2017 C.A. No. 467145

Nova Scotia Court of Appeal

IN THE MATTER OF: Section 3 of the *Constitutional Questions Act*, R.S.N.S. 1989, c.89

-and-

IN THE MATTER OF: An Amended Reference by the Governor in Council concerning the constitutionality of ss. 7-23 of the *Public Services Sustainability (2015) Act*, Chapter 34 of the Acts of Nova Scotia 2015, as set out in Order in Council 2017-254 dated October 4, 2017

FACTUM FILED ON BEHALF OF THE ATTORNEY GENERAL OF NOVA SCOTIA

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PART I

OVERVIEW

1. On August 22, 2017, the Attorney General of Nova Scotia filed a Reference to this Court pursuant to s.3 of the *Constitutional Questions Act*, RSNS 1989, c. 89 **[Tab 28]**. On October 13, 2017, it filed an Amended Notice of Reference. (For the purpose of these submissions, the Amended Notice of Reference will be referred to as "the Reference.")

2. The Reference asks the Court to consider the constitutionality of ss.7-23 of the *Public Services Sustainability (2015) Act*, SNS 2015, c. 34 **[Tab 29]** which has been referred to by the parties in the course of this proceeding by its Bill number on introduction in the Legislature ("Bill 148".)

3. Bill 148 imposed broad-based, time-limited restraints on certain financial outcomes of collective bargaining in the public sector in Nova Scotia, while leaving collective bargaining on other terms and conditions of employment unimpeded. It was adopted, after consultation with public sector unions, as a conscious effort to allow collective bargaining to continue within a fiscally responsible mandate.

4. Section 2(d) of the *Charter of Rights and Freedoms*[1], protects the right to a meaningful process of collective bargaining, but does not guarantee any particular outcome of collective bargaining. The restraints imposed by Bill 148 fall well within the parameters of

[1] Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

government action which have been recognized in the case law as constitutionally permissible.

5. In the alternative, Bill 148 represents a reasonable legal limit on the s.2(d) right to collective bargaining, demonstrably justified in a free and democratic society. The legislation presents, and is rationally connected to, the pressing and substantial objective of prudent fiscal management. It minimally impairs the s.2(d) right in its limitations of time and scope. As a matter of balancing, any deleterious effect is outweighed by the public benefit of fiscal management, an analysis on which the government is entitled to some deference.

6. The Attorney General respectfully submits that the answers to the Reference questions are as follows:

Q(1) Do Sections 7 to 23 of the *Public Services Sustainability (2015) Act*, S.N.S. 2015, Chapter 34, violate the *Canadian Charter of Rights and Freedoms*?

A(1) No.

Q(2) If the answer to question 1 is "yes", are sections 7 to 23 saved by operation of section 1 of the *Canadian Charter of Rights and Freedoms*?

A(1) Yes.

PART II

STATEMENT OF FACTS

The Legislation

7. Bill 148 was introduced as part of a program of responsible fiscal management, to limit increases to public sector compensation in conformity with the Province's consolidated fiscal plan. The design of the Act is to set up a compensation framework that limits the maximum possible wage increases, while allowing some flexibility to negotiate monetary items, and allowing unrestrained bargaining on non-monetary items. It applies to the compensation of a very broad range of public sector employees, whether unionized or not, and whether or not they are strictly part of the "civil service" (see s.5(n) definition of "public-sector employee".) Sections 7-23 of the Act are the subject of this Reference.

8. Sections 7-10 set up a Public Services Sustainability Board (the "Board"). The Board:

- has jurisdiction to address questions that arise under the Act (other than constitutional questions) (s.8);
- has jurisdiction to authorize changes to a compensation plan, including changes bargained between parties to a collective agreement, if they continue to respect the fiscal restraints of the Act in a broad way (s.9(1));
- can order compliance with the Act (s.9(2)).

9. Sections 11-19 of the Act set out the limits applicable to compensation plans, over a four-year period. A "compensation plan" is defined as "the provisions, however established, for the determination and administration of a public-sector employee's compensation" (s.2(f)).

In the normal course, each employee's rate of compensation is determined by a compensation plan, and increases in compensation are implemented as percentage increases to the overall compensation plan.

- Section 11 preserves an existing compensation plan for a period of four years, even if it were to otherwise expire prior to the fourth anniversary of the Act.

- Section 12 is a specific application of s.11 for the unique scenario of a new bargaining unit forming during the four-year period and establishing a compensation plan for the first time.

- Sections 13 & 14 give effect to the most significant fiscal restraint on compensation plans: 0% annual increases for the first two years (s.13), increases of 1% and 1.5% in the following two years, and an increase of 0.5% on the final day of the restraint period (s.14.) Section 19 deems that a non-compliant plan is of no force and effect.

- Section 15 allows for collectively-bargained compensation plans which fall outside the parameters of ss.13 & 14 if they are prescribed by regulation, or if Treasury and Policy Board approves a compensation plan which is otherwise consistent with the Province's obligation of fiscal responsibility.

- Section 16 preserves the possibility for individual employees to receive increases *within* the existing terms a compensation plan, in recognition of length of service, merit increases, and increases in education or experience (s.16(1)) or due to a promotion (s.16(3)). Section 16(2) protects against the possibility of compensation falling below minimum wage. Because of the preserved possibility of individual increases within the terms of a compensation plan, the Province refers to the design of Bill 148 as "restraint" rather than a "freeze".

- Section 17 allows for Treasury and Policy Board to approve collectively-bargained increases which exceed those allowed by ss.13 & 14, if the increased rates are set off by negotiated provisions which demonstrate cost savings.

- Section 18 protects against the possibility of interest arbitration awards that would otherwise exceed the limitations of ss.13&14.

10. Sections 20-23 deal with service awards and accrued sick-leave payments. A "service award" is a payment made on retirement. The award generally accumulates with each year of service up to a certain cap, and is paid out as a percentage of the employee's annual salary.[2] An accrued sick-leave payment operates similarly, but as a payout of untaken sick leave over the course of the employment. The Act does not eliminate any accrued benefit in these sections, but operates to end further accrual of service in the benefit after April 1, 2015, and ensure that the calculation of the benefit is based on the employee's compensation on April 1, 2015 rather than the employee's compensation on the future day when the benefit is paid (ss.20&21). Section 22 prevents employees hired after April 1, 2015 from receiving these benefits. Section 23 allows for exemptions to be made by regulation. The overall effect is to crystalize these benefits as of April 1, 2015, unless otherwise provided for by regulation.

[2] A history of the Public Service Award, including examples of Public Service Award language and calculations, is in the Record at Tab 148. *Record of the Attorney General of Nova Scotia* ("Record"), Volume 7, Tab 148, pp.3098-3107.

11. While not directly at issue in this Reference, it is also important to note s.29 of the Act, which allows for regulations which, among other things, allow for exemptions to ss.13, 14, 20, and 21 of the Act (s.29(k) and (l)).[3]

Consultations respecting the Public Sector Sustainability Mandate

12. As early as the September 2014 Throne Speech, government signaled publicly that, in response to concerns about long-term challenges to the province's economy, it would seek to "balance the legitimate aspirations of public employees with the realities of our province's revenues."[4] The Throne Speech stated starkly that "[t]he central challenge facing our public finances right now is the cost of labour," and called for a "more deliberate and careful approach to labour relations" noting the cost of previous public sector collective agreements.[5]

13. Minister of Finance Randy Delorey invited representatives of public sector unions to meet with him on August 18, 2015 to discuss how the Province and unions could work together to meet the challenges posed by the Province's fiscal situation. At the consultation meeting, after reviewing the key findings of the *Ivany Report*[6], Minister Delorey shared with the union leaders the proposed Public Service Sustainability Mandate. He was open and transparent about the provincial objectives to stay within the scope of the fiscal plan, and

[3] As will be noted later in these submissions, regulations to this effect were in fact passed: *Public Services Sustainability General Regulations*, O.I.C. 2017-207 (effective August 22, 2017), N.S. Reg. 128/2017, amended to O.I.C. 2019-247 (effective September 17, 2019), N.S. Reg. 134/2019 **[Tab 30].**
[4] *Second Session of the 62nd General Assembly Speech From The Throne*, Record, Volume 3, Tab 42, p.1419.
[5] *Ibid*., pp.1419-1420.
[6] Record, Volume 3, Tab 36.

to not raise taxes (or increase provincial debt) to pay for labour increases not contemplated in the fiscal plan.[7]

14. Minister Delorey laid out the goals of the proposed Public Services Sustainability Mandate as follows:

- To meaningfully engage public sector employees through their unions in a collective bargaining process where efficiency, effectiveness and innovation are promoted and some of the benefits are shared with the employees.
- To achieve the Province's fiscal plan and to protect and preserve public services and improve the lives of Nova Scotians by negotiating collective agreements that are affordable to the taxpayers of the province.[8]

15. Minister Delorey also introduced for discussion the principles of the proposed Public Services Sustainability Mandate as follows:

- The province will not provide additional funding over the amount set out in the province's fiscal plan to fund increases in compensation agreements 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 service.
- Funding for compensation increases, over the amount set out in the fiscal plan, may come from budgeted and achieved cost reduction, budgeted and achieved cost avoidance, service redesign or other

[7] "Public Sector Leaders: Moving Forward Together," Record, Volume 3, Tab 47, pp.1584-1598.
[8] *Ibid*., p.1599.

efficiency initiatives (savings must be real, measurable and achievable before being allocated to compensation increases).

- Agreements must be a minimum of five years in length.[9]

16. It was proposed that the mandate would apply to all public sector employers whose collective agreements were to expire on or after March 31, 2014, and the approved mandate would provide public sector employers the ability to negotiate 5-year agreements with a fixed fiscal envelope consistent with the government's published fiscal plan; but, if in the collective bargaining process, savings were identified that could be achieved, public sector employers would be authorized to allocate some portion of cost savings or cost avoidance (as approved, achieved and verified) to the fiscal envelope for wage increases in the out years of the collective agreement.[10] Minister Delorey reiterated that the government was committed to meaningful collective bargaining to achieve the outcome of sustainable public services for Nova Scotia. He concluded by saying that he was not looking for a commitment at that time but wanted to introduce the topic and ask the leadership to bring the information to their members and discuss it further through correspondence and action at the bargaining table.[11]

[9] *Ibid*., p.1600.
[10] *Ibid*., p.1601.
[11] *Ibid*., p.1602.

17. Union leaders at this meeting were aware of the possibility that government would legislate restrictions on collective bargaining, and asked questions about that possibility. The Minister did not deny that legislation was a possibility.[12]

18. The Minister again communicated with all union leaders on November 5, 2015. The purpose was both to encourage engagement for meaningful negotiations but also to consult on the legislative framework for collective bargaining in Nova Scotia. In a presentation headed *Exploring Ways to Move Forward Together*[13], Minister Delorey provided an update to public sector union leaders and noted that since their last meeting there had been limited progress in collective bargaining and, while some tables were meeting, there were not many. He recapped the Public Service Sustainability Mandate and pointed out that the purpose was "to align our interests in collective bargaining processes as much as possible and encourage union leaders to move to collaboration to achieve common goals."[14]

19. The Minister specifically sought the input of the union leadership on the following questions:

- Is the current model – *Wagner Act* - working effectively for Nova Scotians?
- Does our legislation address recent Supreme Court of Canada decisions adequately?
- Are "good faith bargaining" requirements and "impasse resolution processes" effective?
- What changes would promote a more collaborative model?

[12] Various statements to this effect are attributed to public sector union leaders in the materials in the Record, Volume 5, Tabs 79-87.
[13] Record, Volume 5, Tab 121, pp.2398-2410.
[14] *Ibid*., p.2405.

- How can we sustain public services given fiscal realities?

20. Minister Delorey sought written feedback by November 16, 2015, by e-mail or mail and reaffirmed government's commitment to ongoing, meaningful collective bargaining.[15] Feedback was received from a number of organizations, including labour organizations.[16]

Collective bargaining prior to Bill 148

21. The Reference does not deal with the conduct of the parties in bargaining *per se*. However, some highlights of collective bargaining under the Public Services Sustainability Mandate will be relevant to the questions raised by the Reference as to the constitutionality of the legislation.

22. The Minister issued a Ministerial Directive to public sector employers to bargain according to the Public Service Sustainability Mandate, effective September 2, 2015.[17]

23. The NSTU (one of the Intervenor Unions) represents public school teachers across Nova Scotia. In collective bargaining of the Teachers' Provincial Agreement, a tentative agreement was reached on November 12, 2015 between the Province and the bargaining team for the NSTU. This tentative agreement included a four-year term, a wage package of 0%, 0%, 1%, 1.5%, and 0.5% on the last day of the agreement, as well as the elimination

[15] *Ibid*., pp.2408-2409.
[16] Record, Volume 5, Tabs 101-111.
[17] Record, Volume 5, Tab 117, pp.2390-2391.

of further accrual to Service Awards.[18] The NSTU bargaining team and Provincial Executive recommend that members ratify the tentative agreement. In recommending ratification, the NSTU's lead negotiator noted that the bargaining team was aware of possible legislative action for the government to impose a wage pattern.[19] On December 1, 2015, the NSTU membership rejected the recommendation of its bargaining team and did not ratify the tentative agreement.[20]

24. The NSGEU (one of the Intervenor Unions) represents approximately 7600 employees in the Civil Service of Nova Scotia. In collective bargaining of the Civil Service Master Agreement, a tentative agreement was reached on November 13, 2015 between the Province and the bargaining team for the NSGEU. This tentative agreement included a four-year term, a wage package of 0%, 0%, 1%, 1.5%, and 0.5% on the last day of the agreement, as well as the elimination of further accrual to Public Service Awards.[21] In recommending ratification of the tentative agreement to members, the NSGEU noted its awareness of possible legislative action for the government to impose a wage pattern.[22] After the passage of Bill 148, the NSGEU changed its recommendation to members with respect to the tentative agreement, and recommended voting against.[23] The membership voted against the tentative agreement on December 14, 2016.[24]

[18] See summaries at Record, Volume 7, Tabs 169 and 170. The November 2015 tentative agreement is referred to in these summaries as TA1.
[19] Record, Volume 6, Tab 124, p.2418.
[20] Record, Volume 7, Tab 173, p.3531.
[21] Record, Volume 7, Tab 167, p.3389.
[22] Record, Volume 5, Tab 123, p.2413.
[23] Record, Volume 7, Tab 167, p.3387.
[24] Record, Volume 7, Tab 167, p.3388-3389.

Bill 148

25. Bill 148 was introduced in the Legislature on December 14, 2015, and read a second time on December 15, 2015. It passed Law Amendments Committee with recommended changes,[25] and passed after third reading on December 18, 2015. Bill 148 was proclaimed into force on August 22, 2017.

26. At the time of the introduction and passage of Bill 148, the wage pattern and the provisions relating to Service Awards had been bargained by the Province to the point of reaching a tentative agreement with both the NSGEU and the NSTU.

27. Collective bargaining continued after the passage of Bill 148. While the Record itself is incomplete on this point (given the timing,) this is evident by a review of the *Public Services Sustainability General Regulations*[26]. The Regulations exempt bargaining units from the application of Bill 148 once a collective agreement is reached. Nearly all collective agreements covered by Bill 148 have now been exempted as a result of collective agreements being reached under the broad parameters of the Public Services Sustainability Mandate.

[25] Record, Volume 5, Tab 98.

[26] *Public Services Sustainability General Regulations*, O.I.C. 2017-207 (effective August 22, 2017), N.S. Reg. 128/2017, amended to O.I.C. 2019-247 (effective September 17, 2019), N.S. Reg. 134/2019 **[Tab 30].**

The Reference

28. The Reference was filed on August 22, 2017 pursuant to Section 3 of the *Constitutional Questions Act*, RSNS 1989, c.89 (the "Reference"). Section 3 provides that the Governor in Council ("GIC") may refer any matter to the Court of Appeal for hearing or consideration, and the Court shall hear and consider that matter. Section 4 provides that the Court shall certify to the GIC its opinion on the matter referred, with reasons.

29. In January 2018, by consent order, eight unions (Canadian Union of Public Employees ("CUPE"); Canadian Union of Postal Workers; Nova Scotia Government and General Employees Union ("NSGEU"); Nova Scotia Nurses' Union; Nova Scotia Teachers Union ("NSTU"); Service Employees' International Union Local 2; Unifor; International Union of Operating Engineers Local 727) (collectively the "Intervenor Unions") were added as intervenors on the Reference.

30. In an earlier motion related to the admission of evidence proposed by the Unions, this Court clarified that the questions raised on the Reference go to the "constitutionality of legislation" rather than the "constitutionality of government conduct".[27]

[27] *Reference re Public Services Sustainability (2015) Act*, 2021 NSCA 9 **[Tab 1]**, at paras.18-19.

PART III

ARGUMENT

Nature of a Reference

31. As Peter Hogg stated in *Constitutional Law of Canada* (5th ed) at 8.9 **[Tab 2]**:

> …A Provincial reference will secure an advisory opinion from the provincial court of appeal…

32. The fact that constitutional references are of an advisory character is not controversial. Hogg states at 8.11:

> In the Reference Appeal (1912) [A.C. 571], as quoted above, the Privy Council held that the Court's answer to a question posed on a reference was "advisory" only and of "no more effect than the opinions of the law officers". It follows that the Court's answer is not binding even on the parties to the reference, and is not of the same precedential weight as an opinion in an actual case. This is certainly the black-letter law. But there do not seem to be any recorded instances where a reference opinion was disregarded by the parties, or where it was not followed by a subsequent court on the ground of its advisory character. In practice, reference opinions are treated in the same way as other judicial opinions.

33. This Court has discretion not to answer any question posed on a Reference. As Hogg also noted at 8.11, the Court may:

> … exercise that discretion where the question is not yet ripe, or has become moot, or is not a legal question, or is too vague to admit of a satisfactory answer, or is not accompanied by enough information to provide a complete answer.

34. Finally, Hogg notes at 8:12 that:

> Proof of facts in a reference is peculiarly difficult, because a reference originates in a court that is normally an appellate court: there is no trial, and no other procedure enabling evidence to be adduced…

35. A Reference provides an advisory opinion only, and a Court on a Reference may decline to answer the question or provide only a partial answer.

Section 2(d) and collective bargaining

36. Section 2(d) of the *Canadian Charter of Rights and Freedoms* provides that:

> 2. Everyone has the following fundamental freedoms:
>
> …
>
> (d) freedom of association.

37. The application of these straightforward words to the rights of labour organizations has evolved significantly over the life of the *Charter*. After a history of holding that collective bargaining was not protected by s.2(d), the Court for the first time in 2007 found that some aspects of the collective activity of labour unions were protected as "freedom of association". While this was a substantial shift in the jurisprudence, the scope of s.2(d) continues to allow significant deference to governments in reconciling the rights of unionized employees with broader public policy goals. While the *Charter* is now recognized as protecting the right to a process of meaningful collective bargaining, it does not protect the results of bargaining or guarantee a specific outcome.

38. The first development in setting a new scope for s.2(d) with respect to labour rights is the Supreme Court of Canada's decision in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 **[Tab 3]** ("*Health Services*"). In *Health Services* the Supreme Court revisited its decisions in *Reference in Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 **[Tab 4]** (the "*Alberta Reference"*) and the subsequent case of *Professional Institute of the Public Service of Canada* v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367) **[Tab 5]** and found that "excluding collective bargaining from the scope of s. 2(d)" could "no longer stand".[28]

39. *Health Services, supra*, dealt with a 2002 British Columbia statute which imposed specific rights and obligations on health care employers in relation to employee transfers, contracting out of work, job security programs, and layoffs and bumping rights. These issues had been historically the subject of collective bargaining, and the 2002 statutory provision overrode existing collective agreement provisions, and precluded collective bargaining on those issues.[29]

40. Holding for the first time that the *Charter* protected some degree of collective bargaining rights, the Court struck down the legislation as a violation of employees' rights to associate through meaningful collective bargaining.

[28] *Health Services*, *supra*, at para. 37.
[29] *Ibid.*, at paras. 10-11.

41. The Court carefully expressed limits to the operation of s.2(d) in the realm of collective bargaining. First and foremost, the threshold for s.2(d) is substantial interference with a union's ability to exert meaningful influence on work conditions through collective bargaining:

> Section 2(d) of the Charter does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity… Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? … It follows that 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. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.[30]

42. The decision is also explicit about s.2(d) protection being a "limited right", focused on the *procedure* of collective bargaining and not the *outcomes*:

> Nor does [s.2(d)] ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals[31].
>
> …as the right is to a process, it does not guarantee a certain substantive or economic outcome[32].

43. The Court in *Health Services* developed a two-inquiry analysis for assessing interference with s.2(d)—again emphasizing the process-based nature of the protection:

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[30] *Ibid.*, at para. 90.
[31] *Ibid.*, at para. 19.
[32] *Ibid.*, at para. 91.

> …The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation[33].

44. To find legislation in violation of s.2(d), then, a court must find both that the subject matter affected by the legislation is so fundamental to collective bargaining that it affects the capacity of unionized employees to bargain collectively, *and even when that threshold is met*, the s.2(d) right remains intact if the legislation respects freedom of association by preserving a process of consultation and good faith negotiation.

45. With respect to the second inquiry, the Court goes on:

> Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining — the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(d), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining[34].
>
> …Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is

[33] *Ibid.*, at para. 93-94.
[34] *Ibid.*, at para. 96.

> unlikely to have adversely affected the employees' right to collective bargaining. Both inquiries, as discussed earlier, are essential[35].

46. The Supreme Court has thus held that s. 2(d) guarantees a process of collective bargaining. While in *Health Services*, *supra* the Supreme Court has said that s. 2(d) does not guarantee a particular model of collective bargaining[36], one fundamental precept of collective bargaining is that it takes place between an employer and a bargaining agent, and not the employees *per se*.

47. A union's exclusive power to bargaining is a central feature of Canadian labour law. In *Isidore Garon Ltée.* v *Tremblay*, 2006 SCC 2 **[Tab 6]** Deschamps J. summarized the jurisprudence on this point:

> Like collective labour relations law itself, this line of cases is a reaction to the economic liberalism underlying the general law of contracts … In seeking to equalize the balance of power between employers and employees, freedom of contract is dispensed with, and exclusive representation by the union and predominance of the collective agreement replace individual negotiation between an employer and an employee …[37]

48. According to Deschamps J., collective bargaining subordinated "individual rights to the collective scheme." Indeed, the "entire law of employer-employee relations is subsumed in the collective labour relations scheme".[38]

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[35] *Ibid.*, at para.129.
[36] *Ibid.*, at para.91.
[37] *Isidore Garon Ltée.* v *Tremblay*, 2006 SCC 2, at para 11.
[38] *Ibid.*, at paras. 12-13.

49. Five months later the Supreme Court returned to the issue of union exclusivity in *Bisaillon* v *Concordia University*, 2006 SCC 19 **[Tab 7]**. LeBel J., who wrote for the majority, set out the legal consequences of certification:

> First, the *Labour Code* gives certified unions a set of rights, the most important of which is most certainly the monopoly on representation. When it is certified, a union acquires the exclusive power to negotiate conditions of employment with the employer for all members of the bargaining unit with a view to reaching a collective agreement. Once a collective agreement is in place, the union's monopoly on representation also extends to the implementation and application of the agreement.[39]

50. That there are qualitative differences between unions and their members was also recognized by Bastarache J. in *Dunmore* v *Ontario (Attorney General)*, 2001 SCC 94 **[Tab 8]**:

> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak…. Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level. (emphasis added)[40]

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[39] *Bisaillon* v *Concordia University*, 2006 SCC 19, at para.24.
[40] *Dunmore* v *Ontario (Attorney General)*, 2001 SCC 94, at para.17.

51. As the union is the exclusive bargaining agent or, more properly, the representative with the sole authority to negotiate on behalf of the members of the bargaining unit, the mark of true collective bargaining ought to be the good faith efforts to negotiate between the union and the employer, and not the view expressed by employees during a ratification process.

52. The Supreme Court, drawing on the principles developed by labour boards, has identified the salient elements of the duty to bargain in good faith. The first and "basic element" of the duty is the "obligation to actually meet and to commit time to the process."[41] Secondly, the "parties have a duty to engage in meaningful dialogue and must be willing to exchange and explain their positions."[42] Meaningful dialogue requires more than simply the "right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer."[43] The parties must have a genuine intention to reach agreement and make reasonable efforts to arrive at an agreement.[44]

53. There are, however, limits to the duty to bargain in good faith. As noted in *Health Services, supra,* "the efforts that must be invested to attain an agreement are not boundless". Moreover, the duty does not "impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions."[45]

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[41] *Health Services*, *supra*, at para. 100.
[42] *Ibid*.
[43] *Ontario (Attorney General)* v *Fraser*, 2011 SCC 20 **[Tab 9]**, at para.40.
[44] *Health Services*, *supra*, at para. 101.
[45] *Ibid.*, at paras.102-103.

54. The references to "good faith" in *Health Services, supra* are explored further, as the Court addresses the distinction between "hard bargaining" (which is in good faith) and "bad faith bargaining":

> The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions …. Nor does the duty to bargain in good faith preclude hard bargaining. The parties are free to adopt a "tough position in the hope and expectation of being able to force the other side to agree to one's terms….
>
> …This Court has explained the distinction between hard bargaining, which is legal, and surface bargaining, which is a breach of the duty to bargain in good faith:
>
> > It is often difficult to determine whether a breach of the duty to bargain in good faith has been committed. Parties to collective bargaining rarely proclaim that their aim is to avoid reaching a collective agreement. The jurisprudence recognizes a crucial distinction between "hard bargaining" and "surface bargaining" ... Hard bargaining is not a violation of the duty to bargain in good faith. It is the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms. Hard bargaining is not a violation of the duty because there is a genuine intention to continue collective bargaining and to reach agreement. On the other hand, one is said to engage in "surface bargaining" when one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship. It is the improper objectives which make surface bargaining a violation of the Act. The dividing line between hard bargaining and surface bargaining can be a fine one[46].

[46] *Health Services, supra*, at para 103-104 (citations omitted).

55. In other words, it is not inconsistent with good faith bargaining for a party to come to the table with hard and fast positions on which it will not compromise, so long as it comes with the sincere aim of concluding an agreement on the basis of those positions. Parties must approach bargaining with the hope that it will succeed; in bad faith bargaining, a party instead hopes for bargaining to fail.

56. On the facts of *Health Services*, *supra*, important collective agreement terms were imposed by legislation after no collective bargaining whatsoever, and only a few meetings between government and unions (which discussed health care issues generally, rather than the specific issues covered in the legislation.) The virtual absence of any consultation proved fatal to the government's argument.

57. The Supreme Court of Canada also dealt with legislation affecting collective bargaining in *British Columbia Teachers' Federation* v. *British Columbia*, 2016 SCC 49 **[Tab 10]** (which substantially adopted the dissenting reasons of Donald JA in *British Columbia Teachers' Federation* v. *British Columbia*, 2015 BCCA 184[47] **[Tab 11]** ("*BCTF*".)) In *BCTF*, the government had legislatively annulled certain collective agreement terms (dealing with class sizes, student-to-teacher ratios, and teacher case-loads, among other things) and prevented any bargaining on those issues in future collective agreements, with no consultation with the teachers' union.

[47] References in this brief to *BCTF* will be to the dissenting opinion of Donald JA at the British Columbia Court of Appeal.

58. Donald JA confirms and expands on the reference in *Health Services, supra*, to the right being procedural rather than substantive:

> If the act of associating in order to collectively negotiate to achieve workplace goals is not substantially interfered with, the government has not breached s. 2(d). The mere act of passing the terms of employment through legislation rather than a traditional collective agreement makes no difference to whether the employees were given the opportunity to associate and effectively pursue workplace goals. If the government, prior to unilaterally changing terms of employment, gives a union the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees' attempts at associating to pursue workplace goals were not pointless or futile.... Thus, the employees' freedom of association would likely not therefore be breached.[48]

59. Donald JA also accepts that pre-legislative consultations which do not take the form of collective bargaining might be enough to protect the s.2(d) right, if the consultations are a meaningful substitute for true bargaining[49]. Whatever form the consultation takes,

> …if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process[50].

60. Where the collective agreement is concluded on a tentative basis, no binding agreement will come into existence unless and until it is ratified.[51] But the existence of even a

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[48] *BCTF, supra*, at para.287.
[49] *Ibid* at para. 291.
[50] *Ibid* at para. 293.
[51] *Ontario Public Service Employees Union* v *Cybermedix Limited*, 1981 CanLII 865 **[Tab 13]** at para.12; *Office and Professional Employees International Union, Local 527* v *Board of Education for the City of Hamilton*, 1993 CanLII 8028 **[Tab 14]** at paras.62-63.

tentative agreement is surely the best evidence that there was, in fact, bargaining in good faith.[52]

Section 2(d) and legislation affecting bargaining of financial terms

61. The most relevant line of cases to the present Reference establishes clearly that s.2(d) allows governments to pass legislation which restrains the fiscal parameters of collective bargaining, so long as the right to meaningfully bargain remains.

62. That line of cases begins with *Meredith* v. *Canada (Attorney General)*, 2015 SCC 2 **[Tab 12]** ("*Meredith*"). *Meredith*, and a trio of subsequent appellate court cases,[53] all considered the constitutionality of federal legislation affecting wages, the *Expenditure Restraint Act*, SC 2009, c 2, s.393 (the "ERA").

63. The ERA was passed in response to the 2008 global financial crisis. After determining the need for restraint in October 2008, government met with union leaders to advise that there would be a strict wage mandate in upcoming collective bargaining. The intention to legislate was announced in the Throne Speech in November 2008, with actual wage caps announced later that month. The ERA itself became law in March 2009; it imposed broad-based, time-limited wage restraint on increases in the public sector over a five-year period,

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[52] *St. Thomas More College*, 2008 CanLII 47030 **[Tab 15]** (Sask. L.R.B.), at para.62.

[53] (*Canada (Procureur général)* c *Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163 **[Tab 16]** ("*Syndicat canadien*"), leave to appeal to SCC refused, 36914 (25 August 2016); *Federal Government Dockyard Trades and Labour Council* v *Canada (Attorney General)*, 2016 BCCA 156 **[Tab 17]** ("*Dockyard Trades*"), leave to appeal to SCC refused, 35569 (1 December 2016); and *Gordon* v *Canada (Attorney General)*, 2016 ONCA 625 **[Tab 18]** ("*Gordon*"), leave to appeal to SCC refused, 37254 (16 February 2017)).

retroactive to April 1, 2006, and limited other financial compensation. The legislation applied to more than 400,000 individuals paid from federal funds, both unionized and non-unionized, including senators, members of Parliament, senior civil servants, directors of certain Crown corporations and public bodies, members of the Canadian Armed Forces and the RCMP, and Parliamentary appointees, as well as certain federal Crown corporations.

64. *Meredith* itself involved the RCMP, who at that time did not bargain collectively as a traditional bargaining unit, but rather developed recommendations on pay and compensation through a Pay Council, which made recommendations to Treasury Board[54]. The ERA rolled back wage increases already announced and scheduled for RCMP members by Treasury Board (reducing annual increases of 3.32%/3.5%/2% to 1.5%/1.5%/1.5%.) Members of the RCMP challenged the wage restraint provisions as interfering with their s.2(d) rights.

65. The Supreme Court referred to the scope of s.2(d) as guaranteeing "the right of employees to associate in a meaningful way in the pursuit of collective workplace goals," focusing again on the *process* of collective bargaining and not a right to a particular *outcome*.[55] The

[54] This process was found, in the companion case of *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 **[Tab 19]** ("*MPAO*"), to insufficiently protect the rights of RCMP members to bargain collectively. However, for the purposes of *Meredith*, the court considered the Pay Council process to be "associational activity that attracts *Charter* protection," and considered the s.2(d) question as to whether the ERA substantially interfered with that activity [*Meredith*, *supra*, at para.4.]

[55] *Meredith, supra*, at para.25.

Attorney General of Canada conceded that wages were an important issue, and so the Court's focus was on whether the ERA continued to respect the process of bargaining.[56]

66. The Court found the ERA was not in violation of s.2(d). While the restraint on wages was important, the legislation did not substantially impair the employees' collective pursuit of workplace goals.[57] The wage restraint was consistent with the bargaining process in that it reflected the "going rate" achieved in bargaining with other units. The legislation allowed input on workplace conditions other than wages. Additionally, the restraints did not purport to be permanent and impact future bargaining, as was the case in *Health Services, supra*.[58]

67. In *Syndicat canadien, supra,* the Quebec Court of Appeal considered the constitutionality of the ERA as it applied to workers at the CBC. Because of recently negotiated wage rates for unionized CBC employees, the effect of the ERA was to nullify already-negotiated wage increases, as well as limit the possibility of negotiating new increases in the five years covered by the legislation.[59] In some cases, the ERA had the effect of requiring repayment of increases already paid.[60] At the same time, the Court noted that free negotiation of wages would resume in the post-restraint period (while acknowledging that the losses during the restraint period would be difficult if not impossible to regain over time, and that the ERA

[56] *Ibid*., at para.27.
[57] *Ibid*., at para.30.
[58] *Ibid*., at paras.28-29.
[59] *Syndicat canadien, supra*, at para.36.
[60] *Ibid*., at para.49.

precluded future negotiations from retroactively addressing the losses of the restraint period.)[61]

68. Turning to the two-part analysis from *Health Services, supra*, the Court readily found that wages were an important issue for collective bargaining, and the three to five years of restraint was not a trivial interference.[62] On the second inquiry, however, the Court found that the ERA nonetheless preserved the right to consultation and good faith negotiation. It did not amount to a complete wage freeze, allowing for individual employees to receive step increases, merit increases, and other bonuses where provided for in the collective agreement.[63] The wage restraints were limited in time, and had only limited effects on post-restraint bargaining.[64]

69. The Court described it as "crucial" that the legislation explicitly reserved the right to collectively bargain on issues that were non-monetary:

> …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

[61] *Ibid*., at paras.52, 39.
[62] *Ibid*., at para.44.
[63] *Ibid*., at para.48.
[64] *Ibid*., at para.52.

> process inherent to freedom of association recognized under s. 2(d), carries clear weight in assessing the seriousness of the impact of ERA.[65]

70. Overall, the Court found that the interference with freedom of association could not be considered substantial:[66]

> Without doubt, there is obstruction or interference ("ingérence"), but because it "preserve[s] a process of consultation and good faith negotiation", it is not the type that deprives employees of their right to "associate in a meaningful way in the pursuit of collective workplace goals" or that leads them to turn away from collective action. The fact that wage increases are not prohibited but are instead capped, and that subsequent recovery of amounts lost during the restraint period is not permitted does not impair the employees' freedom of choice or their ability to pursue collective goals through an effective process that permits meaningful bargaining (even if one of the bargaining subjects is provisionally limited by an actual legal restriction). It does not create dependence on the employer, limit the right to strike, or have the structural effects that were at issue in *Health Services*, for example. Moreover, this limitation is not part of a series of repeated and successive restraint periods that could cumulatively undermine the ability of employees to come together and defend their interests collectively.

71. The BCCA in *Dockyard Trades, supra,* similarly followed *Meredith, supra,* in upholding the constitutionality of the ERA in the context of dockyard workers employed by Treasury Board. Collective bargaining between Treasury Board and the Council representing dockyard workers was ongoing while the global financial crisis was brewing. Negotiators for Treasury Board informed the Council during bargaining of the possibility of wage restraint legislation, but no agreement was reached at the table and the bargaining dispute

[65] *Ibid*., at para.55.
[66] *Ibid*., at para.58.

was referred to interest arbitration. The Arbitration Board awarded wage increases before the ERA was passed, and which ended up being partially nullified by the legislation.[67]

72. Despite the effect of rolling back a "hard-won wage increase,"[68] the ERA was again found constitutional. Findings that were "critical" to this conclusion included that the Council was given notice of the impending legislation during bargaining; that the government's approach respected past bargaining and avoided extinguishing existing terms and conditions; that the wage limits were for a temporary, defined period and did not limit bargaining on any other term; that government negotiated first and informed the Council about the impending deadline; that government consulted in good faith with all parties including the Council; that government attempted to restart negotiations before the deadline; and that the Council was well aware of the risk of a legislative override.[69]

73. The Court concluded that the legislation did not compromise the essential integrity of the 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.[70]

[67] *Dockyard Trades, supra*, at para.9.
[68] *Ibid*., at para.91.
[69] *Ibid*., at para.92.
[70] *Ibid*., at para.93.

74. In the final relevant ERA case, *Gordon*, *supra*, the Ontario Court of Appeal considered the application of the legislation to the two largest federal public sector unions, PSAC and PIPSC, each of which represented several affected bargaining units. The impacts of the legislation varied, but in some cases included rolling back previously-negotiated wage increases.[71]

75. The Court followed the reasoning in *Meredith*, and determined that the interference with collective bargaining was not "substantial":

> …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.[72]

76. This solid line of jurisprudence upholding the wage restraint provisions of the ERA was recently followed by the Manitoba Court of Appeal in *Manitoba Federation of Labour et al* v. *Manitoba*, 2021 MBCA 85 **[Tab 20]** ("*MFL*,") a case which will be particularly relevant to this Court due to the similarity of the legislative programs at issue.[73] Manitoba's *Public Services Sustainability Act*, CCSM c P272 (the "Manitoba PSSA"), passed in 2017, set wage caps of 0%, 0%, 0.75% and 1% over a four-year period. This wage restraint legislation applied broadly across the public service to both unionized and non-unionized

[71] *Gordon, supra*, at (eg.) paras 143-146.
[72] *Ibid*., at para.176.
[73] The lower court decision in the case explicitly noted that the Manitoba legislation in question was "substantially based on the Nova Scotia model," which refers to Bill 148. (*Manitoba Federation of Labour et al* v. *The Government of Manitoba*, 2020 MBQB 92 **[Tab 21]** at para.17.)

employees. The Court of Appeal found the Manitoba PSSA constitutional under s.2(d), overturning a lower court ruling.

77. The Court in *MFL, supra,* reiterated the salient limits of the Supreme Court of Canada's s.2(d) jurisprudence, including the "substantial interference" test, the focus on the process of bargaining rather than the outcomes of bargaining, and the fact that no particular model of collective bargaining is guaranteed by the *Charter*.[74]

78. Much of the analysis in *MFL, supra,* focused on errors in the lower court's attempts to distinguish *Meredith, supra*. The Court of Appeal found that *Meredith* was persuasive despite coming from outside of a strict collective bargaining context.[75] It found that Manitoba's failure to engage in any collective bargaining before tabling the legislation was not fatal to the *Charter* analysis, despite the references in the ERA cases to the fact that the ERA wage pattern reflected wage patterns which had been bargained prior. There is no obligation on government to consult before legislating.[76] The Court also found it was an error to compare the wage pattern under the Manitoba PSSA to wage increases bargained in the private sector; the Court preferred to rely on the evidence that the few examples in the record of public sector agreements pre-PSSA reflected wage patterns similar to the PSSA.[77]

[74] *MFL, supra*, at para.23.
[75] *Ibid*., at paras.72-78.
[76] *Ibid*., at paras.79-82, 92.
[77] *Ibid*., at paras.83-86.

79. The Court of Appeal rejected the suggestion that the legislation was unconstitutional because wage restraint could have been achieved through hard bargaining, finding that analysis speculative and irrelevant:

> The question before the trial judge was not about the wisdom of the executive branch's policy decision to table the legislation without first trying to negotiate; it was whether the PSSA was constitutional.[78]

80. Moreover, the Court rejected the lower court's efforts to distinguish the ERA cases based on differences in the legislation. The fact that the Manitoba PSSA included lower wage increases, including 0% in some years, was irrelevant to the analysis: "Determining the constitutionality of legislation will not be done by decimal points."[79] Once it was determined under the first inquiry under *Health Services* that wages were an important issue at bargaining (which was conceded by Manitoba,) the focus shifted away from the nature of the issue and on to the effect on the process of bargaining, not the outcome.[80]

81. Finally, the Court of Appeal found that the lower court judge erred in holding that a restraint on monetary issues automatically precluded meaningful bargaining. The evidence of an expert witness to this effect was found to be "diametrically opposed to the jurisprudence".[81]

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[78] *Ibid*., at para.91.
[79] *Ibid*., at para.95.
[80] *Ibid*.
[81] *Ibid*., at paras.98-100.

82. The Court of Appeal in *MFL, supra,* found the Manitoba PSSA shared the essential features which led the Supreme Court and appellate courts to find the ERA constitutional. The restraints imposed were broad-based and time-limited. The legislation preserved the process of bargaining, and allowed meaningful bargaining on non-wage workplace issues. These were the essential requirements coming out of *Meredith*, *supra*, which the Court found binding.[82]

The law on s.2(d) as applied to Bill 148

83. Applying the two-part test from *Health Services, supra*, in the manner outlined in the appellate cases involving the federal ERA, this Court should conclude that Bill 148 does not violate the right of public sector unions to a meaningful process of collective bargaining. The result reached by the Manitoba Court of Appeal with respect to very similar legislation should, the Attorney General submits, be even more persuasive on the facts of the present case.

84. Bill 148 shares all of the salient features of the ERA and the Manitoba PSSA. It imposes a wage pattern in the form of maximum wage increases over a defined period (including, like the Manitoba PSSA, 0% increases in some years.) It applies to the broadest possible scope of public sector employees, unionized and non-unionized alike. It applies only to the financial items of wages and the Public Service Award, leaving bargaining entirely unrestrained on other items including non-monetary items. Unlike the legislation in *Health*

[82] *Ibid*., at paras.126-127.

*Services, supr*a, it does not purport to take any issue off the table for future rounds of bargaining; it is truly time-limited in the way contemplated by the Manitoba Court of Appeal in *MFL, supra*. It does not in any way affect the process of collective bargaining; at most, it limits the range of possible outcomes at bargaining with respect to wages and the Public Service Award, during the period of restraint. There is no meaningful basis for distinguishing the appellate-level wage restraint cases, reviewed above, which unanimously find such legislation not to violate the protections of s.2(d).

85. In fact, unlike the ERA, Bill 148 does not roll back any wage increases already negotiated, but applies only on a go-forward basis. Similarly, it does not strip away or reduce any accrued Public Service Award, but simply prevents further accrual on a go-forward basis. This lack of any retroactive effect makes for even less impact on bargaining than what occurred under the ERA.

86. Turning specifically to the two-part test in *Health Services, supra*, the Attorney General concedes that the first part of the test would be satisfied. That is, the matters affected by Bill 148, wages and the Public Service Award, are clearly important matters in bargaining between government and the public sector unions. However, the Attorney General respectfully submits, the second stage of the *Health Services* inquiry is not satisfied, as the legislation respects freedom of association by preserving a process of consultation and good faith negotiation.

87. Bill 148 respects the collective bargaining process in at least three ways contemplated by the relevant cases: the scope of the legislation preserves the ability to meaningfully bargain collectively; there was consultation with public sector unions on the mandate outside the scope of collective bargaining; and the substance of the restraint reflects a pattern that had been achieved through collective bargaining.

The scope of the legislation preserves the ability to meaningfully bargain collectively

88. Crucially, Bill 148 preserves the ability to bargain collectively, with respect to non-monetary items and, to some extent, with respect to monetary items as well.

89. It is obvious from the face of the legislation that it does not restrain bargaining of any items beyond wages and the Public Service Award. This includes working conditions such as working hours, vacations, leave, employment security, work organization, staffing, assignments, transfers (all recognized in *Syndicat canadien, supra* as crucial collective bargaining items, and most of which actually have monetary implications.)[83] As noted above, the Manitoba Court of Appeal in *MFL, supra*, expressly rejected expert evidence that limiting bargaining to non-monetary items meant bargaining was not meaningful, calling that conclusion inconsistent with the jurisprudence.[84]

[83] *Syndicat canadien, supra*, at para.55.
[84] *MFL, supra*, at paras.99-100.

90. Moreover, the legislation does preserve room for bargaining on monetary items to some extent, which is clear in several ways. First, as noted, Bill 148 did not amount to a complete wage freeze, allowing for individual employees to receive step increases, merit increases, and other bonuses provided for in a collective agreement[85]; this factor was noted as relevant by the Quebec Court of Appeal in *Syndicat canadien, supra*.[86]

91. Secondly, the legislation also provides within it mechanisms for making exceptions to its restraints. Section 15(2) allows Treasury and Policy Board to exempt collective agreements from the wage restraint provisions so long as it remains consistent with the principles of responsible fiscal management under the *Finance Act*, 2021, c.6, ss.7, 8 **[Tab 31]**. Section 17 allows for the parties to negotiate additional compensation increases in exchange for specific cost-savings provisions in terms of productivity improvements, expense reductions, cost avoidance, or other innovations, subject to the approval of Treasury and Policy Board. Finally, the Act also allows for exemptions to be made by regulation, which as can be seen from the *Public Services Sustainability General Regulations, supra,* has been used frequently to allow collective agreement provisions which would otherwise be inconsistent with Bill 148.[87] The Manitoba Court of Appeal

[85] See s.16 of the Act.
[86] at para.48.
[87] To illustrate the use of these regulations, see the December 2017 interest arbitration award between the Province and the NSGEU with respect to the Civil Service Master Agreement (*Nova Scotia* v *NSGEU*, unreported decision of Chair Thomas Cromwell, December 7, 2017) **[Tab 22]**. There, after a process of mediation-arbitration, the Arbitration Board made an award which included a provision relating to Public Service Awards which was inconsistent with Bill 148 (payout of the Award on retirement would be based on the employee's salary at retirement, not the employee's salary as of April 2015, which was inconsistent with ss.20&21 of the Act.) The Board recognized the need for a regulation to allow this exception; this is now on the list of collective agreements given exemptions in the *Public Services Sustainability General Regulations.*

noted the power to exempt via regulation as a factor supporting the constitutionality of the Manitoba PSSA.[88]

Consultation outside the scope of collective bargaining

92. While the fact that the legislation itself allows for meaningful collective bargaining is a complete answer to the second stage of the *Health Services* inquiry, it bears mentioning that there was extensive consultation with public sector unions about the Public Services Sustainability Mandate as well. As outlined above, the Mandate itself was alluded to in the Throne Speech, and was explicitly introduced to public sector unions in a meeting on August 18, 2015, at which the importance of collaborating and achieving goals through bargaining was emphasized. There was further communication on November 5, 2015, at which point written input was sought. And as can be seen from written communications from the NSGEU and NSTU[89], the government was clear during negotiations about the possibility of using legislation to achieve the Mandate.

93. There is no obligation on government to consult unions prior to legislating[90], and this is not a case such as *Health Services*, where government would argue that consultation is a complete substitute for collective bargaining. However, the ERA cases make it clear that openness and consultation about fiscal restraint shows respect by government for the collective bargaining process. For example, in *Dockyard Trades, supra*, the fact that

[88] *MFL, supra*, at paras.101-103.
[89] Record, Volume 6, Tab 124, p.2418; Record, Volume 5, Tab 123, p.2413.
[90] *MFL, supra*, at paras. 79-82, 92.

government was open during bargaining about the possibility of wage restraint legislation was a factor against finding a violation of s.2(d).[91]

94. Before Bill 148 was introduced, government made meaningful attempts to inform public sector unions of its intentions to bargain in a way that showed fiscal restraint and protected the long-term stability of public services. While it was under no obligation to consult before legislating, the fact is that unions were well aware of the government's overall approach to collective bargaining, and the restraints in Bill 148 were in line with that approach.

The restraints in Bill 148 reproduce results achieved in collective bargaining

95. Another way in which Bill 148 lines up with the s.2(d) case law is that its fundamental restraints on collective bargaining actually reflect a result that had already been achieved through collective bargaining prior to the legislation being passed.

96. This factor is not necessary in order to meet the requirements of s.2(d), but it is noteworthy in demonstrating that government continued to operate within a framework of respect for collective bargaining. In *Meredith, supra*, for example, it was relevant that the wage pattern contained in the ERA reflected the "going rate" that had already been achieved at some bargaining tables.[92] In *MFL, supra*, the Court of Appeal found it "proper" that the trial

[91] *Dockyard Trades, supra*, at para.92.
[92] *Meredith, supra*, at paras.28-29.

judge considered how the Manitoba PSSA aligned with the "going rate" already achieved at bargaining, but limited the comparison to other public employers and not private employers.[93]

97. In the present case, it is noteworthy that, prior to the passage of Bill 148, government had already achieved tentative collective agreements with the NSGEU and the NSTU which reflected the restraints that would ultimately become part of Bill 148. The wage pattern and the reductions relating to the PSSA were already achieved through good faith collective bargaining with two of the biggest public sector bargaining units. Thus, as with the ERA, Bill 148 reflected the "going rate" achieved through collective bargaining.

98. It should not go unmentioned that each of those two tentative agreements was rejected by the members on a ratification vote. Ratification, however, takes place after a tentative agreement is reached through collective bargaining; it is not part of the bargaining process itself. The nature of collective bargaining in Canada is that the union is the exclusive agent for the bargaining unit, not the individual members. Collective bargaining takes place with unions, not members.[94] The existence of a tentative agreement is evidence that there was bargaining in good faith.[95]

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[93] *MFL, supra*, at paras.82-86.
[94] See for example the cases referred to above: *Isidore Garon Ltée.* v. *Tremblay*, 2006 SCC 2 *supra; Bisaillon* v. *Concordia University*, 2006 SCC 19,*supra*; *Dunmore* v. *Ontario (Attorney General)*, 2001 SCC 94, *supra*.
[95] *St. Thomas More College*, 2008 CanLII 47030 (Sask. L.R.B.), *supra*, at para. 62.

99. The fact of the matter is, through bargaining in good faith, government achieved its goals of wage restraint and reductions relating to Public Service Awards with the bargaining agents for the Civil Service Master Agreement and the Teachers' Provincial Agreement. In both cases, the bargaining teams with whom the government was legally mandated to pursue collective bargaining agreed to the deal and presented it to membership for ratification, with a recommendation to accept. Those restraints therefore represented the "going rate" in public sector bargaining, despite the ultimate failure of ratification in each case.

Conclusion with respect to s.2(d)

100. While Bill 148 does affect matters important to collective bargaining, the second part of the *Health Services* inquiry demonstrates that it nonetheless complies with the requirements of s.2(d), which protects the collective bargaining process rather than collective bargaining outcomes. The restraints are time-limited and broad-based, and preserve the rights of unions to bargain freely on non-monetary items, as well as providing some flexibility on monetary items. The restraints fit within the Public Services Sustainability Mandate, which was the subject of consultation with public sector unions, and reflected the "going rate" achieved at the bargaining table before legislation was enacted. Consistent with all other appellate-level cases dealing with fiscal restraint legislation, this Court should find that Bill 148 does not substantially interfere with a meaningful collective bargaining process.

Section 1 – The Oakes Test

101. In the event the Court finds that Bill 148 violates s. 2(d), it will be necessary to consider the application of s. 1 of the *Charter*. Section 1 requires the Court to determine whether the Act's limitations on the unions' s. 2(d) rights are "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

102. The application of s. 1 to s. 2(d) rights, like other rights and freedoms guaranteed by the *Charter*, is governed by the *Oakes* test. The elements of the *Oakes* test are set out by McLachlin C.J. and LeBel J. in *Health Services, supra*:

> The analysis for assessing whether or not a law violating the *Charter* can be saved as a reasonable limit under s. 1 is set out in *Oakes*. A limit on *Charter* rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law.[96]

103. The onus of proving each of the elements of the *Oakes* test on a balance of probabilities lies with the Province.[97]

[96] *Health Services, supra*, at para.138.
[97] *Ibid*., at para.139.

104. As whatever limits with respect to s. 2(d) rights in this case exist by virtue of Bill 148, there can be no question that those limits are "prescribed by law" because the interference (which is assumed for the purposes of argument) with collective bargaining is set out in legislation.[98]

Does the Act Pursue a Pressing and Substantial Objective?

105. The objective of the statute must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 **[Tab 23]**, at p. 352. "At minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society."[99]

106. The law is clear that the s. 1 analysis at this stage is not "an evidentiary contest":

> As my colleagues recognized in *Harper*, "the proper question at this stage of the analysis is whether the Attorney General *has asserted* a pressing and substantial objective"… (emphasis in original). McLachlin C.J. and Major J. went on to note that "[a] theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis" …[100]

107. The objective of the Act is set out in the detail in s. 2 of the Act which states:

> The purpose of this Act is
>
> (a) to create a framework for compensation plans for public-sector employees that

[98] *Ibid*., at para.140.
[99] *Ibid*., at para.142.
[100] *R.* v *Bryan*, 2007 SCC 12 **[Tab 24]** at para.32.

(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.

108. The "principles of responsible fiscal management" prescribed under the *Finance Act,* RSNS 2010, c. 2 are found in s. 5 of that Act:

5 (1) The Province shall pursue its policy objectives in accordance with the principles of responsible fiscal management.

(2) The principles of responsible fiscal management include

(a) achieving and maintaining Provincial net debt at prudent levels, taking into consideration its impact on the sustainability of government programs and services for future years;

(b) managing prudently the fiscal and financial risks facing the Province;

(c) managing the financial investment portfolios of the Province in a sound and efficient manner;

(d) pursuing policies that are consistent with achieving a reasonable degree of predictability about the level and

> stability of tax rates, programs and services for future years; and
>
> (e) maintaining a fiscal decision-making system that is rational, fair, efficient, credible, transparent and accountable.

109. The *Finance Act* is not simply an expression of best intentions; it imposes a mandatory obligation on government to act in accordance with responsible fiscal management, including maintaining debt at prudent levels and considering the long-term stability of government programs and services.

110. Where the statute in question has many asserted objectives, it is sufficient for the purposes of s. 1 if only one of them is pressing and substantial.[101] The Act has a number of stated purposes but the essential purpose of the Act, as reflected in its title, is the protection of the "sustainability of public services". A purpose to secure the ability of the government to continue to provide public services to the citizens of the Province is surely an objective that is pressing and substantial.

111. This purpose is analogous to the stabilization of public finances, an objective of the ERA that was recognized as pressing and substantial in both *Syndicat canadien*, *supra*,[102] and *Gordon*, *supra*.[103]

[101] *Health Services, supra*, at para.147.
[102] at paras. 68-70.
[103] at para. 221-22.

112. The Ontario Court of Appeal in *Gordon, supra,* accepted without reservation that judicial deference was appropriate when considering government fiscal policy. As Lauwers J.A. said:

> 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.[104]

113. He continued to explain that the courts have accepted that

> …the Government's core competencies include the determination of economic policy, budgeting decisions, the proper distribution of resources in society, labour relations regulation, and how best to respond to situations of crisis.
>
> The determination of economic policy is among the core competencies of the legislature and the executive, not the judiciary, particularly in circumstances of national importance where the solutions to a problem are uncertain. This is where the democratic principle must surely bite more deeply.[105]

114. Lauwers J.A. noted that budgeting decisions "are plainly within the core competencies of the legislature and the executive". Reference was also made to LaForest J's observation in

[104] *Gordon, supra*, at para. 224.
[105] *Ibid*., at paras.228-229.

Eldridge v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 **[Tab 25]** at para. 85 that "governments must be afforded wide latitude to determine the proper distribution of resources in society".[106]

115. He continued:

> All of these core competencies of government are implicated deeply in this case. In general terms, the closer the decision under review is to the core competency of Parliament, the higher the degree of judicial deference, but deference never amounts to submission, since that would abrogate the court's constitutional responsibility. Chief Justice Dickson, said, at p. 442, para. 36 of *PSAC 1987*: "The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*.[107]

116. The application judge's treatment of the issue of judicial deference was encapsulated in the following passage quoted by Lauwers J.A:

> It is not a matter of who is right. The issue remains whether, in the circumstances, any breach of the freedom of association falls within such reasonable limits as can be demonstrably justified in a free and democratic society. In searching for the answer some measure of deference is to be given to the government's choice of strategy. I say "some measure" mindful of the admonition of counsel for PIPSC that any deference should not lower the standard of justification. This is not a question of mindless genuflection in the direction of the government. *Rather it is an acknowledgement that in the economic sphere there are complex choices to be made and difficult decisions to be taken*.[108]

[106] *Ibid*., at para.232.
[107] *Ibid*., at para.236.
[108] *Ibid*., at para.237 (emphasis added.)

117. The Court found that the application judge made no error in invoking judicial deference as it was "plainly" supported by the authorities.

118. The objectives set out in s. 2 of the Act should be accepted at face value. There is no plausible attack on the good faith of the assertions of those objectives. Neither are they patently irrational.[109] The Province thus respectfully submits that a pressing and substantial objective has been established.

Rational Connection

119. The second element of the *Oakes* test requires the Province to "establish a rational connection between the pressing and substantial objective and the means chosen by the government to achieve the objective"; the evidentiary burden on the Province is not "particularly onerous".[110] The required rational connection can be established "through reason, logic or simply common sense".[111]

120. The evidence need not conclusively establish the means adopted in the Act will, in fact, achieve the government's objectives.[112] The Province "need only demonstrate a

[109] *Ibid.*, at para.242.

[110] *Health Services*, *supra*, at para.148.

[111] *RJR-MacDonald Inc* v *Canada (Attorney General)*, [1995] 3 S.C.R. 199 **[Tab 26]** ("*RJR MacDonald*") at para.184.

[112] *Health Services*, *supra*, at para.149.

reasonable prospect that the limiting measure will further the objective to some extent, not that it will certainly do so".[113]

121. It is "at least logical and reasonable" to conclude that the measures adopted in the Act will improve the fiscal position of the Province and protect the Province's ability to provide public services into the future. The Quebec Court of Appeal in *Syndicat canadien*, *supra* had no difficulty in discerning a rational connection between the objectives of the ERA and the means adopted in the statute to achieve these objectives:

> 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.[114]

122. The comments of the Court of Appeal for Ontario in *Gordon*, supra, are apposite. There Lauwers J.A. concluded with respect to the rational connection element of the test that:

> 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.[115]

[113] *Gordon*, *supra*, at para.249.
[114] *Syndicat canadien, supra*, at para.75.
[115] *Gordon, supra*, at para.255.

Minimal Impairment

123. Next, the court is directed to inquire whether the impugned law minimally impairs the Charter right. The test is not an absolute one. The legislature "need not choose the absolutely least intrusive means to attain its objectives".[116] The legislature is allowed some degree of flexibility. In an oft-cited passage, McLachlin J. (as she then was) said in *RJR MacDonald*, *supra*:

> 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.[117]

124. The Province must do more than simply assert that the measures adopted in the statute in question satisfy the minimal impairment test".[118] There should be evidence of a search "for a minimally impairing solution to the problem the government sought to address".[119]

125. As discussed above, consultation is a factor taken into account by the court when determining whether there has been a breach of s. 2(d). Consultation also has a role to play in the minimal impairment analysis. In *Health Services, supra,* the Court explained that:

> Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to

[116] *Ibid.*, at para.261.
[117] *RJR MacDonald*, *supra*, at para.160. See also *Health Services*, *supra*, at para.150; *MPAO*, *supra*, at para.149.
[118] *Health Services*, *supra*, at para.151.
[119] *Ibid*., at para.152.

> adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.
>
> In this case, the only evidence presented by the government, including the sealed evidence, confirmed that a range of options were on the table. One was chosen. The government presented no evidence as to why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it.[120]

126. Although government is not bound to consult unions before legislating, the affected unions had ample opportunity to make their views known to government. In this context, the words of Lauwers J.A. in *Gordon, supra* are particularly germane:

> The appellants had the same right to participate in the democratic process leading to the introduction and passage of legislation as any Canadian. Government employees are not entitled to privileged stature in the legislative process by virtue of their employment relationship or their status as union members.[121]

127. Judicial deference also has a role to play in the determination of whether the measures adopted were minimally impairing:

> Chief Justice McLachlin explained the relationship between minimal impairment and judicial deference in *Canada (Attorney General) v. JTI-Macdonald Corp.* … She noted: "[T]his Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives." She counselled "a certain measure of deference … where the problem Parliament is tackling is a complex social problem." This is especially true where there are many ways to approach a problem, and "no certainty as to which will be the most effective." Chief Justice McLachlin cautioned against the abuse of hindsight, noting: "It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution

[120] *Ibid*., at paras.156-157.
[121] *Gordon, supra*, at para.112.

> Parliament has adopted." She pointed to the complications posed when "a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal." In such circumstances, as in this case, "[c]rafting legislative solutions to complex problems is necessarily a complex task … that requires weighing and balancing."[122]

128. Wage increase restrictions of the kind found in the Act were considered to be minimally impairing in both *Syndicat canadien, supra,* and *Gordon, supra*. In the former case the Quebec Court of Appeal stated with reference to the *ERA*:

> In this case, the evidence reveals that the government considered various options for limiting public spending growth associated with salaries: a hiring freeze, layoffs, departure incentives, abolition of wage scale increases, suspension of promotions, wage freezes, restriction of wage increases. All things considered, it chose to restrict wage increases, which does in fact appear to be a less draconian restraint measure, especially when scale increases and the possibility of amending the affected agreements are maintained, as well as the other measures discussed above. Accordingly, the Minister of Finance tabled a bill to this effect before Parliament, which was passed and became the *ERA*.[123]

129. The Quebec Court of Appeal also adopted what Dalphond J.A. said in an earlier case dealing with the *ERA*. This earlier case (*Canada (Attorney General)* v. *Canadian Union of Public Employees, Local 675*, 2014 QCCA 1068 **[Tab 27]**) had been remanded by the Supreme Court of Canada for disposition in accordance with *Meredith, supra* and *MPAO, supra*. Dalphond J.A. stated at paras. 86-88:

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[122] *Ibid*., at para.267.
[123] *Syndicat canadien, supra*, at para. 84.

> In this case, the government considered the options and chose a measure that was both effective and less fraught with consequences than a wage scale freeze, layoffs, or wage cuts.
>
> It also chose a measure that sought to be fair to all employees paid from the government budget, irrespective of the date the collective agreement expired or was renewed.
>
> In my opinion, there were no means that would interfere with the respondents' freedom of association to a lesser degree yet also make it possible to achieve the objectives sought.

130. Here, Bill 148 in s. 16 expressly permitted wage increases in respect of scale increases and promotions. There is, moreover, nothing in the Act that would prohibit or limit collective bargaining on non-monetary items. This fits squarely within the parameters which have, in other cases, been found to be minimal impairment.

Proportionality of Effects – Balancing

131. The basic question at the third step of the proportionality analysis is whether the limit on the right is proportionate in effect to the public benefit conferred by the limit. This analysis assesses the severity of the deleterious effects of a measure on individuals or groups, and asks whether the benefits of the impugned law are worth the cost of the rights limitation, or whether the deleterious effects are out of proportion with the public good achieved by the infringing measure.[124]

[124] *Gordon, supra*, at para.296.

132. The answer to this question depends on a consideration of the salutary effects on the one hand and the deleterious effects on the other. The principal salutary effect of Bill 148 is that it contributes to the stabilization of the Province's fiscal situation thereby enhancing the Province's ability to provide public services to Nova Scotians into the future.

133. The societal benefit of putting public service compensation on a sustainable basis is a considerable benefit to the common good. As the Ivany Report said, it is "now or never": "there is a crisis, and it does threaten the basic economic and demographic viability of our province."[125] The Government heeded the Ivany Report's call for urgent action. If it had not heeded that call, the Province's perilous financial situation would have become even more tenuous. It only makes sense to act now before the Province is peering over the abyss of financial calamity.

134. The deleterious effects of the Act are temporary and limited. Wages were not rolled back, job security was not affected, there were no massive layoffs and there was no impediment to the collective bargaining of non-monetary items. There was no material or enduring impact on the collective bargaining process. The words of Lauwers J.A. in *Gordon, supra,* are pertinent in this context:

> The appellants also argue that the harm done to the institution of collective bargaining is something that must be factored into the equation. I agree. But in my view, the impact is negligible. Candidly, public sector unions are powerful in Canada. It is hard to imagine any civil servants wishing to abandon the *Wagner Act* model of collective bargaining because of some

[125] Record, Volume 3, Tab 36, p.1106.

> temporary setbacks under the *ERA*. There is simply no other employment relationship structure on offer that would be more effective. I therefore do not accept the unions' argument, expressed by the application judge, that the experience of the *ERA* would reduce "… the willingness of employees to come together and work towards common workplace objectives." I would not give this factor much weight in the balance.[126]

135. The balancing of the salutary and the deleterious effects is to be approached deferentially:

> 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.[127]

136. The Quebec Court of Appeal's conclusion in *Syndicat canadien*, *supra*, with respect to its s.1 analysis is also worthy of note:

> **The encroachment does not outweigh the objective**. That being the case, and after weighing all the above elements and the inherent seriousness of the impairment, the circumstances do not justify concluding that the intrusion on freedom of association was such that it outweighed the legislator's objective.
>
> Ultimately, the means chosen were rationally connected to the objective sought by the legislator as they meet the test of minimal impairment of the right protected by s. 2(d) of the *Charter* and do not intrude on this right in such a way as to outweigh the objective. They are proportional. The second condition of the *Oakes* test, as restated in *Mouvement laïque*, is thus met.

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[126] *Gordon, supra*, at para. 309.
[127] *Ibid*., at para.135.

> Consequently, and to conclude, although the *ERA* constitutes a substantial interference with the freedom of association guaranteed to the respondents by s. 2(d) of the *Charter*, it sets out reasonable restrictions that can be justified under s. 1.[128]

137. In summary, should this Court find that Bill 148 violated s.2(d) of the Charter by interfering substantially with a meaningful process of collective bargaining, then it should go on to find that it is saved under s.1 of the Charter as a reasonable limit justifiable in a free and democratic society. This is the same conclusion reached by all appellate-level courts reviewing fiscal restraint legislation (albeit in *obiter*, as no case actually found a s.2(d) violation to begin with.)

[128] *Syndicat canadien, supra*, at paras. 95-97.

PART IV

CONCLUSION

138. In light of the foregoing, the Attorney General respectfully submits that the answers to the Reference questions are as follows:

Q(1) Do Sections 7 to 23 of the *Public Services Sustainability (2015) Act*,[1] S.N.S. 2015, Chapter 34, violate the *Canadian Charter of Rights and Freedoms*?

A(1) No.

Q(2) If the answer to question 1 is "yes", are sections 7 to 23 saved by operation of section 1 of the *Canadian Charter of Rights and Freedoms*?

A(1) Yes.

All of which is respectfully submitted this 30th day of November 2021.

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APPENDIX A

LIST OF CITATIONS

1. *Reference re Public Services Sustainability (2015) Act*, 2021 NSCA 9.
2. *Constitutional Law of Canada* (5th ed) Peter W. Hogg, Wade K. Wright, ss. 8.9, 8.11 and 8.12.
3. *Health Services and Support-Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27.
4. *Reference in Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.
5. *Professional Institute of the Public Service of Canada* v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.C. 367.
6. *Isidore Garon Ltée.* v. *Tremblay*, 2006 SCC 2.
7. *Bisaillon* v. *Concordia University*, 2006 SCC 19.
8. *Dunmore* v. *Ontario (Attorney General)*, 2001 SCC 94.
9. *Ontario (Attorney General)* v. *Fraser*, 2011 SCC 20.
10. *British Columbia Teachers' Federation* v. *British Columbia*, 2016 SCC 49.
11. *British Columbia Teachers' Federation* v. *British Columbia*, 2015 BCCA 184.
12. *Meredith* v. *Canada (Attorney General)*, 2015 SCC 2.
13. *Ontario Public Service Employees Union v. Cybermedix Limited*, 1981 CanLII 865.
14. *Office and Professional Employees International Union, Local 527 v. Hamilton (Board of Education)* 1993 CanLII 8028 (ON L.R.B.).
15. *St. Thomas More College*, 2008 CanLII 47030 (Sask. L.R.B.).
16. *Canada (Procureur général) c Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163.
17. *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156.
18. *Gordon v. Canada (Attorney General)*, 2016 ONCA 625.

19. *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, [2015] 1 SCR 3.

20. *Manitoba Federation of Labour et al.* v. *Manitoba*, 2021 MBCA 85.

21. *Manitoba Federation of Labour et al* v. *The Government of Manitoba*, 2020 MBQB 92.

22. *Her Majesty the Queen in Right of the Province of Nova Scotia* v. *Nova Scotia Government Employees Union*, unreported Interest Arbitration Award before Honourable Thomas A. Cromwell, Paul Cavalluzzo and Donald R. Munroe, QC dated December 7, 2017.

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

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

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

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

27. *Canada (Attorney General) v.* RJR – MacDonald Inc., 1993 RJQ 375.

APPENDIX B

STATUTES AND REGULATIONS

28. *Constitutional Questions Act*, RSNS 1981, c 89, ss. 3 and 4.

Reference to Court

3 The Governor in Council may refer to the Court for hearing or consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same. R.S., c. 89, s. 3.

Opinion of Court

4 The Court shall certify to the Governor in Council its opinion on the matter referred, with the reasons therefor, which are to be given in like manner as in the case of a judgment in an ordinary action, and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion, with his reasons therefor, to the Governor in Council. R.S., c. 89, s. 4.

29. *Public Services Sustainability (2015) Act*, SNS 2015, c. 34, ss.7-23

PUBLIC SERVICES SUSTAINABILITY BOARD

…

Purpose

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.

Interpretation

3 In this Act,

(a) "bargaining agent" means a union that acts on behalf of employees

(i) in collective bargaining,
(ii) as a party to a recognition agreement with their employer, or
(iii) as a party to a collective agreement with their employer;

(b) "Board" means the Public Services Sustainability Board established by Section 7;

(c) "collective agreement" means

(i) a collective agreement as defined in the Civil Service Collective Bargaining Act,

(ii) a collective agreement as defined in the Highway Workers Collective Bargaining Act,

(iii) a professional agreement, as defined in the Teachers' Collective Bargaining Act, between the Minister of Education and the Nova Scotia Teachers' Union,

(iv) a collective agreement as defined in the Trade Union Act,

(v) an agreement between Her Majesty in right of the Province and the Nova Scotia Crown Attorneys' Association for defining, determining or providing for working conditions and terms of compensation for crown attorneys,

(vi) any other agreement between a group of two or more public-sector employees established for collective bargaining and a public-sector employer for defining, determining or providing for working conditions and terms of compensation, or

(vii) an award, decision or order that, by operation of law or agreement, governs working conditions and terms of compensation for a group of two or more public-sector employees, but does not include an agreement between the Professional Association of Residents in the Maritime Provinces and a public-sector employer for defining, determining or providing for working conditions and terms of compensation for postgraduate medical doctors who have been accepted for residency training by Dalhousie University and are involved in a university operated educational program;

(d) "collective bargaining" means negotiating with a view to the conclusion of a collective agreement or the renewal or revision thereof;

(e) "compensation" means salary, wages, stipends, honoraria, bonuses, fees and commissions;

(f) "compensation plan" means the provisions, however established, for the determination and administration of a public-sector employee's compensation;

(g) "compensation range" means a range of compensation rates established under a compensation plan;

(h) "compensation rate" means a rate of remuneration, including cost-of-living adjustments, or, where no such rate exists, any fixed or ascertainable amount of remuneration established under a compensation plan;

(ha) "education entity" means an education entity as defined in the Education Act;

(i) "effective date" means

(i) in respect of a compensation plan set out in a collective agreement and in respect of every public-sector employee to whom that compensation plan applies,

(A) the date the collective agreement expired if, before the coming into force of this Act, the collective agreement expired and a new collective agreement has not been concluded, or

(B) the date the collective agreement expires if the collective agreement expires on or after the coming into force of this Act, or

(ii) in respect of a compensation plan other than one set out in a collective agreement and in respect of every public-sector employee to whom that compensation plan applies, the first date after March 31, 2015, on which public-sector employees to whom the compensation plan is applicable are entitled to receive an economic increase to their respective compensation rates or, where no such date exists, the date that this Act comes into force;

(j) "employee" means a person who performs duties and functions that entitle that person to compensation on a regular basis but does not include a consultant or an independent contractor;

(k) "employer" means the employer of an employee or the person, association or entity in the position of the employer of an employee, and includes a person, association or entity providing compensation to an employee;

(l) "minimum wage" means the minimum wage established under the Labour Standards Code;

(m) "public-sector bargaining agent" means a bargaining agent that represents a group of two or more public-sector employees;

(n) "public-sector employee" means

(i) an officer or employee of

(A) Her Majesty in right of the Province, or

(B) an organization that forms a part of the Government Reporting Entity as defined in the Finance Act,

(ii) a person appointed under an enactment of the Province as a public officer and including, without limiting the generality of the foregoing, a person so appointed as a member or chair of an agency, board, commission or tribunal,

(iii) a person employed by a member of the Executive Council or the member's deputy,

(iv) an employee of an employer that provides health or community services within the meaning of clause 3(1)(a) of the Essential Health and Community Services Act, regardless of whether the employee is represented by a bargaining agent,

(v) an employee of Nova Scotia Hearing and Speech Centres,

(vi) the Chief Executive Officer or an employee of the Workers' Compensation Board of Nova Scotia,

(vii) a member of the Nova Scotia Workers' Compensation Appeals Tribunal,

(viii) a person employed under a personal services contract between the person and

(A) Her Majesty in right of the Province,

(B) an organization that forms a part of the Government Reporting Entity as defined in the Finance Act, or

(C) any other public-sector employer, or

(ix) a person designated by the regulations as a public-sector employee, but does not include,

(x) an employee of a municipality as defined in the Municipal Government Act,

(xi) a postgraduate medical doctor who has been accepted for residency training by Dalhousie University and is involved in a university-operated educational program,

(xii) a judge of the Provincial Court of Nova Scotia,

(xiii) a judge of the Family Court of Nova Scotia,

(xiv) a presiding justice of the peace as defined in the Justices of the Peace Act, or

(xv) a person prescribed by the regulations as not being a public-sector employee;

(o) "public-sector employer" means the employer of a public-sector employee;

(p) repealed 2018, c. 1, Sch. A, s. 147.

(q) "service award" means an award or benefit payable to

(i) a person, other than a teacher, who retires or resigns from a public-sector employer and who is eligible for or in receipt of a pension,

(ii) a teacher

(A) who retires or resigns from an education entity and who is eligible for or in receipt of a pension under the pension plan continued under the Teachers' Pension Act, or

(B) who otherwise ceases to be employed by an education entity and satisfies any criteria for receipt of the award or benefit prescribed by the professional agreement, as defined in the Teachers' Collective Bargaining Act, applicable to the teacher, or

(iii) the spouse, dependent children or estate of a teacher who dies while in the service of an education entity,

and, for greater certainty, includes a public service award within the meaning of Article 32 of the Civil Service Master Agreement entered into on September 3, 2013;

(r) "teacher" means a teacher as defined in the Teachers' Collective Bargaining Act;

(s) "union" means an organization of employees, formed for purposes that include regulating relations between employers and employees, that has a constitution and rules or by-laws setting forth its objects and purposes and defining the conditions under which persons may be admitted as members thereof and continued in membership.

…

Board

7 (1) There is hereby established a Public Services Sustainability Board composed of such persons as may be appointed in accordance with the regulations.

(2) The Board may exercise any power conferred upon it by the regulations.

(3) The Board shall perform any duties imposed upon it by the regulations.

Jurisdiction of Board

8 (1) The Board may, upon application by an interested party, decide any question that arises under this Act, including any question that arises as to

(a) whether this Act applies to a particular person, employer or compensation plan;

(b) whether a compensation plan complies with this Act;

(c) when a compensation plan came into effect or expired;

(d) who is the public-sector employer for a particular compensation plan;

(e) whether an increase in a person's compensation rate is in recognition of the person's

(i) length of time in employment or in office,

(ii) meritorious or satisfactory work performance,

(iii) completion of a specified work experience,

(iv) successful completion of a program or course of professional or technical education, or

(v) *bona fide* promotion to a different or more responsible position; or

(f) any matter prescribed by the regulations.

(2) Subject to subsections (3) and (4), the Board shall decide any question referred to it and the decision or order of the Board is final and cannot be questioned or reviewed by any court or tribunal.

(3) The Board may, where it considers it advisable to do so and subject to the regulations, reconsider any decision or order made by it under this Act and vary or revoke any decision or order made by it under this Act.

(4) The Board does not have jurisdiction to

(a) determine the constitutional validity or constitutional applicability of any enactment, including this Act, that is brought into question; or

(b) determine whether a right conferred, recognized, affirmed or otherwise guaranteed by the Constitution of Canada has been infringed.

Orders of Board

9 (1) The Board may by order authorize changes to a compensation plan upon application by

(a) the public-sector employer and the public-sector bargaining agent if the compensation plan is contained in a collective agreement; or

(b) the public-sector employer if the compensation plan is not contained in a collective agreement, if

(c) the net effect of the proposed changes would not increase the total cost of all compensation payable in respect of the persons to whom the compensation plan applies;

(d) the proposed compensation rates do not exceed what is permitted by this Act; and

(e) the proposed changes are not contrary to the intent and purpose of this Act.

(2) Where the Board determines that

(a) this Act is not being complied with;

(b) a compensation plan does not comply with this Act; or

(c) a public-sector employer or other person is implementing, has implemented or is likely to implement an increase in a compensation rate or compensation range that does not comply with this Act, the Board may make an order

(d) requiring compliance with this Act; or

(e) prohibiting the public-sector employer or other person from implementing the increase in a compensation rate or compensation range that does not comply with this Act.

Order is public document

10 An order of the Board is a public document and must be made available for inspection at the office of the Board during regular business hours.

COMPENSATION PLANS

Compensation plans continued for 4 years

11 (1) Every compensation plan in effect immediately before the coming into force of this Act is continued in effect until and including the fourth anniversary of the effective date.

(2) Where, before the coming into force of this Act,

(a) a compensation plan has expired; and

(b) A new compensation plan has not been established, the expired compensation plan is continued in effect until and including the fourth anniversary of the effective date, effective from when it expired but for this subsection.

(3) Nothing in this Section extends the period of employment for any person.

First collective agreement

12 (1) Notwithstanding Section 11 and regardless of whether a compensation plan was established before, on or after the coming into force of this Act, where

(a) a union was certified or recognized under an Act of the Legislature before, on or after the coming into force of this Act as the bargaining agent for public-sector employees who, immediately before the certification or recognition, did not have a certified or recognized bargaining agent; and

(b) a first collective agreement was not concluded before the coming into force of this Act, the public-sector employer and the public-sector bargaining agent may conclude a first collective agreement.

(2) For the purpose of Sections 13 to 17,

(a) the initial compensation rate applicable to a person under the compensation plan set out in a first collective agreement concluded under subsection (1) is deemed to be the compensation rate applicable to the person immediately before the coming into force of this Act;

(b) the initial compensation range applicable to a person under the compensation plan set out in a first collective agreement concluded under subsection (1) is deemed to be the compensation range applicable to the person immediately before the coming into force of this Act; and

(c) the effective date in respect of a compensation plan set out in a first collective agreement concluded under subsection (1) and in respect of every public-sector employee to whom that compensation plan applies is the date this Act comes into force.

2-year freeze in compensation

13 (1) Subject to Sections 15 to 17, the compensation rate applicable to a person immediately before the effective date may not be increased by a public sector employer before the second anniversary of the effective date.

(2) Subject to Sections 15 to 17, the maximum amount within a compensation range, if any, that is applicable to a person immediately before the effective date, and any steps within the compensation range, may not be increased by a public-sector employer before the second anniversary of the effective date.

Compensation restraint following freeze

14 (1) Subject to Sections 15 to 17, the compensation rate applicable to a person immediately before the effective date may be increased by a public-sector employer by no more than one per cent on the second anniversary of the effective date and may be further increased by no more than one and one-half per cent on the third anniversary of the effective date and by no more than one half of one per cent on the day immediately before the fourth anniversary of the effective date, but may not otherwise be increased before the fourth anniversary of the effective date.

(2) Subject to Sections 15 to 17, the maximum amount within a compensation range, if any, applicable to a person immediately before the effective date, and any steps within the compensation range, may be increased by a public sector employer by no more than one per cent on the second anniversary of the effective date and may be further increased by no more than one and one-half per cent on the third anniversary of the effective date and by no more than one half of one per cent on the day immediately

before the fourth anniversary of the effective date, but may not otherwise be increased before the fourth anniversary of the effective date.

Non-application of 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.

Permissible increases in compensation

16 (1) Where a compensation rate falls within a compensation range applicable to a person's position or office, the compensation rate for the person may be increased within that compensation range in recognition of the person's

(a) length of time in employment or in office;

(b) meritorious or satisfactory work performance;

(c) completion of a specified work experience; or

(d) successful completion of a program or course of professional or technical education,

if the increase is authorized under the compensation plan as it existed immediately before the effective date.

(2) Where the compensation rate applicable to a person falls below the minimum wage, the compensation rate is increased to match the minimum wage.

(3) Nothing in Sections 13 and 14 prevents an increase in compensation rates or compensation ranges in excess of that permitted by this Act if the increase occurs as a result of the bona fide promotion of a person to a different or more responsible position.

Application of cost savings to compensation

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.

Arbitration awards

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.

Effect of non-compliant compensation plan

19 A compensation plan is of no force or effect to the extent that it provides for an increase in a compensation rate or compensation range that contravenes Section 13 or 14.

SERVICE AWARDS AND ACCRUED SICK-LEAVE PAYMENTS

Calculation of service award

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.

(2) Subsection (1) does not apply to a service award to which a person is entitled under the Public Service Award Regulations made under the *Provincial Court Act*.

Calculation of certain sick-leave payments

21 When calculating the amount of any 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 any enactment, collective agreement, arbitral or other award or decision, agreement or arrangement of any kind, to which a person is entitled under the 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 and sick leave accrued by, the person immediately before April 1, 2015.

Eligibility for service award and certain sick leave payments

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.

(2) Subsection (1) does not apply to a person who is entitled to receive a service award under the Public Service Award Regulations made under the Provincial Court Act.

Non-application of ss. 20 and 21

23 Sections 20 and 21 do not apply to the calculation of a service award, or of a payment in respect of a person'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 any enactment, collective agreement, arbitral or other award or decision, agreement or arrangement of any kind, to which a person prescribed by the regulations is entitled.

30. ***Public Services Sustainability General Regulations, NS Reg 128/2017, (Public Services Sustainability (2015) Act),***

Citation

1 These regulations may be cited as the *Public Services Sustainability General Regulations*.

Definitions

2 In these regulations,

"Act" means the *Public Services Sustainability (2015) Act*;

"CUPE" means the Canadian Union of Public Employees;

"Eastern Mainland Housing Authority" means the body corporate constituted as a housing authority by the Governor in Council by Order in Council 97-183 dated March 11, 1997, under Section 24 of the *Housing Act*;

"NSGEU" means the Nova Scotia Government Employees Union;

"NSNU" means the Nova Scotia Nurses' Union;

"NSTU" means the Nova Scotia Teachers' Union;

"NSUPE" means the Nova Scotia Union of Public & Private Employees;

"PSAC" means the Public Service Alliance of Canada;

"SEIU" means the Service Employees International Union;

"USW" means the United Steelworkers.

Persons who are not public-sector employees

3 For the purposes of the definition of "public sector employee" in clause 3(n) of the Act, all of the following persons are prescribed as not being public-sector employees:

(a) a person who is employed by any of the following employers, or their successors, and is subject to a collective agreement between that employer and the specified bargaining agent, or its successor:

Employer	**Bargaining Agent**
Canadian Mental Health Association, Kings County Branch	NSGEU, Local 49
Adsum Association for Women & Children	CUPE, Local 4291
Veith House	NSGEU, Local 67
Community Inclusion Society	NSGEU, Local 51

Her Majesty the Queen in Right of the Province of Nova Scotia, represented by the Public Service Commission	Nova Scotia Crown Attorneys' Association
Celtic Community Homes Association	NSGEU, Local 54
Eastern Mainland Housing Authority	USW, Local 3172-09
DASC–Dartmouth Adult Service Centre Association, carrying on business as DASC Industries	PSAC, Local 80023
Chrysalis House Association	PSAC, Local 80024
Louisdale Community Homes Association	NSGEU, Local 105
Hub Residential Services Society	NSGEU, Local 110
King's Meadow Residence Society	NSGEU, Local 52
Gateway Homes Incorporated	NSGEU, Local 58
Hillside Pines Home for Special Care Society	Nova Scotia Nurses' Union, Hillside Pines Home for Special Care Local
Her Majesty the Queen in Right of the Province of Nova Scotia, represented by the Public Service Commission	NSGEU, Local 0001 NSGEU, Local 0002 NSGEU, Local 0003 NSGEU, Local 0004 NSGEU, Local 0005 NSGEU, Local 0006 NSGEU, Local 0007 NSGEU, Local 0008 NSGEU, Local 0014 NSGEU, Local 0016 NSGEU, Local 0017 NSGEU, Local 0480
Tourism Nova Scotia	NSGEU, Local 98
Tibbetts Home for Special Care (Wilmot)	United Brotherhood of Carpenters and Joiners of America, Local 2004

Nova Scotia Community College	NSGEU, Local 267
Tri-County Regional Centre for Education	NSGEU, Local 74
Annapolis Valley Regional Centre for Education	NSGEU, Local 73
South Shore Regional Centre for Education	NSGEU, Local 70
Halifax Regional Centre for Education	NSGEU, Local 53
Halifax Regional Centre for Education	CUPE, Local 5047
Workers' Compensation Board of Nova Scotia	NSGEU, Local 55
Her Majesty the Queen in Right of the Province of Nova Scotia, represented by the Department of Transportation and Infrastructure Renewal	CUPE, Local 1867
Breton Ability Centre	NSNU, Breton Ability Centre Local
Kings Regional Rehabilitation Centre	NSNU, Kings Regional Rehabilitation Centre Local
Quest - A Society for Adult Support and Rehabilitation	NSNU, Quest - A Society for Adult Support and Rehabilitation Local
Conway Workshop Association	NSUPE, Local 16
Homes for Independent Living, Nova Scotia	NSUPE, Local 15
Halifax Transition House Association (Bryony House)	PSAC, Local 80022 (Bryony House)
Atlantic Provinces Special Education Authority (APSEA)	NSTU, APSEA Local
Chignecto-Central Regional Centre for Education	CUPE, Local 3890

Chignecto-Central Regional Centre for Education	NSGEU, Local 71
Nova Scotia Community College	Nova Scotia Community College Academic Union, Community College Local (Faculty)
Nova Scotia Community College	Nova Scotia Community College Academic Union, Community College Local (Professional Support)
North End Community Health Association	NSGEU, Local 102
Alderwood Rest Home	NSNU, Alderwood Rest Home Local
Annapolis Royal Nursing Home	NSNU, Annapolis Royal Nursing Home Local
Shannex Clinical Services Limited (Arborstone), Halifax	NSNU, Shannex Clinical Services Limited, Arborstone (Halifax) Local
Bay Side Home Corporation, also referred to as "Bayside Home Corporation"	NSNU, Bay Side Home Local, also referred to as "Bayside Home Local"
Shannex Clinical Services Limited (Bissett Court), Cole Harbour	NSNU, Shannex Clinical Services Limited, Bissett Court (Cole Harbour) Local
Shannex Clinical Services Limited (Blomidon Court), Greenwich	NSNU, Shannex Clinical Services Limited, Blomidon Court (Greenwich) Local
Shannex Clinical Services Limited (Cedarstone), Truro	NSNU, Shannex Clinical Services Limited, Cedarstone (Truro) Local
Shannex Clinical Services Limited (Celtic Court), Sydney	NSNU, Shannex Clinical Services Limited, Celtic Court (Sydney) Local

Centennial Villa, Amherst	NSNU, Centennial Villa (Amherst) Local
Shannex Clinical Services Limited (Debert Court), Debert	NSNU, Shannex Clinical Services Limited, Debert Court (Debert) Local
Hants County Residence for Senior Citizens, operating as Dykeland Lodge	NSNU, Hants County Residence for Senior Citizens, Dykeland Lodge Local
Shannex Clinical Services Limited (Elk Court), Brookfield	NSNU, Shannex Clinical Services Limited, Elk Court (Brookfield) Local
Foyer Pere Fiset	NSNU, Foyer Pere Fiset Local
Gables Lodge, Amherst	NSNU, Gables Lodge (Amherst) Local
Glen Haven Manor Corporation, New Glasgow	NSNU, Glen Haven Manor Corporation (New Glasgow) Local
Shannex Clinical Services Limited (Harbourstone), Sydney	NSNU, Shannex Clinical Services Limited, Harbourstone (Sydney) Local
Heart of the Valley LTCC, Middleton	NSNU, Heart of the Valley LTCC (Middleton) Local
High-Crest Home for Special Care, Springhill	NSNU, High-Crest Home for Special Care (Springhill) Local
Highland Manor Nursing Home for Special Care	NSNU, Highland Manor Nursing Home for Special Care Local
Inverary Manor, Inverness	NSNU, Inverary Manor (Inverness) Local

MacLeod Group Health Services Limited operating as Ivey's Terrace Nursing Home, Trenton	NSNU, Ivey's Terrace Nursing Home (Trenton) Local
Ivy Meadows Continuing Care Centre	NSNU, Ivy Meadows Continuing Care Centre Local
Maple Hill Manor	NSNU, Maple Hill Manor Local
Shannex Clinical Services Limited (Maplestone), Halifax	NSNU, Shannex Clinical Services Limited, Maplestone (Halifax) Local
The Maritime Odd Fellows Home	NSNU, The Maritime Odd Fellows Home Local
Melville Gardens, Halifax	NSNU, Melville Gardens (Halifax) Local
Melville Lodge, Halifax	NSNU, Melville Lodge (Halifax) Local
Milford Haven Corporation	NSNU, Milford Haven Corporation Local
Miners Memorial Manor, Sydney Mines	NSNU, Miners Memorial Manor (Sydney Mines) Local
Mountain Lea Lodge	NSNU, Mountain Lea Lodge Local
Musquodoboit Valley Home for Special Care Association (Braeside)	NSNU, Musquodoboit Valley Home for Special Care Association (Braeside) Local
North Queen's Nursing Home	NSNU, North Queen's Nursing Home Local
Northside Community Guest Home	NSNU, Northside Community Guest Home Local
Shannex Clinical Services Limited (Northumberland Hall), Amherst	NSNU, Shannex Clinical Services Limited,

	Northumberland Hall (Amherst) Local
Northwoodcare Halifax Incorporated	NSNU, Northwoodcare Halifax Incorporated Local
Northwoodcare Bedford Incorporated	NSNU, Northwoodcare Bedford Incorporated Local
The Dartmouth Senior Care Society, Operators of Oakwood Terrace	NSNU, The Dartmouth Senior Care Society, Oakwood Terrace Local
Ocean View Continuing Care Centre	NSNU, Ocean View Continuing Care Centre, Local
Shannex Clinical Services Limited (Orchard Court), Kentville	NSNU, Shannex Clinical Services Limited, Orchard Court (Kentville) Local
Shannex Clinical Services Limited (Glasgow Court), Dartmouth	NSNU, Shannex Clinical Services Limited, Glasgow Court (Dartmouth) Local
Shannex Clinical Services Limited (Parkstone), Halifax	NSNU, Shannex Clinical Services Limited, Parkstone (Halifax) Local
MacLeod Group Health Services Limited operating as Port Hawkesbury Nursing Home Inc.	NSNU, MacLeod Group Health Services Limited, Port Hawkesbury Nursing Home Inc. Local
Queens Home for Special Care Society (Queens Manor)	NSNU, Queens Home for Special Care Society, Queens Manor Local
The MacGillivray Guest Home Owned and Operated by Ronald C. MacGillivray Guest Home Society	NSNU, Ronald C. McGillivray Guest Home Society (the MacGillivray Guest Home) Local
Richmond Housing Corporation operating as Richmond Villa Nursing Home	NSNU, Richmond Housing Corporation, Richmond Villa Nursing Home Local

R.K. MacDonald Nursing Home Corporation	NSNU, R.K. MacDonald Nursing Home Corporation Local
Shannex Clinical Services Limited (Ryan Hall), Bridgewater	NSNU, Shannex Clinical Services Limited, Ryan Hall (Bridgewater) Local
Sagewood Continuing Care Community	NSNU, Sagewood Continuing Care Community Local
Saint Vincent's Nursing Home	NSNU, Saint Vincent's Nursing Home Local
Seaview Manor Corporation	NSNU, Seaview Manor Corporation Local
MacLeod Group Health Services Limited operating as Shiretown Nursing Home, Pictou	NSNU, MacLeod Group Health Services Limited, Shiretown Nursing Home (Pictou) Local
Shoreham Village Senior Citizens Association	NSNU, Shoreham Village Senior Citizens Association Local
St. Anne Community and Nursing Care Centre	NSNU, St. Anne Community and Nursing Care Centre Local
Surf Lodge Community Continuing Care Centre	NSNU, Surf Lodge Community Continuing Care Centre Local
Admiral LTCC	NSNU, Admiral LTCC Local
The Twin Oaks Senior Citizens Association, The Birches	NSNU, the Twin Oaks Senior Citizens Association, The Birches Local
The Cove Guest Home, Sydney	NSNU, The Cove (Sydney) Local
Mira Nursing Home, Truro	NSNU, Mira Nursing Home (Truro) Local

The Digby Town and Municipal Housing Corporation (Tideview Terrace)	NSNU, the Digby Town and Municipal Housing Corporation, Tideview Terrace Local
Riverton Guest Home Corporation (Valley View Villa)	NSNU, Riverton Guest Home Corporation, Valley View Villa Local
Victoria Haven Nursing Home	NSNU, Victoria Haven Nursing Home Local
Villa Saint-Joseph-Du-Lac	NSNU, Villa Saint-Joseph-Du-Lac Local
Shannex Clinical Services Limited (Vimy Court), Bible Hill	NSNU, Shannex Clinical Services Limited, Vimy Court (Bible Hill) Local
Whitehills LTCC, Halifax	NSNU, Whitehills LTCC (Halifax) Local
Windsor Elms Village for Continuing Care Society	NSNU, Windsor Elms Village for Continuing Care Society Local
Wolfville Nursing Homes Limited, Wolfville	NSNU, Wolfville Nursing Homes Limited (Wolfville) Local
Nova Scotia Health Authority	Nova Scotia Council of Healthcare Unions
Izaak Walton Killam Health Centre	Nova Scotia Council of Healthcare Unions
Nova Scotia Health Authority	Nova Scotia Council of Health Administrative Professional Unions
Izaak Walton Killam Health Centre	Nova Scotia Council of Health Administrative Professional Unions
Nova Scotia Health Authority	Nova Scotia Council of Nursing Unions

Izaak Walton Killam Health Centre	Nova Scotia Council of Nursing Unions
Nova Scotia Health Authority	Nova Scotia Council of Health Support Unions
Izaak Walton Killam Health Centre	Nova Scotia Council of Health Support Unions
Melville Gardens	SEIU Local 2
Nova Scotia Business Incorporated	NSGEU, Local 44
Yarmouth Association for Community Residential Options	NSGEU, Local 59 A and B
Admiral Long Term Care Centre Limited	CUPE, Local 1259
Centennial Villa	CUPE, Local 3215
East Cumberland Lodge	CUPE, Local 2391
The Inverness County Municipal Housing Corporation, proprietors of Foyer Pere Fiset	CUPE, Local 2031
Gables Lodge	CUPE, Local 3215
Lunenburg Home for Special Care Corporation, operating as Harbour View Haven	CUPE, Local 4919
The Inverness County Municipal Housing Corporation, proprietors of Inverary Manor	CUPE, Local 1485
MacLeod Group Health Services Limited, operating as Ivey's Terrace Nursing Home	CUPE, Local 2503
Ivy Meadows Continuing Care Community	CUPE, Local 3618
Magnolia Continuing Care Ltd.	CUPE, Local 5165
Maple Hill Manor	CUPE, Local 2765

Melville Lodge	CUPE, Local 3840
North Queen's Nursing Home, Incorp.	CUPE, Local 2997
The Dartmouth Senior Care Society, operators of Oakwood Terrace	CUPE, Local 2774
Ocean View Continuing Care Centre	CUPE, Local 1245
Port Hawkesbury Nursing Home	CUPE, Local 3630
Queens Home for Special Care Society, operating as Queens Manor	CUPE, Local 2648
Ronald C. MacGillivray Guest Home	CUPE, Local 1562
Richmond Housing Corporation (Richmond Villa)	CUPE, Local 1782
Roseway Manor Incorporated	CUPE, Local 3099
Saint Vincent's Nursing Home	CUPE, Local 1082
Seaview Manor Corporation	CUPE, Local 2094
MacLeod Group Health Services Limited, operating as Shiretown Nursing Home	CUPE, Local 2503
St. Anne Community and Nursing Care Centre Society	CUPE, Local 5032
MacLeod Group Health Services Limited, operating as Surf Lodge Community Continuing Care Centre	CUPE, Local 3257
The Meadows Home for Special Care	CUPE, Local 5248
Whitehills Long Term Care Centre Limited	CUPE, Local 1259
Nova Scotia Hearing and Speech Centres	NSGEU, Local 20
Victorian Order of Nurses for Canada, Nova Scotia Branch	NSNU, Victorian Order of Nurses for Canada, Nova Scotia Branch

Annapolis Royal Nursing Home	SEIU, Local 2
Hants County Residence for Senior Citizens, operating as Dykeland Lodge	SEIU, Local 2
Digby Town and Municipal Housing Corporation (Tideview Terrace)	SEIU, Local 2
Villa Acadienne Home for Special Care	SEIU, Local 2
Windsor Elms Village	SEIU, Local 2
Shannex Health Care Management Limited, with respect to Cedarstone Enhanced Care	Unifor, Local 4619
Northwoodcare Incorporated	Unifor, Local 4606 (Nursing, Client Care and Support Services)
Northwoodcare Halifax Incorporated	Unifor, Local 4606 (Staffing Officers)
Shannex Health Care, with respect to Parkstone Enhanced Care	Unifor, Local 4606
Shannex RLC Limited, carrying on business at Mary's Court	Unifor, Local 2017
Annapolis County Municipal Housing Corporation Adult Residential Centre and Supervised Apartments	SEIU, Local 2
Cape Breton Community Housing Association	Unifor, Local 4624
Cape Breton Residential Society	International Union of Operating Engineers, Local 721 and 721B
Colchester Residential Services Society	NSGEU, Local 64
Highland Visions Society	Unifor, Local 4603

Annapolis Valley Regional Centre for Education	CUPE, Local 3876
le Conseil scolaire acadien provincial	NSGEU, Local 72
Tri-County Regional Centre for Education	SEIU, Local 2
South Shore Regional Centre for Education	CUPE, Local 4682

(b) a teacher;

(c) a person who is otherwise included in the definition of "public-sector employee" by any of subclauses 3(n)(i) to (viii) of the Act, but who is not represented by a bargaining agent.

31. *Finance Act*, 2021, c. 6, ss. 5, 7, 8

Responsible fiscal management

5 (1) The Province shall pursue its policy objectives in accordance with the principles of responsible fiscal management.

(2) The principles of responsible fiscal management include

(a) achieving and maintaining Provincial net debt at prudent levels, taking into consideration its impact on the sustainability of government programs and services for future years;

(b) managing prudently the fiscal and financial risks facing the Province;

(c) managing the financial investment portfolios of the Province in a sound and efficient manner;

(d) pursuing policies that are consistent with achieving a reasonable degree of predictability about the level and stability of tax rates, programs and services for future years; and

(e) maintaining a fiscal decision-making system that is rational, fair, efficient, credible, transparent and accountable.

…

Minister responsible for Act

7 (1) The Minister is responsible for the management and administration of this Act.

(2) The Minister may issue directives as the Minister considers necessary with respect to the authority given to the Minister by this Act.

Minister may delegate

8 (1) The Minister may, in writing, in a general or particular case, delegate to any employee of the Department any duty, act or function that the Minister is required or permitted to do pursuant to Section 19, 36, 37, 38, 45 or 49 or by order of the Governor in Council.

(2) An act or thing done or document or instrument executed or signed pursuant to an authorization given pursuant to this Section has the same effect as if the act or thing were done or the document or instrument were executed or signed by the Minister.