appellants' arguments that neither the extension of the restraint period back one year, nor the rollbacks, were necessary. The government's explanations for these measures are reasonable and plausible. They were rooted in fairness to all employees, including those not represented by unions, and were needed to manage the bargaining process. The alternative measures raised by the appellants were simply not responsive to the exigencies faced by the Government and the pressing and substantial objectives that it set.
>
> [293] I echo and underline the application judge's statement: "It would be preferable if the court did not engage in second guessing Parliament or re-evaluating the strategies of the government where complex policy issues are at stake." Judicial second-guessing, in hindsight, of Parliament's response to a fast moving crisis, in light of the polycentric nature of the issues, must be discouraged.
>
> [Emphasis added]

[73] In terms of overall balancing, the Court of Appeal stated:

> [315] I would approach the determination of overall proportionality deferentially. This is not the first time Canada experienced an economic crisis nor will it be the last, and care must be taken not to hobble Parliament by making the burden of justifying economic legislation impacting collective bargaining in the federal public sector impossible to meet. The negative effects of the ERA were not egregious, and the positive effects were real.

> This is not a case in which the Government acted precipitously, or scapegoated an unpopular group. In the end, the law did nothing more than limit growth in wage increases in the public sector at a time when taxpayers in the private sector were suffering, and experiencing salary rollbacks and unemployment.
>
> [316] In the context of the great recession and the perils it posed for Canadian society, on the measure of social importance, in my view, the Government has justified the measures referred to as reasonable limits in a free and democratic society, under s. 1 of the *Charter*.
>
> [Emphasis added]

[74] In *Gordon*, therefore, the government threat to legislate wage caps during collective bargaining was found not to be a violation of s. 2(d) because the evidence showed that there was no significant disparity in bargaining power. Everything, including wages and the possible wage restraints was under discussion.

[75] Further, the government's failure to consult with the unions and advise of the details of the forthcoming legislation was not a violation of s. 2(d).

[76] The fact that the *ERA* took wage increases beyond the cap off the table did not violate section 2(d) in circumstances where the wage cap was consistent with the going rate reached in agreements concluded with other bargaining processes. As the Court of Appeal stated, "The wage results represent the fruit of free collective bargaining by the largest bargaining units."

[77] The fact that the *ERA* imposed limits on the interest arbitration process also did not violate section 2(d). Alternative dispute resolution mechanisms were said by the Court of Appeal not to be associational in nature. Moreover, the Court of Appeal

stated that interest arbitration was intended to replicate results of collective bargaining, and the *ERA* wage increase caps were "built on the foundation set by free collective bargaining."

[78] Further, s. 8 of the *ERA* allowed for the reopening of collective agreements and arbitral awards in order for unions to negotiate other advantages, which some unions did.

[79] Finally, the fact that the *ERA* prohibited future bargaining or arbitral agreements from making up for the effects of the wage restraints also did not violate s. 2(d). The prohibition on future bargaining related only to the government's need to retain the savings obtained during the restraint period. It was "a corollary of the wage increase caps."

[80] In *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49, the majority adopted in large measure the reasons of Donald J.A., who wrote a dissenting judgment in the British Columbia Court of Appeal decision (*British Columbia Teachers' Federation v. British Columbia,* 2015 BCCA 184 ("*BCTF*").

[81] I find that the following excerpts from the pre-hearing brief of the Applicant Unions accurately sets forth the situations which Donald J.A. in *BCTF* found could constitute substantial interference in collective bargaining:

- "[S]ubstantial interference with past, present, or future attempts at collective bargaining can render employees' collective representatives effectively feckless, and thus negate the employees' right to meaningful freedom of association". (*BCTF*, para. 284).
- "Actions by government that reduce employees' negotiating power with respect to the employer can satisfy this standard of substantial interference". (*BCTF*, para. 284, citing *MPAO*, at para. 96).
- "The act of associating for the purpose of collective bargaining can also be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous effort nugatory". (*BCTF*, para. 285, citing *Health Services*, at para. 96).
- "Associational activity can also be rendered futile by the government through bad faith negotiation or the refusal to consider submissions". (*BCTF*, para. 286).
- [I]mposing absolute barriers to collective bargaining, or prohibiting collective bargaining entirely, also makes associational activity essentially futile". (*BCTF*, para. 286).

[82] Justice Donald further stated that "a *Charter* breach cannot always be seen within the four corners of legislation, but must sometimes be found to occur prior to the passage of the legislation, when the government failed to consult a union in good faith or give it an opportunity to bargain collectively." (*BCTF*, para. 288). "The unilateral imposition, alteration, or deletion of employment terms by the Legislature is, in most circumstances, the final step in an agenda of the executive branch; the same executive branch that both develops policy and has a constitutional obligation to consult or negotiate with collective representatives." (*BCTF*, para. 289).

[83] In *Federal Government Dockyard Trades and Labour Council v. Canada*, 2016 BCCA 156, leave to appeal denied, [2013] S.C.C.A. No. 404, the British Columbia Court of Appeal also considered the constitutionality of the *ERA*, this time in time in connection with unionized dockworkers and not members of the RCMP, as in *Meredith*.

[84] The Court of Appeal's analysis is as follows:

> 89 There is no doubt that the RCMP associational rights are premised on a bargaining framework that is distinguishable from the labour regime that governs the Dockworkers. However, I am not persuaded that *Meredith* can be meaningfully distinguished from this case; both involved wage rollbacks under identical legislation. Nor am I persuaded that applying the broad principles articulated in *Meredith* and *MPAO* to the facts of this case would lead to a result different from the one reached by the summary trial judge, although for somewhat different reasons.
>
> 90 The test prescribed in *Health Services*, which (despite all subsequent judicial pronouncements) remains the test for unconstitutional infringement of s. 2(d), is evaluated

on the basis of substantial interference. I disagree with the appellants' articulation of the test as whether an enactment "disrupts the balance" the *Charter* achieves between employers and employees. While *MPAO* discusses the importance of s. 2(d) in negotiating a balance of power in the workplace, I agree with the respondent British Columbia that the Supreme Court was not attempting to articulate a new version of the substantial interference test. In my view, the remarks in question are best understood in the context of the historical discussion of the purpose of according workplace association s. 2(d) protection. *MPAO*, *Meredith* and *Saskatchewan Federation of Labour* firmly establish "substantial interference" as the relevant threshold.

91 In this case, the matter affected was a hard-won wage increase. It was subjectively important to the Council, but, like the summary trial judge, I am not persuaded the rollback of this single wage increase undermines the capacity of the union to collectively and effectively pursue its goals**.** The legislation itself explicitly guarantees the right to collective bargaining in ss. 6-10. As noted, the Council was able to successfully negotiate a subsequent agreement.

92 In my view, the length and depth of the negotiations and consultations prior to the ERA's enactment was adequate, given the looming fiscal crisis. The summary judge examined the circumstances surrounding the negotiations, the arbitration, and the exigencies that led the government to enact the ERA. He concluded that, in the circumstances, the government's conduct did not rise to the level of interference necessary to establish a breach of s. 2(d). In reaching that conclusion he made the following findings:

> a) The notice to the Council about the impending legislation was considerable compared to the 20 minute warning in *Health Services* (at para. 233). He described this as close to the "maximum" possible notice given the financial crisis facing government (at para. 234).
>
> b) The government adopted an approach to controlling public sector wages that respected past collective bargaining and avoided extinguishing existing terms and conditions.
>
> c) The government chose to limit wage increases for a temporary, limited defined period and only limited future wage increases if they had not been settled before December 8, 2008. Unlike *Health Services*, the legislation did not limit future bargaining on any term in the collective agreement other than in respect to the wage increase for 2006 (at para. 262).
>
> d) The government chose a "negotiate first, legislate second" approach, informing the negotiators of the looming deadline (at paras. 240-241).
>
> (a) The government used its best efforts to consult in good faith with all parties including the Council (at para. 248).
>
> (b) The government negotiators made five different attempts to restart negotiations in the days before the deadline (at para. 249).
>
> …

> (g) The Council and its members were well aware that they risked the legislation overriding an arbitration award if they pressed ahead with the arbitration (at para. 259).
>
> 93 These findings are critical. Fiscal and economic context cannot be ignored. The government met its constitutional obligations through its attempts to negotiate until the last moment, and to signal the potential effects of the impending legislation. Its response was proportional to the looming fiscal emergency. Moreover, I do not think it can be said, as contended by the appellants, that this legislation compromised the essential integrity of the collective bargaining process. It is not my view that this legislation can be said to significantly impair or thwart the associational goals of the Dockworkers. The legislation simply does not have that reach.
>
> [Emphasis added]

[85] A further decision which considered whether the *ERA* unconstitutionality violated s. 2(d) rights is *Canada (Procureur general) c Syndicat Canadian de la function publique, section locale 675*, 2016 QCCA 163, leave to appeal denied, [2016] S.C.C.A. No. 117 ("*Syndicat Canadien*").

[86] The *ERA* amended collective agreements signed in 2007 between CBC and the two unions. The employees covered by the collective agreements had their wages reduced, and some had to reimburse amounts already paid. The Unions successfully brought an application for a declaration that the *ERA* provisions violated the employees' s. 2(d) rights. The Attorney General of Canada successfully appealed. The Supreme Court of Canada referred the case back to a new appeal panel for redetermination in light of the judgments in *Meredith* and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*").

[87] The issue before the Quebec Court of Appeal was whether the *ERA* unconstitutionally infringed s. 2(d) rights by impacting a series of freely negotiated clauses contained in two collective agreements establishing employee remuneration. The amendment of these clauses by the *ERA* affected their scope for the duration of the agreements by partially reducing the wage increases intended by the parties. Their future scope was also affected, in that the wage threshold on the basis of which future remuneration would be negotiated was lower and the attendant benefits (in particular those relating to pensions) reduced accordingly. The parties to a collective agreement reached after the *ERA* came into force were also barred from setting out retrospective measures neutralizing the limits on wage increases for the years contemplated in the *ERA*.

[88] The Quebec Court of Appeal, stated:

> 30 It can therefore be posited at the outset - and the appellant does not dispute - that the ERA did indeed affect the collective agreements signed by the parties and, for a time, affected the parties' ability to freely negotiate the terms of a new collective agreement with their employers. Whether this constitutes substantial interference with freedom of association guaranteed to the parties and their members under s. 2(d) of the *Charter*, however, is the debate the Court must settle here.
>
> 31 For there is indeed a debate. It is difficult to see how we can accept the respondents' claim that any statutory amendment of freely negotiated clauses in a collective agreement inevitably constitutes substantial interference with the ability to negotiate of those who enjoy freedom of association. This proposition, as stated, would mean that the contents of a collective agreement, by its mere existence, take on a sort of immutable constitutional status through the effect of s. 2(d)**.** Not only has this never been stated in the relevant case law, but it seems far removed from the nuanced and contextual analyses that the Supreme Court proposes in even its

most recent judgments. While it is conceivable that a government's statutory, regulatory or other measures modifying or neutralizing certain clauses in a collective agreement may have such an impact, the question is to what degree or intensity, and the measure must sufficiently interfere in the process to violate the *Charter*. This is what we saw in *Health Services*, where the Supreme Court held that certain statutory provisions constitute a substantial interference with the exercise of freedom of association, while others do not.

[…]

36 In the present case, the application of the *ERA* had the following consequences for the respondents:

- In the case of the Association des réalisateurs, whose collective agreement was signed on October 17, 2007, came into force on October 1, 2007, and expired on December 11, 2011, the employees were deprived of the full wage increase they had agreed to with the employer for the period defined in ss. 19 and 21 ERA. Although the collective agreement provided for a 2.5% wage increase on December 15, 2008, another on December 14, 2009, and again on December 13, 2010, the annual increase was instead 1.5%, the maximum allowed under the *Act*.

- In the case of the Canadian Union of Public Employees, Local 675, whose collective agreement was signed on October 1, 2007, came into force that day, and expired on September 26, 2010, the employees were deprived of the full wage increase they had agreed to with the employer for the period defined in ss. 19 and 21 ERA. Instead of receiving the annual 2.5% increase that was supposed to be paid on September 29, 2008, and again on September 28, 2009, the employees received the maximum 1.5% annual increase under the *Act*. Subsequently, the Union and the employer were deprived of the ability to freely negotiate the salaries payable for the 2010-2011 period, in that they were prohibited from providing for a wage increase greater than the 1.5% rate set out in the *Act*.

- After March 31, 2011 (the date on which the restraint period ended), the respondents were deprived of the possibility of negotiating terms with their employer to recover the increases they had lost, and the employer was barred from granting such terms, whether through an adjustment in the rate of pay applicable at any period beginning during the restraint period (ss. 17 and 56 ERA), the restructuring of rates of pay (s. 23), additional remuneration (s. 27), compensation (s. 57), or changes to performance pay plans (s. 59).

- The cap on wage increases during the restraint period had a negative effect on employees who retired during that period or in the few years that followed by reducing the amounts considered for the purposes of the pension under the collective agreement.

[…]

41 In this case, then, there is interference ("ingérence", in the words of the Supreme Court in *Health Services*). This finding is not the complete analysis,

however, and we must now answer the second question posed in that judgment, to wit: Does the interference, which here takes the form of legislative provisions capping wage increases for a certain period and perpetuating the effects of the cap, constitute substantial interference with the respondents' freedom of association? More specifically, and once again borrowing from McLachlin and LeBel, JJ. in *Health Services*, does it compromise "the essential integrity of the process of collective bargaining protected by s. 2(d)" ("l'intégrité fondamentale du processus de négociation collective protégé par l'al. 2d)")?

42 Two questions requiring an assessment of both the context and the facts are thus in order: first, the nature of the rights affected by the ERA and their importance to the employees' exercise of their freedom of association must be considered; second, it must be determined whether the ERA allows the parties to benefit from "the processes of collective bargaining" ("le droit à un processus de négociation collective").

43 On the first point, there is no question that wage issues are certainly important to workers who, through their union, are involved in the collective bargaining process which is an integral part of freedom of association guaranteed by s. 2(d) of the *Charter*. These issues are central to the exercise of this freedom in a workplace and are ordinarily one of the crucial points of discussion during collective bargaining.

[…]

54 Section 6 expressly preserves "the right to bargain collectively under the *Canada Labour Code*" ("*C.L.C.*"), the scheme that applies to the respondents and their employer in this case. As for s. 8, it adds to the general scheme, explicitly allowing the parties to amend the collective agreements clauses affected by the *Act*, with the following two exceptions: (1) first, amending the date of expiry of the collective agreement is prohibited; (2) the amendment the parties agree to must not be contrary to any provision of the *ERA*.

55 This provision, which reinforces the general statement in s. 6 *ERA* continuing the right to collective bargaining, is crucial. It allows the union and employer to consult with each other, to negotiate and, in this context, to freely reform or amend the *other* working conditions of employees affected by the *Act*, that is, the non-monetary clauses (often referred to in French as "*clauses normatives*"), which do not directly impact compensation (although they may have pecuniary effect). These may include working hours, vacations, leave, employment security, or terms affecting work organization, staffing, assignments, transfers, and so on. This possibility of union-management discussion about working conditions not strictly related to wages, which is one of the central aspects of the bargaining process inherent to freedom of association recognized under s. 2(d), carries clear weight in assessing the seriousness of the impact of *ERA* ss. 16 *et seq.*

[…]

> 58 In view of all of these elements -- on the one hand, the wage caps imposed on the respondents (with limited retroactive and prospective effects) and, on the other, the maintenance of real bargaining channels that were not used by the respondents but that would have been available to them (and the employer) to begin a consultation process regarding non-monetary clauses -- the interference with the freedom of association of the respondents and the employees they represent cannot be characterized as substantial.

[89] This Court notes that the Quebec Court of Appeal specifically notes that the *ERA* did not impose salary freezes or reductions, "measures that would have been much more draconian". (para 48)

[90] In *Manitoba Federation of Labour et al v. The Government of Manitoba*, 2021 MBCA 85 ("*Manitoba Federation*") at issue was whether the *Public Services Sustainability Act*, CCSM c P272 ("PSSA") unconstitutionally violated union members' s. 2(d) rights. However, the "key question" on the appeal, as summarized by the Court, was "whether it is unconstitutional for legislation to prevent collective bargaining on wages for a limited period of time" (para. 1.) and further:

> [124] As I indicated at the beginning of these reasons, the key question is whether it is unconstitutional for legislation to prevent collective bargaining on wages for a limited period of time. There can be no doubt that the intention of the ERA and the PSSA legislation was to remove the issue of wages from discussion at the bargaining table. In the end, the Supreme Court of Canada in *Meredith* and the three appellate courts concluded that removing the issue of wages from the bargaining process for a limited period of time did not substantially interfere with a meaningful collective bargaining process and, thus, the ERA complied with section 2(d).
>
> [125] I have not been persuaded that there is any sound legal basis to distinguish *Meredith*. It is my view that *Meredith* stands for the proposition that it is not unconstitutional for a government to remove by statute the topic of wages from the bargaining table so long as:
>
> a) the wage restraint legislation is broad-based and time-limited; and

> b) it does not preclude a meaningful collective bargaining process from occurring on other important workplace matters.
>
> [Emphasis added]

[91] In *Reference re Bill 148*, *An Act Respecting the Sustainability of Public Services*, 2022 NSCA 39, the Nova Scotia Court of Appeal noted in relation to *Manitoba Federation*:

> [49] In my view, *Manitoba Federation* does not add any new principles to the jurisprudence with respect to s. 2(d) of the *Charter.* The Attorney General relies heavily on this decision because of the similarities between the legislation under consideration and the *PSSA*. He argues it stands for the proposition time limited wage restraint legislation is always constitutional. If the suggestion is this conclusion can be reached without the need to consider the surrounding context, this runs contrary to the clear advice of the Supreme Court of Canada in *Health Services*, *Meredith* and *British Columbia Teachers' Federation*. I would not adopt such an interpretation of *Manitoba Federation*.

[92] This Court concludes, therefore, that the decision in *Manitoba Federation* is of very limited value due to the manner in which the Court framed the issue before it. As the Nova Scotia Court of Appeal recognized in *Reference re Bill 148*, *An Act Respecting the Sustainability of Public Services*, the Manitoba Court of Appeal limited its analysis to whether it is unconstitutional for legislation to prevent collective bargaining on wages for a limited period of time.

[93] The most recent Canadian appellate level decision provided by counsel to this Court concerning *Charter* compliance of wage restraint legislation is the 2024 decision of the Ontario Court of Appeal in *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101 "*OECTA*". The

legislation at issue was the Ontario *Protecting a Sustainable Public Sector for Future Generations Act,* 2019, S.O. 2019, c. 12 ("Bill 124" or the "*Act*").

[94] In 2019, the Ontario legislature passed Bill 124, which imposed a 1% cap per year on increases to salary rates and compensation for three years for employees in the broader public sector.

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

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

[97] Bill 124 was introduced on June 5, 2019, and received royal assent on November 7, 2019. The *Act* imposed a three-year "moderation" period on compensation, including salary rates, for all employees in the broader public sector. For those three years, compensation increases were not to exceed above 1% per year.

The *Act* applied to represented and non-represented employees. The *Act* started with a lengthy preamble:

> 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 …

[98] The purpose was set out at s.1:

> 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.

[99] Sections 3 and 4 maintained the rights to bargain collectively and to strike:

> 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.

[100] Section 5(1) outlined the public sector employers to whom the *Act* applied, including the Crown, Crown agencies, school boards, universities and colleges, hospitals, licensed not-for-profit long-term care homes and children's aid societies. It also applied to not-for-profit organizations that received at least $1 million in funding from government in 2018. Section 5(2) specified the categories of employers to whom the *Act* did not apply, including municipalities and for-profit organizations. Section 6 provided that the *Act* applied to the employees of the employers to whom the *Act* applied.

[101] Pursuant to s. 8, the *Act* applied to "bargaining organizations", including unions and other organizations that bargain collectively on behalf of the broader public sector employees affected by the *Act*. The *Act* also applied to the non-represented employees in the broader public sector.

[102] The *Act* limited "salary rate" and "compensation" increases during the "moderation period". Salary was a subset of compensation.

[103] The *Act* defined "salary rate" at s. 2 as:

> "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.

[104] The *Act* defined "compensation" very broadly:

> "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;

[105] This definition was found to include matters such as pension contributions, vacation days, sick days, bereavement days, meal and travel allowances and any other benefits to which a monetary value can be assigned.

[106] Sections 9 to 16 addressed the limits to salary rates and compensation during the moderation period for represented employees covered by the *Act*. Under s. 9, the moderation period for represented employees began at different times.

[107] Pursuant to s. 10(1) of the *Act* a collective agreement or arbitration award could not provide for a salary rate increase of more than 1 per cent per year during the three-year moderation period. The 1 per cent cap applied to any position or class of positions. Section 10 stated:

> 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.

[108] Pursuant to s. 11(1), increases in compensation, which included salary rates for all employees covered by a collective agreement, were limited to 1 per cent per year during the three-year 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).

[109] Sections 17 to 23 of the *Act* set out the provisions that applied to non-represented employees. They were similar to those that applied to represented employees. For non-represented employees, the start date of the moderation period was different than for represented employees. The moderation period started on a date selected by the employer that was after June 5, 2019, but no later than January 1, 2022.

[110] The *Act* included measures designed to prohibit employers from avoiding compliance with the 1 per cent limit on compensation increases during the moderation period. For example, s. 24 prohibited an employer from providing compensation before or after the moderation period to make up for compensation the employee did not receive during the moderation period.

[111] The *Act* also gave the government broad powers of enforcement. Section 25 gave the Management Board of Cabinet the power to obtain information from employers about collective bargaining or compensation to ensure compliance with the *Act*. Section 26 gave the minister responsible for administration of the *Act* the sole discretionary power to make an order declaring that a collective agreement or arbitration award did not comply with the *Act*, which then required the parties to enter into a new collective agreement that is compliant with the *Act*.

[112] Finally, s. 27 of the *Act* provided that the minister "may, by regulation, exempt a collective agreement from the application of [the] *Act*." However, the *Act* did not set out criteria or the basis on which the minister could make such an exemption.

[113] In concluding that the *Act* violated s. 2(d), the application judge found that the *Act* substantially interfered with the respondents' ability to enter into good faith

negotiation and consultation. In reaching this conclusion, the application judge considered the following ten factors:

1. The financial impact of the wage cap: The *Act* interfered with the process of collective bargaining because it placed significant limits on the ability of unions to negotiate higher wages or to use wages to negotiate other better work conditions.
2. The impact on trading salary against other issues: The *Act* inhibited the ability of unions to trade off wages for other issues.
3. The impact on staffing: The application judge accepted the respondents' evidence that there was a "serious long-term recruitment and retention crisis" in the health care sector. He found that the *Act* prevented unions from negotiating solutions to this crisis.
4. The impact on wage parity between public and private sector employees: On this factor, the application judge focused on the long-term care sector, which consists of private for-profit homes, private non-profit homes and municipal homes, whose employees have typically bargained together. The application judge held that "[f]ragmenting bargaining units into public and private sector units interferes with the unions' ability to choose who bargains together."
5. The impact on employee self-government: The application judge held that the *Act* interfered with the respondent organizations' ability to decide democratically how to prioritize their negotiating positions.
6. The impact on freely negotiated agreements: The government's power under the *Act* to decide whether a collective agreement will or will not be exempted from the *Act* interfered with freely negotiated agreements.
7. The impact on the right to strike: The application judge held that the *Act* rendered the right to strike "financially meaningless" because the best the unions could achieve was a wage increase of 1% or an increase of benefits equal to 1% of wages, a benefit he found would be exhausted after 2.6 days of striking.
8. The impact on interest arbitration: The *Act* affected bargaining units subject to interest arbitration, because one of the principles of interest arbitration is the replication of negotiated agreements.
9. The impact on the relationship between unions and their members: The application judge relied, by way of example, on negative responses from ONA's members to their 1% wage increase as evidence that the *Act* caused discord within unions.
10. The impact on the power balance between employer and employees: The application judge stated that the "shadow of the legislator" would loom over negotiations and disrupt the power balance between employees and employers achieved through meaningful collective bargaining.

[114] The application judge then considered whether the process of consultation prior to the introduction of Bill 124 amounted to a meaningful process of collective bargaining. He stated that the government did not have an obligation to consult with the respondents on its legislation. However, relying on prior jurisprudence, he stated that, in appropriate circumstances, meaningful consultation before the passage of legislation can nevertheless take the place of collective bargaining. In this case, he found that there was no meaningful consultation.

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

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

[117] After reviewing this decision in detail, this Court notes that the breadth of the definition of "compensation" in the Ontario legislation was relevant to the Court of Appeal's analysis as to whether the legislation left room for meaningful negotiation and consultation on issues other than wages. The Court stated that the *ERA* and Manitoba's *PSSA* "did not impose such broad limitations on the areas affected by the caps in those statutes."

[118] This Court also notes that the Ontario Court of Appeal rejected the Manitoba Court of Appeal's finding in *Manitoba Federation* that the trial judge erred by considering the government's failure to consult with unions before passing legislation. The Ontario Court of Appeal notes that negotiation of collective agreements and consultation on legislation "can both play a role in determining whether legislation limiting the areas of negotiation violate s. 2(d)." The Court explained that good faith collective bargaining prior to the enactment of legislation can form the basis for a finding that there has been no substantial interference with the process of collective bargaining. Similarly, meaningful consultation, while not required, can also serve as evidence that there has not been significant interference.

[119] Further, the Court of Appeal held that the four-week long consultation prior to the introduction of Bill 124 was not meaningful for multiple reasons, including that no consultation paper was circulated to the unions beforehand. Instead, the unions were given a series of questions about managing compensation costs and legislated compensation caps. The questions did not set out any proposed caps, nor did government contemplate any further consultations following receipt of answers to the questions. The consultation was not intended to replicate or replace collective bargaining. Bill 124 was introduced shortly after the limited consultations.

[120] In addition, the Court of Appeal noted that although Bill 124 contained an exemption provision, and the ability to obtain or negotiate an exemption to wage restraint legislation can be relevant to assessing the degree of interference, the possibility of an exemption was illusory rather than a meaningful avenue of negotiation. Moreover, there was no evidence of a process or any criteria used by the Minister to consider requests for an exemption.

[121] This Court notes that Bill 124's wage restrictions did not match other collective agreements negotiated in the public sector in the same time period. However, the Court of Appeal in *OECTA* also noted that the 1% cap in the *Act* applied not only to wages, but to all forms of compensation that could be quantified in monetary values like sick days and vacation days. As a result, there was an even greater difference between the 1% cap imposed by the *Act* and results achieved in other negotiated collective agreements.

[122] Further, and importantly, although the objective of the *Act* was pressing and substantial, and the measures in the *Act* were rationally connected to its objective, the *Act* did not minimally impair the right to collective bargaining under s. 2(d) because there was no evidence that the same goals could not have been achieved through a process of good faith bargaining.

[123] With that review of relevant case law, this Court turns to a review of evidence before the Court.

ANALYSIS AND FINDINGS

Prelude to Collective Bargaining during the Relevant Time Period

[124] When the Liberal McNeil Government was elected in October 2013, the Province was in the process of finalizing the last few collective agreements from the previous cycle of bargaining. A new cycle was due to begin, with the first agreements set to expire in 2014.

[125] Prior to commencement of bargaining with any public sector unions in the new cycle, the Government made public and private statements to the unions about its goal to bring fiscal restraint and responsibility to the Province's public sector wages, which accounted for just over 50% of the Government's budget. In addition to the high cost of wages, many (but not all) employees within the broader public sector were entitled to a lump sum payment upon retirement, called variously a public service award or a retirement allowance, depending on the specific collective agreement. The Province estimated that the annual cost of the public service awards/retirement allowances in December 2014 to be approximately $48 million.

[126] On September 5, 2014, CBC News published a story on its CBC Nova Scotia news website headlined "Liberals urge public sector wage restraint." The story contained several public statements by the Ministers of Finance and Health indicating that the Government intended to limit wage increases in the upcoming round of bargaining. The article stated, in part:

> Some members of Nova Scotia's Liberal government are suggesting recent public sector increases are not affordable.
>
> Under the previous NDP government, employees won a 7.5 per cent increase over three years. Those deals expire next spring.
>
> "We in the health department really have to change the negotiating dynamic," says Health Minister Leo Glavine.
>
> He says the province can't afford long, drawn out talks and overly generous payouts. He says that's why he likes what he sees on the west coast.
>
> British Columbia's public sector workers are agreeing to five-year contracts with modest 5.5 per cent raises.
>
> "We know that in Nova Scotia, as we currently have a lower performing economy, we have to make wage settlements on that kind of thinking and basis," says Glavine.

[127] The CBC article quoted the Minister of Finance as follows:

> We're in tough times and that's the message I want everybody to understand. Taxpayers are paying as much as they can, we don't have enough money to balance our books, so we're going to have to work together to come up with some fair and reasonable settlements that are going to [*sic*] sustainable.
>
> Really, the amount we had in the past has put a tremendous burden on the province, I'll tell you that.

[128] The Government also publicly indicated that it might wish to delete the Memorandum of Agreement #3 – Article 37 of the 2010-2012 Civil Service Master Agreement ("Job Security Memorandum").

[129] The Job Security Memorandum provided civil servants with strong protection against involuntary lay-off in cases where their positions had become redundant or had been relocated, or where they would otherwise have received a notice of layoff. The NSGEU negotiated the Job Security Memorandum with the Province in the round of bargaining that led to the conclusion of the 2010-2012 Civil Service Master Agreement. The Province was seeking wage restraint in the form of 1% increases in each of three years of a new collective agreement. The NSGEU ultimately agreed to a two-year collective agreement with increases of 1% per year in return for the Job Security Memorandum.

[130] On September 23, 2014, the Chronicle Herald published an article headlined "'Zero mechanism' for public service layoffs". The article included the following statement by the Minister responsible for the PSC.

> The public service contract is set to expire at the end of March, and while Kousoulis said he wouldn't get into discussing potential negotiations, he did say the government would target the memorandum of agreement. The policy has a more negative impact on the province's finances than any wage increase in recent memory, he said.
>
> "As it stands now, there is zero mechanism to have any layoffs."

[131] The Government reiterated its fiscal goals in the Throne Speech delivered on September 25, 2014.

> The central challenge facing our public finances right now is the cost of labour.
>
> Most recently, the wage pattern devised by the former government saw increases of more than 7.5 per cent over three years.

> It is important to remember that each percentage point equates to an additional $50 million of tax dollars that become embedded in the cost of government. The current public sector contract has cost taxpayers $711 million so far.
>
> Unlike the previous administration, this government will take a more deliberate and careful approach to labour relations in Nova Scotia. There will be no improvised and *ad hoc* decisions that ultimately cost taxpayers hundreds of millions of dollars.
>
> …
>
> Furthermore, it has to be understood that 58.6 per cent of the provincial budget is devoted to wages and salaries.
>
> To put the province on a sustainable course, all partners in this must be reasonable, all partners must ensure that the long-term interests of the province take precedence in the renovation of our fiscal foundation.
>
> …
>
> There is no question that the road to sustainable spending and a balanced budget is long and steep. But it is a road that must be travelled. My government will balance the budget by 2017–18 and will do so, in part, by eliminating programs that are not achieving their desired results. To get there, my government is looking with a critical eye to determine how to best deliver services, including asking if the service could be better delivered by the private sector.
>
> My government will also reduce or eliminate spending in areas where the costs clearly exceed what Nova Scotians want and need from their government today.
>
> As I have mentioned, wages make up the vast majority of government spending. Over the years, unsustainable wage increases have exceeded government's ability to pay for them and added to a mounting debt. My government has already directed a hiring slow down and will take steps to achieve a more sustainable wage pattern.

[132] The evidence before the Court shows that the Applicant Unions were aware of these public statements by Government in the lead up to collective bargaining.

[133] In October 2014, the Executive Council was shown a slide presentation titled "15-16 Budget Approach – Labour Mandate" recommending that it adopt and budget for a 0%/0%/1.5%/1.5% wage pattern over the ensuing four years and set

aside 1% for incidental items (shift premiums, signing bonuses, meal allowances, etc.) at 0.25%/year. Executive Council was advised as follows:

- The new wage pattern must be negotiated
- A pattern at this level will likely not lead to many, if any, other concessions.
- If the budget plan is built around this pattern then you will need to legislate it, if you can't negotiate it (we will bring in labour strategy deck in the near future)

…

[134] According to Roland King, as the new cycle of bargaining began, the Province's goal was to establish fiscally responsible annual economic adjustments through collective bargaining at one table, with that deal to be replicated at subsequent tables. In other words, the Province's intent was to establish a wage pattern for the sector.

[135] The Province made the strategic decision early in the bargaining cycle to focus on setting a pattern at one of the bargaining tables that allowed a strike or lockout. The purpose of the strategy was to avoid allowing an interest arbitrator to impose the first annual economic wage adjustments (and by extension, a likely wage pattern) on the parties in that cycle of bargaining. The Province's goal was to get a freely negotiated collective agreement in a bargaining unit where there was a right to strike/lockout, and to then have that agreement replicated by an interest arbitrator.

Collective Bargaining Begins with CUPE Local 1867, NSTU and NSGEU Begins

[136] Bargaining commenced in the fall of 2014 between the PSC and CUPE Local 1867, the Highway Workers' union.

[137] As noted earlier, the *Highway Workers Collective Bargaining Act*, S.N.S. 1997, c. 1, prohibits highway workers from striking and prohibits the Province from locking them out (s. 40(1)). It requires matters that cannot be resolved by collective bargaining to be referred to interest arbitration (s. 24(1)).

[138] Before the introduction of Bill 148, CUPE Local 1867 and the Province had been party to 15 collective agreements, including the 2011-2014 Highway Workers Collective Agreement. Under that agreement, and every previous version going back to the mid-1970s, highway workers were entitled to a public service award on retirement equal to one week's pay for each year of full-time service to a maximum of 26 weeks. The award was to be calculated using the employee's hourly rate on the date of retirement.

[139] The bargaining committees for CUPE Local 1867 and the Province met and exchanged bargaining proposals on November 3, 2014. CUPE Local 1867 put forward proposals on matters of critical importance to highway workers, including:

1. General wage increases for all classifications;
2. Additional wage increases for classifications whose wage rates were below that of similar employees performing similar work in Nova Scotia;

3. Reclassification of certain classifications to a higher classification group with higher pay, in recognition of the skill, training and responsibility of the employees occupying those classifications; and
4. Language that would protect the job security of highway workers in situations where the Province contracts out work.

[140] CUPE Local 1867 did not propose specific wage increases in its bargaining proposals or at the beginning of bargaining.

[141] The Province did not make a wage proposal in its bargaining proposals. Nor did it propose any change to the public service award, other than a small housekeeping change to correct an error in the language.

[142] One month later, in December 2014, Cabinet was presented with a slide deck recommending the freezing of the accrual of public service awards/retirement allowances, and the elimination of the benefit for new hires. The presentation indicated:

- <u>This must be negotiated out of the collective agreements</u>
- If it can't be negotiated out it can be legislated, with care.

[Emphasis in original]

[143] As to the budget implications, the presentation stated:

- Provides savings of $32 m/year
- This cannot be booked until after agreed upon with the unions or legislated.
- <u>It is an existing provision so until action is taken to the contrary it is an existing obligation.</u>

[Emphasis in original]

[144] On December 16, 2014, the Chronicle Herald published a story headlined "Nova Scotia premier takes aim at bonuses for exiting civil servants". It stated, in part:

> Premier Stephen McNeil wants to do away with a public service benefit that saw one lucky civil servant walk away with more than $111,000 last year.
>
> McNeil has made no secret of his feelings for public-sector contracts that have been negotiated in the past, as well as the impact wage increases, which he calls unsustainable, have on the province's bottom line. Last week, he said contract settlements that outstrip the province's economic performance are "a recipe for disaster" and "failure of leadership."
>
> But just as bad, according to the premier, is the public service award, which goes to employees who are resigning or retiring and immediately eligible for, and accepting, a pension. The payout amounts to one week's salary for each year of full-time work, capped at 26 weeks, with the calculation based on the employee's salary at the time he stops work.
>
> The public service award has cost taxpayers in the range of $8 million each of the last three years.
>
> …
>
> McNeil said benefits, as with wage patterns, need to be in step with what the province can afford and sustain.
>
> "I think people are wondering how is it that we can afford to continue to have the kind of benefits package that we have at a time when (the province faces) such difficult financial constraints. There are many, many Nova Scotians who are going from paycheque to paycheque with little benefits associated with them at the end."

[145] On January 15, 2015, Roland King, in his role as Executive Director of Labour Relations, and Doug Stewart, Associate Deputy Minister of Finance and Treasury, delivered a presentation to the Executive Council titled "Labour Relations – Timing, Strategy & Options". With respect to timing and bargaining strategy, they recommended:

> <u>Timing</u>

- LR structure in health – fall/winter
- Delay any public sector bargaining until winter/spring 2015
- Introduce right to strike (with essential services) in civil service – Spring
- Excluded civil service – Announce 0% wage increase in 2015 and introduce freeze in public service awards
- First window for pattern settlements in health – April – June 2015
- Table wage offers in all processes spring/summer 2015

Bargaining Strategy

- Attempt negotiated settlement with NSNU (and others) – Spring 2015
- Put NSGEU on notice of changes to *Civil Service Collective Bargaining Act* – Feb/Mar 2015
- Introduce right to strike in civil service to avoid arbitrated resolutions – Spring 2015
- Use negotiated settlement(s) to set pattern with other tables if possible
- If no settlements appear likely by July 2015 – prepare settlement legislation for fall sitting to apply wage pattern and freeze public service awards (retirement allowances)

[146] The presentation outlined several recommended key priorities, including establishing an affordable wage pattern for the entire public sector, freezing existing public service awards, and eliminating the Job Security Memorandum. It cautioned that the key priorities "will be extremely difficult to achieve through agreement in collective bargaining", and that "[d]ecisions will need to be made in the future whether to attempt to achieve through job action or to legislate." The next slide stated:

Affordable Wage Pattern – negotiate or legislate

Note: Following mandate was approved as part of the budget process – Dec 16, 2014:

- 4 Year term

- Increases of 0/0/1.5/1.5
- Additional 1% for other items (0.25%/year)

  Always some improvements in non-wage items sought

  Freeze public service awards (retirement allowances)

  Bargaining Approach:
- Intention would be to table lesser offer (e.g 5 years with three 0's)
- Leave open possibility to move if there is opportunity for a 4 year deal however permits legislation 5 year pattern

[147] Also on January 15, 2015, Catherine Blewett, Secretary/Clerk of the Executive Council, wrote to the Minister of Finance to "confirm that the Executive Council confirmed its agreement with the mandate, approach to bargaining, including timing and the key priorities as proposed in the presentation."

[148] On February 23, 2015, the NSGEU gave notice to the Province to commence collective bargaining for the renewal of the Civil Service Master Agreement. The parties agreed to exchange collective bargaining proposals on October 21, 2015.

[149] In April 2015, the Minister of Finance announced that the Government would impose a three-year wage freeze on Members of the Legislative Assembly and non-unionized Government employees and freeze the accrual of their service awards.

[150] On June 18, 2015, the NSTU gave the Minister of Education notice to bargain a new Teachers' Provincial Agreement, pursuant to s. 18 of the *Teachers' Collective Bargaining Act*.

[151] Also on June 18, 2015, the Finance and Treasury Board gave a presentation to Cabinet titled “Wage and Benefits Parity Bill”. The presentation included a slide outlining the status of each of the major bargaining tables:

- Health Authorities – Actively looking for dates, no meetings likely before fall
- Highway Workers – In bargaining, next dates June 16 and 17
- Civil Service Master Agreement – Actively looking for dates, no meetings before fall
- Crown Attorneys – First dates set September 24 and 25
- Physician Agreements – In negotiations, $$ offer already tabled, further dates set until December
- Residents – Negotiations started with first meeting, further dates in August

  September
- Teachers – Preparing bargaining proposals, not actively looking for dates, no meetings likely before fall
- School Boards – Not actively looking for dates, no meetings before fall
- All others – Not actively looking for dates, no meetings likely before fall

The presentation identified the following “possible approaches” to collective bargaining:

1. All tables proceed independently/naturally
   - Unlikely to achieve timely settlements
   - Risk that many tables will not meet for meaningful discussion
   - Unions unwilling to come to table – they know what to expect
   - Legislation will be required
2. Send proposals to unions to initiate discussions in advance of confirmed dates where none are set
   - Initiates discussions even if unions refuse to come to the tables quickly
   - May mitigate the requirement to hold meaningful discussion prior to legislation
   - Unlikely to achieve any agreements
3. Coordinate multi-union discussions on wages centrally
   - Demonstrates meaningful discussion

- Unlikely to reach agreement from all (perhaps no agreement from any) but there is a chance some unions may negotiate and affordable wage pattern
- Legislation will be required but may avoid protests from organized labour.

[152] On August 18, 2015, the Minister of Finance met with the representatives of public sector unions. Union representatives were shown a slide presentation titled "Public Sector Leaders: moving forward together". The presentation began with quotes from the Report of the Nova Scotia Commission on Building Our New Economy (the "Ivany Report"), including that "Nova Scotia hovers on the brink of an extended period of decline", and that "… if government continuously grows its hiring, spending and capital investments faster than the overall economy, and therefore has to keep raising tax rates and borrowing more to sustain such stimulus spending, it eventually runs out of room to maneuver fiscally and politically."

[153] In the presentation, Government outlined its "Expectations":

- Mutual commitment to a fair, transparent collective bargaining process that respects the interests of employees, employers and the public
- Mutual openness to negotiate and engage in a timely manner
- Meaningfully engage public sector employees, through their unions, in a manner that draws on their full knowledge, skills and commitment to deliver public services in a more cost-effective, innovative and sustainable manner

[154] Government indicated that the Province would not provide funding for compensation beyond the amounts set out in the fiscal plan:

- The Province will not provide additional funding over the amounts set out in the Province's fiscal plan to fund increases in compensation negotiated in collective bargaining

- Increases to compensation must not have a negative impact on the Province's fiscal plan and not have a negative impact on levels of services
- Funding for compensation increases, over the amounts set out in the fiscal plan, may come from budgeted and achieved cost reduction, budget and achieved cost avoidance, service redesign or other efficiency initiatives
    - Savings must be real, measurable and achieved before being allocated to compensation increase
- Agreements must be a minimum of five years in length.

[155] The Government's presentation contained no reference to freezing the accrual of the public service award or the prospect of the Government legislating the terms of its fiscal plan. The Minister would neither confirm nor deny that legislation was a possibility.

[156] Effective September 2, 2015, the Minister of Finance issued a directive instructing public sector employers "to explore cost savings or cost avoidance opportunities with bargaining agents, and, where possible, to allocate some portions of cost savings or cost avoidance achieved through innovation (as approved, achieved, and verified) to the fiscal envelope for wage increases in out years of the collective agreement."

[157] By fall 2015, CUPE Local 1867 and the PSC had not yet reached an agreement, and bargaining between the NSTU and the Minister of Education and Early Childhood Education, and between the NSGEU and the PSC was scheduled to begin. Of these three tables, only the NSTU table gave the parties the right to

strike/lockout, and Roland King was concerned that the CUPE Local 1867 table "was getting out in front of the others".

[158] As a result, negotiators for the employers at all three table were instructed to table the financial mandate of a five-year deal of 0%, 0%, 0%, 1% and 1% economic adjustments each year, and the end of the accrual of any service awards.

[159] In addition, bargaining tables dealing with voluntarily recognized associations like medical residents and Crown Attorneys were well advanced.

[160] On September 29, 2015, the NSTU negotiating committee and the Minister of Education's negotiating committee met and exchanged bargaining proposals.

[161] On page 21 of the Minister's asking package, the Government proposed to end the accrual of the service award in Article 61 of the Teachers' Provincial Agreement effective July 31, 2015, and to pay vested service awards upon retirement based on the teacher's salary on July 31, 2015, rather than on the date of retirement.

[162] On October 21, 2015, the NSGEU negotiating committee and the Province's negotiating committee met and exchanged bargaining proposals. The NSGEU proposals were contained in a nine-page document. According to James Gosse, then an employee relations officer with NSTU and its chief negotiator for collective bargaining, because of public statements by Government indicating an intention to

freeze the public service award and eliminate the Job Security Memorandum, the NSGEU decided to seek very modest improvements in collective bargaining and to prioritize the Job Security Memorandum and the public service award.

[163] The NSGEU negotiating committee decided to propose wage increases that would be limited to any increase in the nominal, gross domestic product for the Province.

[164] The Province's proposals, set out in a 48-page document, included eliminating the Job Security Memorandum and ending the public service award. The Province proposed general wage increases limited to a total of two percent over five years.

[165] During negotiations on October 21, 2015, the lead negotiator for the Province, Shirley Nevo, stated that the Province was bound by its mandate on term, wages, and the public service award. She further stated that in order for NSGEU to negotiate higher wage increases, it would have to find savings that were real, measurable and achieved, and the savings could not have a negative impact on the level of service.

[166] When asked, Ms. Nevo said the minimum cost savings that had to be achieved was $5 million. The Province refused to agree to incorporate a process for identifying such savings in the collective agreement. The Province also advised that savings from the public service award could not fund increases to wages.

[167] The parties met again on October 22, 2015, and agreed on a number of minor or housekeeping changes to the collective agreement.

[168] During bargaining on October 22, 2015, the Province stated that if the NSGEU in fact found cost savings in the collective agreement, there was no formula for determining how much, if any, of those savings would be used to fund wage increases. That decision would be left up to the Department of Finance. The Province again refused to agree on a process to identify cost savings and to have those savings applied to wage increases.

[169] On October 28, 2015, the Province's bargaining committee provided CUPE Local 1867's bargaining committee with a written document proposing, for the first time, that the public service award accrual be frozen as of April 1, 2015, and calculated using the employee's service and hourly rate as of April 1, 2015. The Province also, for the first time, made a wage proposal consisting of a wage freeze in the first three years of the renewed collective agreement and a wage increase of 1% in the fourth year of the collective agreement.

[170] The October 28, 2015 document included the following statement:

> The mandate enables us to allocate some portion of costs savings or cost avoidance (as approved, achieved, and verified) that has been negotiated through collective bargaining to the fiscal envelope for wage increases in the out years of the collective agreement.

[171] The Province merely presented their new proposal on terms, wages and the public service award on October 28, 2015. There was no bargaining that day between the Province and CUPE Local 1867.

[172] According to Peter Baxter, a CUPE national representative for more than 20 years until he retired in 2022, CUPE Local 1867 concluded that its members would not vote in favour of reducing benefits in the collective agreement because: (1) even if voluntary benefit reduction resulted in all of the costs savings being allocated to further wage increases, there would be no net gain, and (2) the Province was not making any commitment to allocate any of the achieved savings to further wage increases.

[173] On November 4 and 10, 2015, the NSGEU negotiating committee and the Province's negotiating committee met again for collective bargaining. They reached an agreement on minor changes to three additional articles.

[174] During negotiations on November 10, 2015, NSGEU's lead negotiator again referred to the Province's position that any wage increase beyond 2% over five years had to be funded by finding savings in the collective agreement, and again asked the Province to agree to a process so that the exercise could be on-going through the life of the collective agreement, rather than requiring the NSGEU to identify potential

cost savings prior to the conclusion of collective bargaining. This was particularly important to NSGEU because the Province represented that the cost savings had to be realized first and then it would unilaterally decide how much, if any, of the savings would benefit civil servants. The Province refused to agree on such a process.

[175] The parties met for five days during this first phase of bargaining. No progress was made on key issues, including wages and the public service award.

[176] On November 12, 2015, the NSTU entered into a tentative agreement with the Minister of Education. According to Wallace Fiander, then First Vice President of the NSTU provincial executive and a member of the NSTU negotiating committee, the NSTU entered into the tentative agreement "to avoid the potential for less favourable terms to be imposed by legislation".

[177] The tentative agreement would freeze service award accrual as of July 31, 2015, with payment of the service award to be based on the teacher's salary at retirement. It would also freeze wages for two years, provide for a 1% increase in the third year, a 1.5% increase in the fourth year, and a 0.5% increase on the last day of the renewed collective agreement. This represented an increase in the financial mandate from 2% over five years to 3% over four years. As a result of this tentative

agreement, the mandate for all tables was updated to the same four-year pattern of 0%, 0%, 1%, 1.5% + 0.5% on the last day of the agreement.

[178] On November 13, 2015, the NSGEU accepted an offer of a tentative agreement from the Province to settle a new Civil Service Master Agreement. In the tentative agreement, the Province would drop its proposals for significant concessions, including elimination of the Job Security Memorandum, and would modify somewhat its demands on wages and the public service award. The Province offered the updated wage mandate of 0%, 0%, 1%, 1.5% and 0.5% on the last day of the agreement and proposed that the public service award that had accrued up to April 1, 2015, would be paid out at an employee's salary upon retirement as opposed to the employee's salary on April 1, 2015.

[179] According to Mr. Gosse's evidence, the NSGEU negotiating committee accepted the tentative agreement and was prepared to recommend its ratification to members out of concern that the Province could legislate the concessions it had originally sought in bargaining, including elimination of the Job Security Memorandum.

[180] Meanwhile, the Province and CUPE Local 1867 met on November 12 and 13, 2015. There was no bargaining on term, wages, or the public service award on those

days. On the afternoon of November 13, 2015, the Province informed CUPE Local 1867 that the civil service bargaining unit represented by NSGEU had reached a tentative agreement with the Province that included wage freezes, wage restraint and cessation of the public service award accrual, and that there would be no new collective agreement for CUPE Local 1867 without those concessions.

[181] No bargaining between the Province and CUPE Local 1867 on the public service award or wages had taken place prior to the ultimatum delivered by the Province on November 13, 2015.

[182] On November 13, 2015, CUPE Local 1867 concluded that the parties had reached an impasse because of the Province's new and unwavering position on term, wages, and the public service award, and in light of the fact that the parties had not been able to agree on any item of any significance since bargaining began. To date, the parties only agreed on four minor or housekeeping items. In contrast, in the 2013 round of bargaining, the parties had agreed on 11 separate items, along with an agreement to renew or not renew several memoranda of agreement, an agreement on three new letters of understanding, an agreement on across-the-board wage increases (economic adjustments), and further wage increases for certain specific classifications in recognition of either internal or external comparability.

[183] The members of CUPE Local 1867's bargaining committee concluded that Highway Workers would not ratify a collective agreement containing the wage freezes, wage restraint, and public service award freeze proposed by the Province.

[184] On November 23, 2015, CUPE Local 1867 requested that the Minister of Labour and Advanced Education appoint a conciliation officer under s. 21(b) of the *Highway Workers Collective Bargaining Act*. The appointment of a conciliation officer is the first step toward the establishment of an interest arbitration panel under the legislation.

[185] On cross-examination, Peter Baxter agreed that between November 2014 to November 2015, CUPE Local 1867 and the Province held 26 days of bargaining, which were not productive. He further agreed that neither party was making much in the way of concessions, and that CUPE has a policy against concessionary bargaining generally. Mr. Baxter indicated that a policy against concessionary bargaining meant that any language that was bargained into the collective agreement for the benefit of the local was to be maintained.

[186] On December 1, 2015, NSTU's membership voted to reject the tentative agreement. As a result of this vote and CUPE Local 1867's request for the appointment of a conciliation officer, Roland King was concerned that a pattern for

compensation packages would not be reached by agreement at a bargaining table but imposed by a third-party interest arbitrator. Mr. King further noted that the Province was also negotiating with physicians, and the physicians had also threatened to seek an interest arbitrator to settle their financial demands of the Province.

[187] On December 2, 2015, the Premier stated publicly that the Province was drafting legislation requiring that any agreement on financial terms in the current round of public sector bargaining would be no better than the terms of the tentative agreement rejected by the teachers. He added, however, that no decision had been made yet on whether to use the legislation.

Bill 148 is Introduced, Passed, But Not Proclaimed in Force

[188] On December 14, 2015, the Province introduced Bill 148. Its purpose was set out in s. 2:

> The purpose of this *Act* is
>
> (a) to create a framework for compensation plans for public-sector employees that
>
> (i) is consistent with the duty of the Government of the Province to pursue its policy objectives in accordance with the principles of responsible fiscal management prescribed under the Finance Act, and
>
> (ii) protects the sustainability of public services,
>
> by placing fiscal limits on increases to the compensation rates and compensation ranges payable by public-sector employers that are in conformity with the consolidated fiscal plan for the Province;

(b) to authorize a portion of cost savings identified through collective bargaining to fund increases in compensation rates, compensation ranges or other employee benefits established by a collective agreement;

(c) to limit the scope of arbitral awards to comply with the principles of responsible fiscal management prescribed under the *Finance Act*; and

(d) to enable and encourage meaningful collective bargaining processes

[189] "Compensation" was defined at s. 3(e) as "salary, wages, stipends, honoraria, bonuses, fees and commissions". "Compensation plan" was defined at s. 3(f) as "the provisions, however established, for the determination and administration of a public-sector employee's compensation".

[190] Section 11 dictated that the wage provisions of expired collective agreements would be extended for four years. Sections 13 and 14 provided that wage increases would be restricted as follows:

- wage freezes in the first two years of the collective agreement
- a maximum wage increase of 1% in the third year of the collective agreement
- a maximum wage increase of 1.5% in the fourth year of the collective agreement
- a maximum wage increase of 0.5% on the last day of the collective agreement

[191] In his affidavit, Roland King's noted that these provisions of the *Act* were consistent with the annual economic adjustments agreed to in the two tentative agreements reached between the Province and the NSTU and NSGEU. He further notes that the Province had reached agreements with two other groups of employees, the Crown attorneys (on October 23, 2015) and the medical residents (on November 18, 2015), which both included the same wage package.

[192] Section 15 created the following exemptions to ss. 13 and 14:

> 15 (1) Sections 13 and 14 do not apply to a compensation rate or compensation range provided for in a compensation plan established by a collective agreement if the collective agreement is prescribed by the regulations or if
>
> (a) neither the compensation plan nor any part of it was the subject of an arbitration award issued by an arbitrator or arbitration board established under any *Act* of the Legislature or in accordance with a collective agreement; and
>
> (b) the compensation plan is approved by Treasury and Policy Board before the collective agreement is concluded.
>
> (2) Treasury and Policy Board may not approve a compensation plan under clause (1)(b) unless it is satisfied that the entering into of the collective agreement by a public-sector employer would not impose an obligation on the public-sector employer that is inconsistent with the duty of Her Majesty in right of the Province under subsection 5(1) of the *Finance Act* to pursue Her Majesty's policy objectives in accordance with the principles of responsible fiscal management.

[193] Section 17 purported to offer a mechanism for employees to negotiate increases above the imposed wage freeze and wage restraint by identifying cost savings, a portion of which could be used to fund wage increases with approval of the Treasury and Policy Board:

> 17 (1) A collective agreement entered into between a public-sector employer and a public-sector bargaining agent may contain provisions respecting the application of negotiated cost savings to compensation rates, compensation ranges or other employee benefits, which cost savings may include
>
> (a) productivity improvements;
>
> (b) expense reductions;
>
> (c) cost avoidance; and
>
> (d) any other innovation that may result in cost savings,
>
> and may provide that a portion of any such savings realized, subject to the approval of the Treasury and Policy Board, fund increases in compensation rates, compensation ranges or other employee benefits established under the collective agreement.

> (2) For greater certainty, an increase in compensation rates, compensation ranges or other employee benefits approved by Treasury and Policy Board under subsection (1) is not a contravention of Section 13 or 14.

[194] Section 18 prohibited an interest arbitration board from making an award that resulted in wage increases that contravened the wage caps prescribed in ss. 13 or 14:

> 18 (1) An arbitrator or arbitration board, appointed or established under any *Act* of the Legislature or in accordance with a collective agreement for the purpose of arbitrating a dispute arising between a public-sector employer and a public-sector bargaining agent as to the content of a collective agreement, shall not make an award resulting in a compensation plan that provides for an increase in a compensation rate or compensation range that contravenes Section 13 or 14.
>
> (2) Where an arbitrator or arbitration board contravenes subsection (1), the arbitration award is of no force and effect to the extent that it provides for an increase in a compensation rate or compensation range that contravenes Section 13 or 14.
>
> (3) Notwithstanding any *Act* of the Legislature, a public-sector employer is not bound to implement any award of an arbitrator or arbitration board to the extent that it provides for an increase in a compensation rate or compensation range that contravenes Section 13 or 14.

[195] Sections 20 and 22 of Bill 148 provided for cessation of the accrual of the service awards and retirement allowances, using the salary of an employee immediately before April 1, 2015, to calculate the amount of the service award or retirement allowance:

> 20 (1) When calculating the amount of any service award to which a person is entitled under any enactment, collective agreement, arbitral or other award or decision, agreement or arrangement of any kind, the calculation must be made using the compensation rate of, and the amount of service accrued by, the person immediately before April 1, 2015.
>
> …
>
> 22 (1) Notwithstanding any enactment, collective agreement, arbitral or other award or decision, agreement or arrangement of any kind but subject to subsection (2), no person is entitled to receive a service award or payment in respect of a public-sector employee's accrued sick leave, other than a payment made in respect

> of absence by the public-sector employee from employment by reason of illness, injury or other absence authorized by the enactment, collective agreement, arbitral or other award or decision, agreement or arrangement of any kind, in connection with employment by a public-sector employer commencing on or after April 1, 2015.

[196] Section 28 prohibited an interest arbitration board from determining the constitutional validity or constitutional applicability of Bill 148 or any regulations made under it.

[197] Section 29(k) authorized the Governor in Council to make regulations "prescribing, for the purpose of subsection 15(1), collective agreements that establish a compensation plan in respect of which Sections 13 and 14 do not apply to any compensation rate or a compensation range provided for under the compensation plan".

[198] According to Roland King's evidence, it was because the Province was aware "that there was still significant bargaining to take place" that Bill 148 contained a mechanism for the Province to exempt any particular bargaining unit or group of employees from the operation of ss. 13 and 14 in the event that an agreement was reached or an interest arbitration award was imposed that exceeded the cap (King affidavit, para. 79).

Bargaining after Bill 148 is Passed

[199] Bill 148 was passed on December 18, 2015. The *Act* was not immediately proclaimed in force.

Finalization of a New Collective Agreement with NSGEU Civil Servants

[200] Following the passage of Bill 148, the NSGEU concluded that civil servants would not likely ratify a collective agreement that contained the wage freezes and caps and the ending of the accrual of the public service award as proposed by the Province.

[201] On January 22, 2016, the NSGEU recommended that the membership reject the Province's final offer for civil servants. On December 14, 2016, the offer was rejected by 94% of the members who voted.

[202] Bargaining resumed in December 2016 but was unproductive. The Province refused to modify its position on wages and the public service award, as set out in the unproclaimed Bill 148.

[203] On January 6, 2017, the NSGEU asked that a conciliation officer be appointed to assist the parties in concluding a collective agreement. The parties met with the conciliation officer on April 19 and 20, 2017. The Province's lead negotiator indicated that the Province would not agree to any terms that differed from Bill 148. The lead negotiator further stated that the Province's earlier proposals for

concessions, including elimination of the Job Security Memorandum, would be back on the table for conciliation.

[204] The NSGEU negotiating committee met on April 22, 2017, to review the course of conciliation. Because the Province refused to negotiate terms that differed from Bill 148 and because of its intention to pursue significant concessions to provisions that were of central importance to civil servants, the NSGEU negotiating committee concluded that the parties would be unable to come to a new collective agreement through conciliation. On May 19, 2017, the NSGEU wrote to the Minister of Labour to request the appointment of an arbitration board. Initially, the Province objected to the appointment of an interest arbitration board. The parties eventually agreed to try conciliation one more time. Conciliation failed again and on August 9, 2017, the NSGEU renewed its request for an interest arbitration board to be appointed.

[205] Although bargaining continued, no further tentative agreements were reached, and the matter proceeded to interest arbitration. On August 22, 2017, after the NSGEU requested interest arbitration, but before the board was convened, Bill 148 was proclaimed in force. In a news release, the Province stated in part:

> The *Act* was originally introduced and passed in December 2015 to ensure that third-party arbitrators could not make decisions about public sector contr*act*s with unions that determine the province's future.

> Labour Relations Minister Mark Furey said the decision to proclaim the *Act* came after recent negotiations with the NSGEU reached an impasse, triggering an arbitration board.
>
> …
>
> "The decision to proclaim this legislation clearly signals our belief that elected officials sitting in the legislature are the ones who get to create public policy," said Premier McNeil. "We are elected and can be held accountable by our constituents – that cannot be said of a third-party arbitrator."

[206] The interest arbitration board was convened on December 5, 2017, and issued a decision on December 7, 2017. The board was not able to award any wage increase for the first two years of the collective agreement, or wage increases beyond the caps imposed by Bill 148 for the third and fourth years of the agreement. The board's award was for a six-year term:

a. Year 1: 0%
b. Year 2: 0%
c. Year 3: 1%
d. Year 4: 1.5% and 0.5% on the last day of the year;
e. Year 5: 1.5% and 0.5% on the last day of the year; and
f. Year 6: 1.5% and 0.5% on the last day of the year.

[207] Because of Bill 148, the NSGEU was not able to retain the public service award language in Article 45 of the Civil Service Master Agreement. The interest arbitration board ordered the inclusion of an option for the immediate payout of the service award accrued to March 31, 2015, before March 31, 2018, using the employee's salary on March 31, 2018. Because this award exceeded the

compensation cap under Bill 148, the Province passed a regulation exempting the employees subject to the collective agreement from the *Act*.

[208] In Mr. Gosse's affidavit, he notes that at the time of the December 7, 2017, interest arbitration award, no collective agreement had been concluded for any public sector bargaining unit of any significant size in Nova Scotia. He added that if the powers of the interest arbitration board had not been restricted by Bill 148, the NSGEU would not have accepted the wage freeze or wage caps in the first four years of the collective agreement, nor would it have accepted the freezing of the public service award accrual.

Bargaining between the NSTU and the Province

[209] During bargaining after Bill 148 was passed, the Minister of Education's negotiating committee took the position that it had no mandate to discuss wages or the elimination of the service award because of Bill 148. It did not waiver from that position.

[210] According to Wallace Fiander, the NSTU negotiating committee was aware that the Government could proclaim Bill 148 into force at any time, thereby imposing the same wage pattern as in the tentative agreement rejected by teachers, and less favourable service award provisions than in the tentative agreement.

[211] On October 4, 2016, a majority of teachers voted to reject a second tentative agreement that contained the same wage and service award provisions rejected by teachers on December 1, 2015. Strike action began in December 2016.

[212] On February 8, 2017, a majority of teachers voted to reject a third tentative agreement that would have paid the same wage increases but somewhat earlier, and that contained the same service award provisions as in the first tentative agreement.

[213] On February 14, 2017, the Government introduced the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, S.N.S. 2017, c. 1 ("Bill 75"). It was proclaimed into force on February 21, 2017.

[214] Bill 75 imposed a collective agreement on teachers and ended their strike action. Bill 75 also imposed the same wage increases, timing of wage increases, cessation of service award accrual and payment of service award as in the tentative agreement rejected by teachers on December 1, 2015. Bill 75 did not provide for an alternative method of resolving the collective bargaining dispute between the NSTU and the Minister of Education, such as interest arbitration.

[215] Effective August 22, 2017, the Province excluded teachers from Bill 148 under the *Public Services Sustainability General Regulations*.

[216] Effective January 30, 2018, the Province passed the *Teachers' Service Payouts Regulations* under Bill 75, allowing teachers to receive an early pay-out of their service award accrued to July 31, 2015, using their salary as of March 31, 2018.

[217] On October 23, 2020, the NSTU and the Minister of Education signed a new collective agreement with a term from August 1, 2019, to July 31, 2023. Mr. Fiander noted that the effects of Bill 75 and Bill 148, including the loss of the service award and the effects to teachers' wages, carried through to the October 2020 collective agreement.

[218] On June 13, 2022, the Supreme Court of Nova Scotia concluded that Bill 75 was unconstitutional as it violated s. 2(d) of the *Charter* and could not be saved by s. 1 (*Nova Scotia Teachers Union v. Nova Scotia (Attorney General)*, 2022 NSSC 168, aff'd 2023 NSCA 82). However, the Court declined to grant a s. 24 *Charter* remedy for the financial losses suffered by teachers, largely because the Court did not comment on the constitutionality of Bill 148.

Bargaining between CUPE Local 1867 and the Province

[219] From January 14, 2016, to October 25, 2017, CUPE Local 1867 and the Province met on 11 separate days with the assistance of a conciliation officer. The Province would not agree to any terms inconsistent with the terms of Bill 148. The

Province made it clear to CUPE Local 1867 that the terms of Bill 148 were non-negotiable, even though Bill 148 had not yet been proclaimed into law. The Province refused to agree to anything unless CUPE Local 1867 accepted the concessions imposed by Bill 148. As a result, there were no items of any significance agreed to in bargaining after Bill 148 was introduced. The parties were only able to agree on three further items of little significance during conciliation.

[220] In his affidavit, Peter Baxter stated:

> 64. Without the ability to strike or threaten a strike, and without the ability to resist the terms of Bill 148, CUPE Local 1867 and the Highway Workers had no bargaining power at the negotiating table. Normally, wages are used as leverage for other significant gains, such as other items with an associated cost, or important language changes. For example, CUPE Local 1867 might have agreed to a lower wage increase in exchange for another benefit or language change, such as language that would protect job security in the vent of the contracting out of work, one of the bargaining priorities of CUPE Local 1867. However, wage restraint and a frozen Public Service Award were guaranteed for the Province, so the Province did not have to bargain to obtain them. There was no give-and-take like there would normally be in collective bargaining.

[221] On October 25, 2017, the conciliation officer informed CUPE Local 1867 and the Province that conciliation would cease because the parties were at an impasse. The parties had not been able to agree on any item of significance despite 26 days of bargaining and 11 days of conciliation.

[222] The matter was ultimately referred to an interest arbitration board in August 2018. The arbitration board released its award on August 14, 2018, and ordered the

same wage pattern and freezing of the public service award (along with an option of an early payout) as the civil service interest arbitration board.

[223] In addition, the interest arbitration board issued two special adjustments of $1.50 per hour increase to the Mechanic II and Mobile Service Mechanic classifications, effective November 1, 2018 and November 1, 2019, the fifth and sixth years of the collective agreement only.

[224] Because the award exceeded the compensation cap mandated by Bill 148, the group of employees subject to this collective agreement was exempted from the *Act*.

Bargaining between IUOE 727 and Emergency Medical Care Inc.

[225] On November 5, 2015, IUOE 727 gave notice to the employer, Emergency Medical Care Inc. ("EMC"), to commence collective bargaining for the renewal of the 2011-2015 Collective Agreement for the full-time and regular part-time employee bargaining unit.

[226] An updated list of proposals was provided to the EMC at the first meeting between the parties on December 14, 2015. Among the proposals were several monetary items, including but not limited to a proposal for a wage rate increase, that are noted to be of critical importance to the members of the full-time and part-time bargaining unit. EMC did not make an initial wage proposal.

[227] On December 14, 2015, the same day IUOE 727 and the EMC first met to commence collective bargaining, the Government introduced Bill 148.

[228] On October 14, 2016, by order of the Nova Scotia Labour Board, IUOE 727 was certified as the bargaining agent for a bargaining unit of casual employees of the Employer.

[229] On February 28, 2017, the IUOE 727 gave EMC notice to bargain a first collective agreement for the casual employee bargaining unit. The parties agreed that the casual bargaining unit would be merged with the full-time and regular part-time bargaining unit collective agreement. Negotiations focused on the applicability of the provisions of the collective agreement to casual employees and what additional provisions were required.

[230] Between December 2015 and December 2018, the parties held 24 days of negotiations – 16 days for the full-time and regular part-time bargaining unit and eight for the casual bargaining unit. The parties were not able to conclude an agreement.

[231] Throughout negotiations, EMC maintained the position that the provisions of Bill 148 prohibited it from agreeing to any monetary increase.

[232] On August 25, 2016, EMC made a wage proposal that precisely mirrored the provisions of Bill 148.

[233] Bill 148 was proclaimed into force on August 22, 2017.

[234] On December 7, 2018, EMC made a final proposal. The proposed wage increases had not changed since its original proposal over two years earlier and it continued to mirror the provisions of Bill 148. In addition to the Bill 148 requirements, EMC's proposal included wage increases between November 1, 2019, and October 31, 2021, and shift differential and weekend premiums to mirror other settlements in the public sector.

[235] Kerry Fletcher has been a shop steward for the IUOE 727 for about 25 years. He was on the bargaining committee for the round of bargaining that resulted in the eventual collective agreement between IOUE 727 and EMC, which was in force from November 1, 2015, to October 31, 2023. Mr. Fletcher stated in his affidavit:

> 50. Without the ability to make progress on monetary items, the collective bargaining process that IUOE 727 had experienced in previous rounds of collective bargaining prior to Bill 148 did not unfold. In previous rounds of negotiations, the parties had been able to engage in a back and forth of proposals that resulted in compromises. This would occur because there was flexibility to make trade-offs. Bill 148 resulted in the Employer effectively taking monetary items off the table….

[236] Mr. Fletcher stated that the union understood, based on its experience with the bargaining unit members, that EMC's final offer would be rejected. This would leave

two options – strike or arbitration. He noted that the ability of the two IOUE 727 bargaining units to strike was limited. In 1999, a strike continued for only 18 hours before the Legislature intervened. In 2013, the Legislature intervened prior to the bargaining unit being in a legal strike position. Moreover, the union understood that the provisions of Bill 148 would apply to any arbitration to conclude a collective agreement.

[237] In September 2019, IUOE 727 and the EMC agreed to arbitrate the issue of a new collective agreement before Frank DeMont, Q.C. On February 18, 2020, Arbitrator DeMont released his interest arbitration decision. He imposed an eight-year collective agreement running from November 1, 2015, to October 31, 2023. The agreement was consistent with the terms of Bill 148. Arbitrator DeMont recognized that the first four years could not deviate from Bill 148.

Bargaining between the Councils of Unions and NSHA/IWK

[238] In April 2015, the *Health Authorities Act*, S.N.S. 2014, c. 32, merged the previous health authorities into one body, the NSHA, and created four councils of unions to represent the employees in four merged bargaining units at the NSHA and the IWK:

> (a) the Nova Scotia Council of Nursing Unions ("Nursing Council"), to represent all unionized employees who occupy positions that must be occupied by a registered nurse or a licensed practical nurse ("Nursing Bargaining Unit");

(b) the Health Care Council, to represent all unionized employees who (i) occupy positions that require them to be engaged primarily in a clinical capacity to provide patient care, and (ii) are not included in the nursing bargaining unit ("Health Care Bargaining Unit");

(c) the Nova Scotia Council of Health Administrative Professionals Unions ("Health Administrative Professionals Council"), to represent all unionized employees who occupy positions that require them to be engaged primarily in a non-clinical capacity to perform functions that are predominantly administrative or clerical ("Administrative Professionals Bargaining Unit"); and

(d) the Nova Scotia Council of Health Support Unions ("Health Support Council"), to represent all unionized employees who (i) occupy positions that require them to be engaged primarily in a non-clinical capacity to provide operational support in respect of the provision of health services, and (ii) are not included in the administrative professionals bargaining unit ("Support Bargaining Unit").

[239] The Health Care Council, led by the NSGEU, bargains on behalf of 6,500 health care professionals across Nova Scotia who deliver patient care, including medical laboratory technologists, x-ray technicians, physiotherapists, occupational therapists and those with master's degrees in social work. The Health Care Council is made up of elected bargaining committee members from NSGEU, CUPE, Unifor and staff from NSGEU and CUPE. The NSGEU collective agreements bargained by the Health Care Council contained service awards or retirement allowances.

[240] The Legislature passed Bill 148 before bargaining commenced with any of the four Councils of Unions. Bill 148 applied to the collective agreements between the Health Care Council and the two employers – the NSHA and the IWK. Once proclaimed, Bill 148 would end the accrual of the service awards and retirement

allowances for current employees and remove those benefits for any new employees. The Province did not consult with the Health Care Council before passing Bill 148.

[241] After Bill 148 was passed, the four Councils decided that the Health Care Council would bargain the first collective agreement with the NSHA and the IWK. Bargaining with the Health Care Council commenced on October 3, 2016.

[242] Shawn Fuller, Director of Negotiations and Servicing for Health Care for the NSGEU from 2014 to 2018, acted as lead negotiator for the Health Care Council. Mr. Fuller was chief negotiator in the first round of collective bargaining for the Health Care Bargaining Unit in Nova Scotia, which involved two employers – the NSHA and the IWK. Most of the collective agreements bargained by the Health Care Council in the round of negotiations prior to Bill 148 expired on November 1, 2014.

[243] Mr. Fuller states in his affidavit that during bargaining, the employers took the position that they were bound by the wage mandate and retirement allowance accrual freeze as set by Bill 148, except that they would agree that an employee's salary on retirement could be used to calculate the retirement allowance. The employers took this position despite the fact that Bill 148 had not yet been proclaimed into force.

[244] On the first day of bargaining, the chief negotiator for the employers, Thomas Groves, advised in his opening remarks that because of Bill 148 there would be no new money. Mr. Fuller also said in his opening remarks that ratification of a tentative agreement would be very difficult in the face of Bill 148, and that a failed ratification vote would result in a loss of confidence in the Health Care Council by union members.

[245] Mr. Fuller deposed in his affidavit that in December 2015 and throughout 2016, he and other experienced negotiating staff and bargaining committee members from NSGEU, CUPE, NSNU and Unifor, concluded that union members would not vote in favour of two years of wage freezes or in favour of freezing the service award or retirement allowance in their collective agreements. They also concluded that if they brought a tentative agreement to union members that the members rejected, they risked dividing the membership and losing the membership's trust, and never being able to get another tentative agreement ratified.

[246] The Health Care Council and the employers held 18 bargaining days up until the end of August 2017. Mr. Fuller had conversations with Mr. Groves in which he took the position that the original retirement allowance language should remain unchanged in the new collective agreement in the event that Bill 148 was declared unconstitutional. Mr. Groves, on behalf of the employers, agreed to retain the

retirement allowance language in the collective agreement and to add language immediately after providing that the *Act* requires the employer to freeze the years of service used to calculate the amount of the retirement allowance.

[247] Bill 148 was proclaimed in force on August 22, 2017. As of September 1, 2017, the Health Care Council and the employers had agreed completely on only 7 of 46 articles proposed for the new collective agreement. Mr. Fuller stated that the seven articles were not key articles and did not involve monetary items. There was no agreement on any key item or monetary item.

[248] The employers did not make any proposals for cost savings or cost avoidance to fund wage increases beyond the freezes and caps required by Bill 148. Mr. Fuller's evidence was that the Health Care Council did not make any proposal for cost savings or cost avoidance in exchange for enhanced wage increases because:

> (a) There was no way for the Health Care Council to know what value the Province would place on a benefit reduction, or what portion, if any, the Province would allocate to further wage increases in the future;
>
> (b) The Health Care Council would not have been able to recommend that employees vote to reduce a collective agreement benefit in the hope that the Province might allow a portion of savings, once realized at some point in the future, to fund further wage increases, at some point in the future; and
>
> (c) The Health Care Council did not believe employees would vote in favour of such a proposal.

[249] On April 30, 2018, employees in the Health Care Bargaining Unit voted 93% in favour of a strike.

[250] On May 18, 2018, members of the four Councils of Unions, including the Health Care Council, voted in favour of a mediation/arbitration agreement with the NSHA and the IWK. The mediation/arbitration agreement:

- included the wages provisions dictated by Bill 148 for the first four years of the collective agreements;
- added a fifth and sixth year to each of the new collective agreements, with the same wage increases that had been awarded by the civil service interest arbitration board;
- allowed for early pay-out of service award and retirement allowance accrued to March 31, 2015, using the salary on October 31, 2017; and
- provided for the resolution of any other dispute between the parties by way of final and binding mediation/arbitration.

[251] The Province agreed to pass a regulation allowing for the early pay-out of the frozen services awards and retirement allowances.

[252] The arbitrator appointed pursuant to the May 2018 mediation/arbitration agreement awarded collective agreements for each of the Council of Unions in four different awards issued between August and December 2018.

[253] Mr. Fuller deposed that if Bill 148 did not dictate wage freezes and caps for the first four years of the new collective agreement or freeze retirement allowances, the Health Care Council would not have accepted the wage freeze or wage caps in the first four years of the new collective agreement, nor would it have accepted the freezing of the retirement allowance.

Bargaining between the NSNU and the Province

[254] The NSNU is a party to collective agreements governing bargaining units of registered nurses, licensed practical nurses and/or nurse practitioners employed by numerous employers in the acute care, long term care, and community care sectors.

[255] In 2014, all of the NSNU collective agreements expired. All of the NSNU collective agreements at this time contained a retirement allowance. The retirement allowance was a significant and important monetary benefit for NSNU members and was an important factor in nurse retention.

[256] Article 19 of the NSNU acute care collective agreement with the provincial health authorities and the IWK, effective from November 1, 2012, to October 31, 2014, provided for a retirement allowance equivalent to one week of pay for each year of service to a maximum of twenty-six weeks' pay.

[257] All NSNU non-acute care bargaining units also had retirement allowances in their collective agreements.

[258] After Bill 148 was passed, the four Councils of Unions considered how best to proceed and decided that the Health Care Council would bargain a new collective agreement with the employers first. As noted above, bargaining began on October 3, 2016, and in May 2018, members voted to proceed to mediation/arbitration to

conclude collective agreements for the four Councils of Unions. Four different awards, one for each Council, were issued between August and December 2018.

[259] Bargaining for long term care and community care typically awaits the settlement of collective agreements in the acute health care sector. After the settlement of the acute care collective agreements pursuant to the May 2018 mediation/arbitration agreement, the NSNU long term care nurses voted to accept a "roll-over" of their collective agreements, meaning that there were no changes except for the wage freezes and wage increases agreed to in acute care; increase to weekend and shift premiums agreed to in acute care; and the ability for nurses to obtain an early pay-out of their retirement allowances.

Bargaining between SEIU Local 2 and the Province

[260] Between 2014 and 2019, SEIU Local 2 was the exclusive bargaining agent for, and party to the collective agreements governing 530 employees across six different nursing homes; five employees working in the Licensed Practical Nurse classification at a residential care facility in Bridgetown; nine employees working at a residential care facility in Windsor; all teacher assistants and library staff at the South Shore Regional School Board (approximately 160 employees); and all teacher assistants and library staff at the Tri County Regional School Board (approximately 130 employees).

[261] The collective agreements covering employees in nursing homes represented by SEIU Local 2 are very similar and have the same rates of pay.

[262] The employees in the nursing home and residential care facility bargaining units are predominantly female and relatively low paid. For example, one of the largest classifications is Personal Care Worker, comprised mostly of women whose hourly rate of pay at the expiry of the collective agreement on October 31, 2014, ranged from $16.06 and $17.68.

[263] On December 14, 2015, the Province introduced Bill 148. All of the above-noted employees were directly affected by Bill 148.

[264] Only one of the bargaining units represented by SEIU Local 2 made provision for a retirement allowance, the accrual of which was frozen under Bill 148. The collective agreement between SEIU Local 2 and Villa Acadienne Home for Special Care, November 1, 2011 – October 31, 2014, included a retirement allowance provision.

[265] Collective bargaining to renew the collective agreements that expired on October 1, 2014 was long delayed and many collective agreements were not concluded before 2019, despite having expired on October 31, 2014.

[266] Initially there was a delay because of the reorganization of the acute care sector by the *Health Authorities Act* in April 2015.

[267] Gerald Higgins was the Atlantic Regional Coordinator of the Service Employees' International Union, Local 2 (SEIU Local 2) until October 1, 2020. He assumed that role in 2000. His duties included collective agreement negotiations and grievance handling on behalf of bargaining units represented by SEIU Local 2. He stated in his affidavit that his assessment in December 2015 was that for the foreseeable future, there was no collective agreement that could be negotiated and ratified successfully within the framework of the wage freeze for two years and a further two years of wage restraint as provided for in Bill 148. He was unwilling to negotiate and recommend an agreement that he knew his members would reject.

[268] In Mr. Higgins's experience, negotiations on wages are critical to the collective bargaining process because they generally require trade-offs with other issues and provide leverage for the union to make gains on behalf of members in the give and take of bargaining. His assessment was that, with wage increases determined by Bill 148, SEIU Local 2 had no leverage to make any gains in collective bargaining because the employers had no incentive to bargain favourable outcomes on issues other than wage rates.

[269] Mr. Higgins further stated that collective bargaining for SEIU Local 2 members over the years had typically resulted in renewed collective agreements within a year to a year and a half. In Mr. Higgins's view, if he had negotiated a tentative agreement with the wage freeze and wage restraint set out in Bill 148 and brought it back to a vote by his members within a year to a year-and-a-half of the expiry of the previous collective agreements on October 31, 2014, his members would be voting on ratifying an agreement with zero wage increases. He saw no way that such an agreement would ratify and therefore, the only viable collective bargaining strategy was to wait.

[270] When the Councils of Unions under the *Health Authorities Act* settled collective agreements in the fall of 2018 with wage increases totaling 7% of a six-year term starting November 1, 2014 and with future increased shift and weekend premiums, Mr. Higgins concluded that it was then possible to negotiate collective agreements that could be ratified.

[271] Once SEIU Local 2 recommended bargaining in late 2018, it concluded agreements in the nursing home and residential care units that simply extended the collective agreements that expired on October 31, 2014, to October 31, 2020, with wage increases and the increases in premiums in the Councils of Unions' agreements. In a few bargaining units, SEIU Local 2 also amended provisions for

pregnancy, parental and adoption leave to bring the agreement into compliance with the *Labour Standards Code.*

[272] In the one agreement that provided for a retirement allowance, the extension agreement reflects the Bill 148 requirement to end accrual of retirement allowances effective April 1, 2015.

[273] Mr. Higgins indicated that in previous rounds of bargaining that he had conducted or participated in over the years, it was always possible to negotiate improvements for members, including wage increases, by the mechanism of free collective bargaining. While often a pattern wage settlement emerged from major settlements by other unions, there was usually the opportunity for give and take on some monetary issues and real negotiation on non-monetary terms and conditions. For example, in 2009, SEIU Local 2 agreed to two years of wage restraint but made other improvements through a genuine process of collective bargaining. Mr. Higgins deposed that Bill 148 denied SEIU Local 2 that genuine process and resulted in extension agreements that simply incorporated the wage freeze and wage restraint features of Bill 148 and produced limited gains for members only in the two-year period after the four years governed by Bill 148.

Bargaining between CUPW and EMC

[274] CUPW represents full-time, regular part-time, term, and temporary employees of EMC working at its communication centre in Dartmouth in the classifications of Paramedic Communications Officer, Communications Officer, and Transfer Administrator.

[275] At all relevant times, there were approximately 50 employees employed by EMC at its communications centre that were represented by the CUPW.

[276] In 2014, Jeffrey Callaghan was chief negotiator for CUPW in the negotiation of a five-year collective agreement in which the following key improvements were made:

- Conversion from a defined-contribution pension plan to the defined-benefit Nova Scotia Health Employees' Pension Plan;
- Wage increases of 2.0%, 2.5%, 3.0% for the first 3 years, with increases for the fourth and fifth years to be equivalent to the wage rate percentage of the Acute Care Paramedics employed by EMC;
- The establishment of shift premiums ranging from $0.65 per hour to $1.50 per hour beginning in April 2015;
- The establishment of a weekend premium of $1.50 per hour;
- An additional paid statutory holiday (Family Day) beginning in February 2015;
- Ability to use paid sick leave to transition onto third party benefit plans;
- The contentious issue of wages for the new classification of Transfer Administrator was also resolved in bargaining.

[277] The increases in the fourth and fifth years of the 2014-2019 collective agreement (2017 and 2018 respectively) were tied to collective bargaining by the IUOE Local 727, which represents the acute care paramedics employed by EMC.

[278] The collective agreement between the IUOE Local 727 and EMC expired in 2014. A new collective agreement was not concluded until Arbitrator DeMont imposed an agreement in a February 18, 2020 arbitration award.

[279] As a result of the so-called “me too” clauses in the 2014-2019 collective agreement, the wage increases for the last two years of the agreement were limited to the terms imposed by Bill 148.

[280] In 2019, CUPW started bargaining to conclude a subsequent collective agreement. These negotiations began before the DeMont arbitration award was released. As a result, CUPW faced considerable uncertainty not only about the wage rates in the fourth and fifth year of the 2014-2019 collective agreement, but also of the application of Bill 148 both to the expired and any renewal agreements.

[281] In Mr. Callaghan’s experience as a negotiator, negotiations on wages are critical to the collective bargaining process, not only because of the importance of wage increases, but because they generally require trade-offs with other issues and provide leverage for the union to make gains on behalf of members in the give and take of bargaining.

[282] In Mr. Callaghan's view, the union was seriously disadvantaged in the process of collective bargaining for the renewal agreement as a direct result of Bill 148 and the uncertainty it created.

The State of Public Sector Labour Relations

[283] In addition to the affidavit of Roland King, the Province filed the affidavit of Angela Kidney, Executive Director, Labour Relations and Compensation with the Department of Finance and Treasury Board. Ms. Kidney has been in the role since May 1, 2020.

[284] Ms. Kidney indicated that although the title has changed, her role is similar to the role played by Roland King when he was Executive Director.

[285] One of Ms. Kidney's duties is to monitor all collective bargaining in the broader public sector in Nova Scotia to ensure that the resulting collective agreements fit within the Province's fiscal mandate. As a result, she expects the lead negotiators for the employer for all the broader public sector bargaining tables to keep her team apprised of all major monetary proposals from the union(s) with which they are bargaining. Her team in turn keeps her apprised of such major monetary proposals.

[286] The cycle of bargaining affected by the *Act* has now passed. At the time of Ms. Kidney's affidavit, all the major public sector bargaining units had concluded a new collective agreement for the first cycle of bargaining subsequent to the *Act*. As of the affidavit date, there were only about 30 bargaining units which had not concluded a collective agreement during the current cycle.

[287] With respect to the public service award, Ms. Kidney asked the PSC to review the payroll records of all employees of the civil service in the five years prior to the passage of the *Act*. The review revealed that over the period of 2010 to 2015, 11,514 employees left the civil service without a public service award, compared to 1,656 employees who retired and received a public service award.

[288] Finally, approximately 88% of all employees in the broader public service who were eligible to do so elected to take an early payout of their public service awards/retirement allowances.

[289] Ms. Kidney deposed that she is not aware of any proposals from any of the Applicant Unions to renegotiate a long service award/retiring allowance into any of the collective agreements in the broader public sector in Nova Scotia.

[290] Several of the affiants for the Applicant Unions filed rebuttal affidavits in response to the affidavits of Mr. King and Ms. Kidney. In Shawn Fuller's rebuttal

affidavit, he pointed out that Ms. Kidney's statement that she is unaware of any union proposals to renegotiate a public service award failed to acknowledge that many public sector collective agreements negotiated in the context of Bill 148 maintain the pre-Bill 148 service award language. He indicated that the intention of the Councils of Unions in preserving the language was at least in part to preserve their members' entitlement to public service awards and to allow for reactivation of that entitlement if Bill 148 is struck down as unconstitutional. Mr. Fuller provided a list of 25 collective agreements negotiated by the Councils with language preserving service awards. Likewise, in Peter Baxter's rebuttal affidavit, he listed 18 collective agreements negotiated by CUPE with language preserving service awards.

[291] In the rebuttal affidavit of Susan Gill on behalf of Unifor, she noted that on May 18, 2022, during collective bargaining with the Province, the Council of Health Support Unions provided the Province with notice that it intended to require the NSHA and the IWK to abide by the meaning of Article 29 of the respective collective agreements, which created the entitlement to a retirement allowance.

[292] The Council provided this notice to the Province after the Province represented to the NSCA, during oral submissions on the *Reference re Bill 148*, 2022 NSCA 39, that the Council was exempt from Bill 148 due to the operation of regulations passed by the Governor in Council.

[293] Ms. Gill further noted that the two most recent collective agreements negotiated between Northwoodcare Inc. and Unifor, Local 4606, maintained language regarding service awards and included language accounting for the effects of Bill 148.

[294] Finally, in the rebuttal affidavit of Christine Albrecht, she stated that the NSNU has taken several steps to preserve its members' entitlement to public service awards. In 2017, the NSNU filed a policy grievance regarding the elimination of service awards for each NSNU bargaining unit that had a collective agreement providing for a service award. The policy grievances were in the form of one of two versions, depending on the language of the relevant collective agreement. Each policy grievance requested that all adversely affected bargaining unit members be made whole for any unpaid retirement allowance amounts.

[295] On or around November 28, 2017, the NSNU and all employer parties to the service award grievances agreed to place the grievances in abeyance on the belief that the *Reference re Bill 148*, *supra*, would resolve the issue of entitlement to the Service Awards eliminated by Bill 148. The issue was not resolved, however, as the Nova Scotia Court of Appeal exercised its discretion and declined to answer the questions referred to it.

[296] Ms. Albrecht further noted that NSNU negotiated four collective agreements which maintained the pre-Bill 148 service award language.

Did Bill 148 Substantially Interfere with the Applicant Unions' Section 2(d) rights?

[297] Section 2(d) protects the right of unions and union members to bargain collectively. As noted above, in *Health Services*, Chief Justice McLachlin and LeBel J., writing the majority judgment, stated that s. 2(d) protects "the capacity of members of labour unions to engage in collective bargaining on workplace issues" (para. 2). The majority in *Health Services* stated that it is "substantial interference with collective bargaining" that s. 2(d) protects. The state must "not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith". The requirement is that both employer and employees to meet and "to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation". (para. 90).

[298] In *Health Services*, the Supreme Court made it clear that the inquiry into substantial interference is contextual and fact specific. "The question in every case is whether the process of voluntary, good faith collective bargaining between

employees and the employer has been, or is likely to be, significantly and adversely impacted" (para. 92).

[299] The majority in *Health Services* set out the two part test which governs the substantial interference inquiry:

1. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert.

2. The second inquiry examines the meaningfulness of the collective bargaining process and the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

[300] Under the first inquiry, "the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of union to pursue common goals collectively. The more important the matter, the more likely that there is substantial interference with the s. 2(d) right". (*Health Services*, para. 95).

[301] In *Health Services*, the majority said that substantial interference with collective bargaining may be found under the first part of the test where "laws or

state actions prevent or deny meaningful discussion and consultation about working conditions between employees and employers" (para. 96) or "unilaterally nullify significant negotiated terms in existing collective agreements" (para. 96).

[302] Although the Respondents say that the *Act* did not remove wage increases from the bargaining table, but rather established a presumptive maximum wage pattern for a defined period, I do not accept that interpretation. Here, I accept the evidence of the Applicants that the effect of the *Act* was to cap wage increases. In removing wages from the items up for negotiation, the *Act* materially undermined the ability of the Applicant Unions to effectively bargain for their members. Wages and compensation have been held to be matters of significant importance to unionized employees (*Meredith* para. 130).

[303] Employer actions which may violate s. 2(d), depending on the context include taking important matters off the table or restricting the matters that may be discussed (*MPAO*, at par. 72), as are the imposition of "arbitrary outcomes" (*MPAO*, at para. 72).

[304] As noted earlier in this decision, Donald J.A. in *BCTF* stated that "Actions by government that reduce employees' negotiating power with respect to the employer can satisfy this standard of substantial interference".

[305] This Court has reviewed earlier in this decision the Government's actions as they relate to the long term service award. The Respondent's submission that "properly construed, service awards are, at best, a matter of marginal importance at the first step of the *Health Services* test. To the extent that they are important, they are not uniquely important to employees or to their participation in collective bargaining". These submissions fly in the fact of the Applicants' evidence. It is clear to this Court that the removal of the long term service awards, along with the wage restraint caps imposed by the *Act*, had a hugely negative impact on the bargaining power of the Applicant Unions, and thereby their ability to meaningfully negotiate on behalf of their members.

[306] I find that the Applicant Unions have established the first inquiry in the *Health Services* test.

[307] The second inquiry asks the question of whether "the legislative measure or government conduct in issue respects the fundamental precept of collective bargaining – the duty to consult and negotiate in good faith?". The duty to negotiate in good faith requires the parties to approach negotiations with good intentions, engage in genuine and meaningful dialogue, and make a reasonable effort to arrive at an acceptable contract, honestly strive to find a middle ground and mutually respect the commitment entered into. (*Health Services*, paras 98-101).

[308] I have reached the conclusion that it did not (in answer to the second inquiry). Bill 148 substantially interfered with the ability of the Applicant Unions to exert meaningful influence over important working conditions through a process of good faith collective bargaining. Those important working conditions importantly include wages and Service Award accrual.

[309] I find that wages and service awards were significantly impacted by Bill 148 and impeded the Applicant Unions' ability to pursue workplace goals in concert.

[310] Bill 148 removed the Applicant Unions' leverage on monetary items and thereby upset the balance of power between the parties and negated the ability of the Unions to engage in meaningful bargaining.

[311] In *Nova Scotia Teachers Union v. Nova Scotia (Attorney General)* 2022 NSSC 168 Justice Keith noted the importance of service awards as they related to teachers. This Court also has the evidence of the Unions' affiants as to how the service awards were negotiated over decades.

[312] In his expert report, Dr. Hebdon states (paras. 42 and 43) that:

> "….monetary issues are pivotal to the exercise of bargaining power of both labour and management. The parties know that when monetary issues are settled it is almost impossible to generate pressure on any other issues because they are central to the negotiations. Thus by predetermining pay rate increases in favour of management the union is left with almost no ability to exercise bargaining power on non-monetary issues. The loss of bargaining power is not the only problem.

> Collective bargaining is more complex than just the across-the-table negotiations between management and labour. A critical element, as discussed above, is the democratic involvement of the union membership in formulating proposals, setting priorities, electing bargaining team members that represent various member interests, resetting priorities as negotiations progress through team caucuses, and finally voting on the final package. By removing the key monetary issue from the scope of bargaining [Bill 148] damages these political sub-processes of collective bargaining. Under the [Bill 148] restrictions, the union members can no longer voice their true preferences or if they do the union cannot satisfy their demands. This builds frustration and cynicism om the part of union members in the institution of collective bargaining and can lead to internal union conflict including the rejection of tentative settlements. These rejected settlements may damage both the relationship between the union and its members but also between the union and management.
>
> Both the wage pattern of Bill 148, and the elimination of service awards independently had a significant impact on the ability of the Applicant Unions to pursue their members' common workplace goals. The combined effect of these two had a compounding effect on those goals.

[313] The evidence shows, and I find that Bill 148 did not respect the principle of the duty to consult and negotiate in good faith. Bill 148 imposed a wage pattern, including a wage freeze. Bill 148 imposed Government's position on service awards.

[314] The Cabinet documents reviewed earlier in his decision, as well as the Government's conduct in collective bargaining demonstrates to this Court that the Government did not intend to really listen and seriously consider the position of the Applicant Unions on these issues. Rather, the focus of the Government, was whether it could achieve its outcome in bargaining, or by legislation.

[315] The evidence discloses that there was very little bargaining with the Teachers Union, the NSGEU, the Civil Service and Highway Workers prior to the passage of Bill 148 and no bargaining with any of the other Applicant Unions.

[316] At the point when Bill 148 was passed, the Government had a failed agreement with the NSTU, a tentative agreement which had not been voted on by members of the NSGEU, both of which had been bargained in the shadow of the imposition of Bill 148 – a bargaining process which did not reflect free and fair collective bargaining. Rather, it was a bargaining process similar to that referred to by Justice Donald in the *BCTF* case as an "unwavering position" with "no intention to strive for middle ground".

[317] Prior to the passage of Bill 148, there was no meaningful consultation with affected unions. The content of the Government's meetings with unions in August and October 2015 falls far short of the consultations described in *OECTA* which the Ontario Court of Appeal found to be inadequate.

[318] This Court also finds that once Bill 148 was passed, it did not allow for meaningful collective bargaining to continue. Rather, as reviewed above, bargaining stalled and no items of significance could be negotiated.

[319] I find that the terms of section 17 of Bill 148 fell far short of a meaningful avenue for collective bargaining. It is to be recalled that Section 17(1) purported to offer a mechanism for employees to negotiate increases above the imposed wage freeze and wage restraint by identifying "cost savings" through "productivity improvements", "expense reductions", "cost avoidance", and "any other innovation that may result in cost savings". Section 17 states that "a portion of any such savings realized" could be used "to fund increases in compensation rates, compensation ranges or other employee benefits". However, such increases could only be awarded with "the approval of the Treasury and Policy Board".

[320] There is no evidence before this Court that any parties were able to negotiate s. 17 increases. As noted earlier in this decision, the Government refused to tell Unions the value it would provide to any particular labour-side concession, nor how much of that value the Government would reallocate into wage increases. The Government also refused to agree on a process for identifying such savings.

[321] The affidavit evidence of Shawn Fuller, the Executive Director of the NSGEU makes it clear why section 17 'benefits' were illusory. He states that the union's Health Care Council did not make any proposal for cost savings or cost avoidance in exchange for enhanced wage increases because:

a) There was no way for the Health Care Council to know what value the Province of Nova Scotia would place on a benefit reduction, or what portion, if any, the Province would allocate to further wage increases in the future;

b) The Health Care Council would not have been able to recommend that employees vote to reduce a collective agreement benefit in the hope that the Province of Nova Scotia might allow a portion of savings, once realized at some point in the future; and

c) The Health Care Council did not believe employees would vote in favour of such a proposal.

[322] The affidavit evidence of Peter Baxter, a long-time national representative of CUPE is to similar effect in terms of bargaining for the Highway Workers:

> CUPE Local 1867 concluded that its members would not vote in favour of reducing benefits in the collective agreement because: (1) even if voluntary benefit reduction resulted in all of the cost savings being allocated to further wage increases, there would be no net gain; and (2) the Province of Nova Scotia was not making any commitment to allocate any of the achieved savings to further wage increases. CUPE is not aware of any union that agreed to costs savings or costs avoidance in exchange for potential further wage increases beyond the Bill 148 caps.

[323] The Court refers to these "outcomes" as they relate to section 17. While collective bargaining is not about a guarantee of a particular outcome, in *Meridith*, the Supreme Court of Canada concluded (para. 29) that the enactment of the *ERA* had a minor impact on the appellants' associational activity. In *Merdith*, the RCMP Staff Association was able to achieve significant gains, including improvements to their service awards, notwithstanding the *ERA*.

[324] On the evidence before this Court, none of the Applicant Unions were able to effectively use section 17. Professor Fuller, in his expert opinion also refers to the illusory "gains" provided by section 17 (para. 55):

> The process as explained is problematic for several reasons. First, as indicated above, the union has lost much of its bargaining power or leverage because wages have been unilaterally predetermined by Government and the key issue of service awards has been unilaterally taken off the bargaining table. It is questionable, therefore, whether the process can reach the necessary level of intensity to qualify as negotiations. Collective bargaining assumes that labour and management have relatively equal bargaining power. Second, the Treasury and Policy Board must approve the outcome of these flawed 'negotiations'... The Treasury and Policy Board is part of the same bureaucracy that introduced and administers the PSSA. It is an arm of the employer in collective bargaining and as such is neither neutral nor impartial. Thus, the dispute settlement mechanism in the event of an impasse in these 'negotiations' is biased and unfair. Third, the savings must be realized before an approved portion can be used to fund improvements in monetary issues. It could take years for the savings to be realized and at the end of this vague process, the employees only get an unspecified fraction of the savings. An unknown fraction to be determined by the Government's Treasury and Policy Board. It is hard to imagine how this process could ever work. In any case, it is not a process of viable collective bargaining.

[325] Bill 148 contained provisions which allowed the Government to exempt collective agreements or service awards by regulations. What the evidence shows is that when exemptions were employed, they allowed for very modest alterations to the Bill 148 framework in interest arbitration awards, i.e., early pay-out of service awards and change of date for the calculation of service awards. Even in those cases, the Government did not rely on the provisions in Bill 148 to exempt collective agreements, but rather relied upon its regulation-making authority to define the unions who had reached these results in interest arbitration as non "public sector

employees", i.e., not subject to Bill 148, even though these groups would obviously be caught within the public sector.

[326] It is to be emphasized here that in *Meredith* the Supreme Court found that although for the RCMP Staff Association, which obviously had not agreed to the wage freeze stipulated in the *ERA*, those rates reflected the going rate in the public sector. In other words, in effect the restraints in the *ERA* reflected outcomes of what had been achieved in free collective bargaining (the lower Court decision in *Meridith*). The government in *Meredith* had been able to bargain more than 44 agreements and more than 30 separate agencies had reached agreements.

[327] On the evidence before this Court there was no "going rate" as there was in *Meredith*. The tentative agreements with the NSTU and the NSGEU were never concluded. In the case of the civil service, no vote had taken place prior to Bill 148 being passed. Further, I find that the tentative agreements themselves did not reflect an outcome of free collective bargaining, being bargained in the shadow of the imposition of wage restraint/ freeze legislation. The groups which did conclude agreements around the time of the passage of Bill 148 – Crown Attorneys and Medical Residents do not come close to the circumstances in *Meredith* where large numbers of large bargaining units concluded collective agreements and the lower Court noting that there was a "going rate" established .

[328] Here, two small unions and their members concluded collective agreements and the wage rates in those agreements should not be extrapolated as the "going rates" and imposed on tens of thousands of public sector employees represented by the nine Applicant Unions. As I have said earlier, there was no meaningful bargaining with the NSGEU, the NSTU or the Highway Workers and there was no bargaining whatsoever with any other unions before the passage of Bill 148.

[329] This Court agrees with the Applicant Unions that s. 2(d) is relevant to understanding the fiscal context in which collective bargaining took place. That principle comes from *Meredith* (para. 40). The Court notes that the facts of the case unfolded in the midst of the 2008 global financial crisis, and although not determinative, that context was relevant to the inquiry into the adequacy of the government's consultation with the pay council. At paragraphs 7-10 of *Meredith* the Court notes that in June 2008 the Treasury Board had announced salary increases for the RCMP. In the fall of 2008 the financial crisis reached its peak. On November 27, 2008 the government announced the projected deficit and proposed various wide-ranging economic measures intended to stabilize the financial system. It was in December 2008 that the government announced that it intended to rollback the wage increases for the RCMP.

[330] That timeline between the financial crisis and the decision to announce the change is very short. Despite the change, it is clear from the decision (para 43), that there were meetings in January and February between the RCMP Staff Association and the Minister to discuss alternatives to the wage increase restrictions. On February 5, 2009 there was a meeting with the President of the Treasury Board who was willing to discuss other aspects of compensation, i.e., allowances. In fact when the legislation was before the House of Commons on February 6, it included a provision to allow members of the RCMP to achieve those allowances. At para. 44 the Supreme Court says that these meetings constituted good faith and meaningful consultation which remedied the government's earlier failure to consult with members of the RCMP. The Court said that government officials demonstrated an openness to negotiate on compensation issues, and engage with the members' representatives.

[331] The Court notes here that the Applicant Unions did not argue that the Ivany Report could not be considered as part of this proceeding. As noted above, Mr. King in his affidavit evidence identifies the fact that this report was a document considered at the time. It was referenced by Government in the August, 2015 meeting with the unions.

[332] However, in this Court's view, the reality of what is described in the Ivany Report does not provide the kind of timeline considered by the Court in *Meredith* in connection with the time for the Government to engage in meaningful consultation with unions. That is abundantly shown by the facts before this Court which show from late 2014 and into 2015 the Government very clearly contemplated legislation and the scope of its fiscal mandate. There were many months in which consultations could have been held and were not.

Conclusion on s. 2(d) Interference

[333] For all of these reasons, I conclude that Bill 148 substantially interfered with the Applicant Unions' s.2(d) collective bargaining rights.

Is Bill 148 and the *Act* Saved by S. 1 of the *Charter*?

[334] Having found that the legislation breached the Applicant Unions' s. (d) right, the onus shifts to the Government to establish, on a balance of probabilities, that Bill 148 was a reasonable limit on that right. The applicable test is found in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[335] The *Oakes* test requires the Government to show that the law (1) addresses a pressing and substantial objective, (2) that objective is proportional to the means

chosen to achieve it, and (3) the salutary effects of the law must be proportional to its deleterious effects.

Pressing and Substantial Objective

[336] This branch of the Oakes test was considered by the majority of the Ontario Court of Appeal in *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 at para. 224:

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

[337] The majority decision in *OECTA* summarized these limiting principles from *Gordon* as (1) the separation of powers between legislatures, the courts and the executive; (2) the recognition of the respective institutional capacities of each branch and (3) the core competencies of each branch, including the government's core competency in determining economic policy, budgeting decisions, the proper distribution of resources in society, labour relations regulation and how best to respond to situations of crisis.

[338] As a result of the application of these principles, the Court in *Gordon* stated that the court should refrain from second-guessing, in hindsight, the legislatures' policy decisions (para. 293). However, the Court in *Gordon* also notes that "deference never amounts to submission, since that would abrogate the court's constitutional responsibility…" (para. 236).

[339] Before this Court, the Unions argue that the purpose of the Government in enacting Bill 148 was to control costs and that that is not a pressing and substantial objective which serves to override *Charter* rights.

[340] The Government argues that the objectives of Bill 148 were indeed pressing and substantial. They say that the objectives of the legislation were twofold: to ensure the sustainability of public services in accordance with the *Finance Act*; and (2) to focus the collective bargaining process on issues with respect to which the Government could afford to make concessions.

[341] The Government points to the legislative purposes set out in s. 2 of the *Act*:

> The purpose of this Act is to
>
> (a) to create a framework for compensation plans for public-sector employees that
>
> (i) is consistent with the duty of Province to pursue its policy objectives in accordance with the principles of responsible fiscal management prescribed under the Finance Act, and
>
> (ii) (protect the sustainability of public services, by placing fiscal limits on increases to the compensation rates and compensation ranges payable by public-sector employers that are in conformity with the consolidated fiscal plan for the Province;

[342] Section 2(b)-(d) of the *Act* further provide that the legislation's purpose is:

> (b) To authorize a portion of cost savings identified through collective bargaining to fund increases in compensation rates, compensation ranges or other employee benefits established by a collective agreement;
>
> (c) To limit the scope of arbitral awards to comply with the principles of responsible fiscal management prescribed under the *Finance Act*; and
>
> (d) To enable and encourage meaningful collective bargaining processes.

[343] The Unions and the Government disagree as to whether there was an economic crisis facing Nova Scotia in 2015. The Government points to the Ivany Report which warned that the province was "on the verge of a serious crisis" (exhibited to Roland King's Affidavit, at page 81). The Unions say that the financial circumstances of Nova Scotia in 2015 and 2017 when Bill 148 was passed were not analogous to the 2008 global financial crisis.

[344] In *Gordon* the Ontario Court of Appeal held that "the court should generally accept Parliament's objectives at face value, unless there is an attack on the good faith assertion of those objectives or on their patent irrationality" (para. 242).

[345] There is no evidence before this Court which directly attacks the Government's good faith objectives in enacting Bill 148; nor is there a suggestion that the objectives, in and of themselves are patently irrational.

[346] Based on the evidence before this Court, and recognizing that I should act with caution before finding that the Government's fiscal rationale for enacting Bill

148 is constitutionally suspect, I conclude that the Government has met its burden of showing that Bill 148 was enacted for a pressing and substantial objective.

Proportionality - Rational Connection and Minimal Impairment

[347] The proportionality branch of the *Oakes* test addresses three subfactors: rational connection, minimal impairment, and the balancing of beneficial and deleterious effects. As noted by the Unions, in most cases applying s. 1 of the *Charter*, the analysis hinges on minimal impairment and the balancing of effects.

Rational Connection

[348] The *Oakes* test requires the government to "establish a rational connection between the pressing and substantial objective and the means chosen by the government to achieve the objective" (*Health Sciences*, at para. 148). The Supreme Court of Canada in *Health Sciences* stated that the evidentiary burden on this branch of the *Oakes* test is not "particularly onerous" (para. 148).

[349] The Government points to the conclusions of the Quebec Court of Appeal on this point in *Canada (Procureur general) c. Syndicat canadien de la lonction publique, section locale 675*, 2016 QCCA 75 where the Court of Appeal stated:

> [75] In this case, it certainly cannot be said that the wage increase cap (and in some cases, the reduction) for employees whose remuneration is paid from public funds

> is not rationally connected to the legislator's threefold objective. On the contrary, regarding the first aspect, since this type of expenditure represents a significant – and controllable – portion of public expenditures, the logic of the measure is obvious, and it is reasonable to infer that the means are useful to achieving the objective in question. As for the other two aspects (setting an example and checking upward pressure on private sector wages), the measure might not have had a determinative impact on its own, but the evidence nevertheless reveals a sufficient logical connection.

[350] The evidence of Roland King was that labour compensation comprised a significant portion of governmental spending in Nova Scotia at the time, and no doubt it continues to do so. Mr. King's evidence was that the Government has calculated that the savings from the *Act's* impact on service awards was more than $44 million in fiscal year ending March 31, 2017, while the wage restraint was expected to save approximately $240 million from 2015 through 2019.

[351] The Government argues, therefore, that limiting expenditures on public sector compensation is rationally connected to ensuring the sustainability of public programs.

[352] Further, in terms of the *Act's* second objective, the Government argues that legislating wage increases, as a mater of logic, is rationally connected to the objective of focusing the bargaining process on issues on which the Government can afford to make concessions.

[353] The Unions focuses their submission on the "minimally impairing" branch of the proportionality test, and not the "rational connection" branch.

[354] I conclude that the objectives of the *Act* are rationally connected to wage moderation and its impact on long term service awards. Applying logic and common sense, the effect of the *Act* in both respects is to decrease Government expenditure and thereby assist in meeting Government's duty to responsibility manage the Province's limited finances and protect and sustain public services. The Government has met the 'rational connection' branch of the *Oakes* test.

Minimal Impairment

[355] Here, the Government must meet the burden of establishing that Bill 148 was minimally impairing. In order to meet that the burden, Government must show that Bill 148 was tailored to impair rights no more than necessary.

[356] The Government argues that the *Act's* measures fall within a range of reasonable alternatives. Here the Government notes that section 16 of the *Act* permits step increases and promotions and that the preservation of key monetary entitlements such as salary increases and promotional increases mitigated the effect of the wage restraints. The Government says that it could have legislated more drastic measures such as implementing a "true freeze" of wages by preventing employees from moving along salary grids and freezing promotions. The

Government argues that it chose a less disruptive course and points out that the *Act* did not prohibit or limit collective bargaining on non-monetary items.

[357] The Government also points to section 17 of the *Act* which allowed Unions to find cost savings and apply those savings to benefits.

[358] This Court has already determined Section 17 of the *Act* provided benefits that were illusory. The Government refused to provide the Unions with any kind of framework for achieving those benefits, let along assurance that those benefits could be applied to wages. The Government refused to engage in meaningful discussions regarding s. 17.

[359] The Union says that the *Act* is not minimally impairing.

[360] The majority in *MPAO* describes this branch of the *Oakes* test at para. 149:

> At this stage, the question is whether measure impairs the s. 2(d) right as little as possible in order to achieve the government's objective. 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:
>
> > The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. 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…On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.
>
> (Emphasis added)

[361] The Unions reference *Health Sciences*, where the Supreme Court concluded that the requirement of minimal impairment was not made out because "[t]he government provide[d] no evidence to support a conclusion that the impairment was minimal", contenting itself "with an assertion of its legislative goal" (para. 151). The majority in *Health Sciences* held that, "[i]n the absence of supportive evidence, they were unable to conclude that the requirement of minimal impairment was made out" (para. 151) and that "[t]he provisions at issue bear little evidence of a search for a minimally impairing solution to the problem the government sought to address." (para. 152).

[362] The Government argues that the evidence before this Court shows that before enacting Bill 148, it did try to negotiate collective agreements with two of the Applicant Unions, NSTU and NSGEU. The Government says that the Unions' own evidence is that these unions would not have accepted wage restraints in the absence of the *Act*. The Government says that it was therefore reasonable for it to conclude at that point that voluntary wage restraint would not advance its pressing and substantial objectives.

[363] This Court notes that it is obvious that some collective bargaining with these two unions is objectively better than no collective bargaining, but that doesn't

advance the Government's burden to show that the *Act* was minimally impairing of s. 2(d) rights.

[364] There is no evidence before the Court that suggests that the Government could not have achieved its objectives by engaging in good faith bargaining with the Unions prior to enacting the *Act*. There was also no evidence before the Court that particular expediency dictated the timing of Bill 148.

[365] The fact that the Government could have legislated more stringent measures affecting the wages and other monetary items achieved through fair collective bargaining does not assist the Government. Accepting that argument would be to distort the "minimally impairing" branch of the *Oakes* test. This is the point made by Donald J.A. in *BCTF*, "the s. 1 analysis does not look at whether the Province has taken a less damaging approach to the legislation compared to some even more egregious alternative, but whether the Province took a least damaging approach within a range of reasonable alternatives" (para. 386).

[366] I find that the Government has not met its burden of showing that the *Act* was minimally impairing.

Proportionality

[367] This Court has found that the *Act* is not minimally impairing. It is accordingly unnecessary to consider whether its salutary effects are proportional to its detrimental effects.

CONCLUSIONS

[368] Bill 148 substantially interfered with the Applicant Unions' s. 2(d) *Charter* right to a process of good faith collective bargaining. The Government has failed to demonstrate that Bill 148 amounted to a reasonable limit to that right pursuant to s. 1 of the *Charter*.

[369] This Court declares that the *Act* is unconstitutional and of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[370] The Government says that this Court should suspend any declaration of invalidity for a period of 12 months to give the parties an opportunity to negotiate, including with respect to the effect of the declaration on collective agreements currently in force. The Government refers to the test for a suspended declaration of invalidity set out by the Supreme Court of Canada in *Ontario (Attorney General) v. G,* 2020 SCC 38 ("*G*") at paras. 130-132 where the Supreme Court held that a court may suspend a declaration of invalidity where the Government demonstrates that an immediately effective declaration would endanger a compelling public interest that

outweighs the importance of immediate constitutional compliance and a remedy for those whose *Charter* rights are violated.

[371] The Government says that it meets this test. It says that a declaration of unconstitutionality would have an immediate and deleterious impact on the public interest, given the evidence that collective agreements with the Nova Scotia Nurses Union, Canadian Union of Public Employees, Unifor, NSGEU and various Health Councils all contain language that expresses an intention to preserve and reassert rights in the event that the *Act* is declared unconstitutional. In the circumstances, the Government argues that a declaration with immediate effect would require the Government to revise collective agreements with multiple bargaining units. The Government says that it should be given time to consider its fiscal framework and the concessions that it is able to offer to these bargaining unit.

[372] The Unions argue that the Government has not met the burden required for a suspension of a declaration in "*G*" and notes that suspensions are not routinely granted.

[373] The Court finds that the Government has met the burden of satisfying the *G* test. The Court notes that the fiscal implications of an immediate declaration of invalidity would likely be considerable. The current Government should be given

time to consider these implications. Accordingly, I suspend this declaration of unconstitutionality of the *Act* for a period of twelve months from the date of this decision.

[374] The Court, at the request of both parties, and pursuant to s. 24(1) of the *Charter*, remits the question of any further remedy to the parties for their consideration.

[375] This Court retains jurisdiction should the parties be unable to resolve any further remedy.

[376] The Applicant Unions are granted their costs on this Application.

Smith, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Union of Public Employees (CUPE) v. Nova Scotia (Attorney General)*, 2026 NSSC 57

Date: 20260225
Docket: HFX No. 498647
Registry: Halifax

Between:

Canadian Union of Public Employees, Canadian Union of Public Employees, Local 1867, Canadian Union of Postal Workers, Nova Scotia Government and General Employees Union, Nova Scotia Nurses' Union, Nova Scotia Teachers Union,

Service Employees' International Union Local 2, Unifor, International Union of Operating Engineers Local 727

Applicants

v.

Attorney General of Nova Scotia representing His Majesty the King in right of the Province of Nova Scotia

Respondent

ERRATUM

Judge:	The Honourable Justice Ann E. Smith
Heard:	June 2, 3, 4 & 5, 2025, in Halifax, Nova Scotia
Counsel:	Jillian Houlihan, for the Applicants Adam Goldenberg, for the Defendant
Erratum Date:	March 5, 2026
Erratum Details:	Paragraph 308 begins with “I have reached the conclusion that it did….” It has been changed to “I have reached the conclusion that it did not (in answer to the second inquiry)”.