Manitoba Federation of Labour et al v. The Government of Manitoba, 2020 MBQB 92 (CanLII)

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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

) Counsel:
)

MANITOBA FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE PARTNERSHIP TO DEFEND PUBLIC SERVICES), THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION, THE MANITOBA NURSES' UNION, THE MANITOBA TEACHERS' SOCIETY, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 2034, 2085 AND 435, MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS, UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 832, UNIVERSITY OF MANITOBA FACULTY ASSOCIATION, CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, ASSOCIATION OF EMPLOYEES SUPPORTING EDUCATION SERVICES, GENERAL TEAMSTERS LOCAL UNION 979, OPERATING ENGINEERS OF MANITOBA LOCAL 987, THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, UNIFOR, LEGAL AID LAWYERS ASSOCIATION, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS	<u>For the Plaintiffs</u>: Garth Smorang, Q.C. Shannon Carson Joel Deeley Kristen Worbanski

7975, 7106, 9074, and 8223, WINNIPEG ASSOCIATION OF PUBLIC SERVICE OFFICERS IFPTE LOCAL 162, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL UNION 254, BRANDON UNIVERSITY FACULTY ASSOCIATION, THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 63, THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION NO. 1515, PHYSICIAN AND CLINICAL ASSISTANTS OF MANITOBA INC., and UNIVERSITY OF WINNIPEG FACULTY ASSOCIATION, Plaintiffs, -and- THE GOVERNMENT OF MANITOBA, Defendant.	)	<u>For the Defendant:</u> Heather Leonoff, Q.C. Michael Conner Michael Bodner Alan Ladyka JUDGMENT DELIVERED: **JUNE 11, 2020**

MCKELVEY J.

INTRODUCTION

[1] This case involves the question of whether ***The Public Services Sustainability Act***, S.M. 2017 c. 24 (“***PSSA***”) violates the Plaintiffs’ right to freedom of association under s. 2(d) of the ***Canadian Charter of Rights and Freedoms*** (the “***Charter***”), and, if so, whether such an infringement can be justified pursuant s. 1. The action has been brought on behalf of the Manitoba Federation of Labour (“MFL”) and 28 plaintiff unions. Sixteen of the 28 unions are affiliated with the MFL. There are approximately 111,651 public service employees impacted by the ***PSSA*** (19.4 per cent of the Manitoba workforce) and 334 collective agreements.

[2] The evidence presented in this case constituted *viva voce* trial evidence, affidavit evidence, expert evidence, a 114 page Statement of Agreed Facts (Exhibit 1), 16 binders of agreed documents, along with other exhibits and written submissions (Plaintiffs - 421 pages; Defendant - 79 pages).

[3] The Plaintiffs (or “unions”) seek the following relief:

> (c) a declaration that the Defendant violated s. 2(d) and s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11 (“the *Charter*”) respecting the rights of employees represented by UMFA, and that the violation cannot be justified under s. 1 of the *Charter*;
>
> (d) a declaration that the Defendant violated the s. 2(d) and s. 7 *Charter* rights of the employees represented by the Plaintiff Unions by failing to give them an opportunity to engage in a timely, good faith process of collective bargaining with their respective employers prior to enacting the PSSA, and that the violation cannot be justified under s. 1 of the *Charter;*
>
> (e) in the alternative to paragraph (d), if a process of meaningful consultation between the Plaintiff Unions and the Defendant about the PSSA is a constitutionally adequate substitute for the process of timely, good faith collective bargaining between the Plaintiff Unions and their respective employers in the circumstances of this claim, which is denied, then:
>
> > a. a declaration that the Defendant violated the s. 2(d) and s. 7 *Charter* rights of employees represented by the Plaintiff Unions who participated in the Fiscal Working Group (as herein defined), by failing to engage in a good faith process of negotiation and meaningful consultation process prior to enacting the PSSA, and that the violation cannot be justified under s. 1 of the *Charter*; and
> >
> > b. a declaration that the Defendant violated s. 2(d) and s. 7 *Charter* rights of employees represented by the Plaintiff Unions who did not participate in the Fiscal Working Group, by failing to engage in any process of good faith negotiation and meaningful consultation prior to enacting the PSSA, and that the violation cannot be justified under s. 1 of the *Charter*;
>
> (f) a declaration that sections 9 – 15 of the PSSA violate the rights and freedoms guaranteed by s. 2(d) and s. 7 of the *Charter*, cannot be justified under s. 1 of the *Charter*, and are invalid and of no force and effect;
>
> ...
>
> (i) an order that any term or condition of the PSSA declared invalid does not bind any of the Plaintiff Unions, their members, or their employers;
>
> ...

[emphasis in original]

[4] The trial of this case took place from November 18–December 4, 2019, with final arguments occurring February 18–21, 2020. Accordingly, the evidence and analysis does not consider, contemplate or discuss the many ramifications of the coronavirus (COVID-19), which was declared a pandemic by the World Health Organization on March 11, 2020.

ISSUES

[5] The issues to be determined in this case are:

1. Does this court have jurisdiction to rule on the constitutionality of the ***PSSA***, as it is unproclaimed legislation without legal effect?
2. If it does, did the Government violate s. 2(d) of the ***Charter*** with respect to the rights of the public sector employees and the collective bargaining process?
3. If such a violation occurred, was it justified pursuant to s. 1 of the ***Charter***?
4. Was Government required to afford the unions an opportunity to engage in bargaining prior to enacting the ***PSSA***?
5. Was Government required to conduct meaningful pre-legislative consultation with unions with respect to the ***PSSA***?

[6] The Plaintiffs are not pursuing declarations pursuant to s. 7 of the ***Charter*****.**

[7] The Defendant (or "Government") denies any violation of s. 2(d) ***Charter*** rights and all other relief sought, including by virtue of s. 1.

THE LEGISLATION

[8] The ***PSSA*** (or "Bill 28") was introduced during the Second Session of the 41st Manitoba Legislature on March 20, 2017. It was passed on June 1, 2017, and received Royal Assent the following day. Section 31 of the ***PSSA*** stipulates that it will come into force on a day to be fixed by proclamation. The ***PSSA*** has not been proclaimed as of the date of this decision.

[9] The provisions of the ***PSSA*** that will receive the most scrutiny are:

Purposes

1 The purposes of this Act are

(a) to create a framework respecting future increases to compensation for public sector employees and to fees for insured medical and health services that reflects the fiscal situation of the province, is consistent with the principles of responsible fiscal management and protects the sustainability of public services;

(b) to authorize a portion of sustainability savings identified through collective bargaining to fund increases in compensation or other employee benefits; and

(c) to support meaningful collective bargaining within the context of fiscal sustainability.

Right to bargain collectively

3 Subject to the other provisions of this Act, the right to bargain collectively under *The Labour Relations Act* and *The Civil Service Act* is continued.

Right to strike

4 Nothing in this Act affects the right to strike under *The Labour Relations Act*.

Incremental increases

6 Nothing in this Act affects an employee's entitlement to increases as a result of promotion or reclassification or to periodic or performance-based increases within an established pay range in accordance with a collective agreement or terms of employment.

Persons excluded by regulation

7(4) Despite this section, on the recommendation of the Treasury Board, the Lieutenant Governor in Council may, by regulation, designate any person or class of persons as persons to whom this Part does not apply.

EMPLOYEES REPRESENTED BY A BARGAINING AGENT

Sustainability period — represented employees

9(1) For the purposes of sections 10 to 15, **"sustainability period"**, in relation to employees represented by a bargaining agent, means the four-year period that begins or began, as the case may be,

(a) on the expiry of the term of the collective agreement or arbitral decision that governed their rate or rates of pay on March 20, 2017; or

(b) if there was no collective agreement that governed their rates of pay on March 20, 2017, on the day the first collective agreement governing their rates of pay takes effect.

Term of collective agreement

9(2) For the purpose of subsection (1), the term of a collective agreement is the term specified in the collective agreement without regard to any extension under a provision of the kind described in clause 63(2)(a) of *The Labour Relations Act* or by operation of that Act.

No restructuring of rates of pay

11 No collective agreement or arbitral decision may provide for the restructuring of rates of pay during the sustainability period.

Maximum increases in rates of pay

12(1) Subject to subsections (2) and (3), no collective agreement or arbitral decision may provide for an increase in a rate of pay during the applicable sustainability period that is greater than

(a) 0% for the first 12-month period of the sustainability period;

(b) 0% for the 12-month period immediately following the first 12-month period;

(c) 0.75% for the 12-month period immediately following the second 12-month period;

(d) 1.0% for the last 12-month period of the sustainability period.

Shortened sustainability period

12(2) If employees governed by a collective agreement or arbitral decision received no pay increase for a 12-month period that began in 2016, on the recommendation of the Treasury Board, the Lieutenant Governor in Council may by regulation shorten the sustainability period for those employees to three years.

Maximum increases — shortened sustainability period

12(3) The maximum increase in a rate of pay for employees to whom a three-year sustainability period applies under subsection (2) is

(a) 0% for the first 12-month period of the sustainability period;

(b) 0.75% for the 12-month period immediately following the first 12-month period;

(c) 1.0% for the last 12-month period of the sustainability period.

Restrictions on additional remuneration

13 No collective agreement or arbitral decision may provide for an increase to existing additional remuneration — or for any new additional remuneration — for any employees during the applicable sustainability period unless

(a) the resulting increase in the cost of additional remuneration is not greater than the savings achieved by rates of pay less than those permitted by section 12; and

(b) the increase or new additional remuneration is approved by the Treasury Board.

Use of negotiated sustainability savings

14(1) Despite sections 12 and 13, if a collective agreement provides for negotiated sustainability savings during the sustainability period, the Treasury Board may — in its sole discretion — approve the use of a portion of the savings to fund an increase to the compensation payable to employees during the last 24 months of the sustainability period under the collective agreement.

"Negotiated sustainability savings" defined

14(2) For the purpose of subsection (1), **"negotiated sustainability savings"** means an ongoing reduction of expenditures as a result of measures agreed to in a collective agreement that reduce or avoid costs.

Act prevails

15 If a collective agreement or arbitral decision, whether entered into or made before or after the coming into force of this Part, provides for

(a) a restructuring of rates of pay contrary to section 11;

(b) an increase in a rate of pay contrary to section 12; or

(c) an increase in additional remuneration or new additional remuneration contrary to section 13;

the provision of the agreement or arbitral decision is, to the extent of the inconsistency, of no effect and deemed never to have taken effect, and the parties are deemed to have agreed to the maximum increases in compensation permitted by this Part for employees represented by a bargaining agent.

Debt due

28 Every amount paid — including amounts paid before the coming into force of this Act — to any person in excess of the amount that should have been paid as a result of this Act is a debt due to the employer, in the case of an excess rate of pay, or to the government, in any other case.

[10] Bill 29, ***The Health Sector Bargaining Unit Review* Act,** C.C.S.M. c. H29, was introduced and passed on the same dates as Bill 28 and was proclaimed. This legislation has consolidated and restructured the number of health care bargaining units operative in the Province. Its operation is significant in terms of the collective agreements bargained or to be bargained with like entities in the healthcare sector. A desire for uniformity of compensation for similar work functions has been or will be sought.

[11] Bill 9 was introduced for 1st reading during the 2nd session of the 42nd Manitoba Legislature in November 2019, being ***The Public Services Sustainability Amendment Act***. These amendments, if passed, will come into force on the date of Royal Assent.

BACKGROUND OF THE LEGISLATION

[12] The Progressive Conservative Party became the governing party in Manitoba subsequent to an April 19, 2016 election. The Minister of Finance delivered the 2016 Budget on May 31, 2016. At that time, a 1.012 billion dollar deficit was projected, albeit at the close of Public Accounts in September 2016, the actual deficit proved to be 846 million dollars.

[13] The Government, soon after the election, undertook an examination of the feasibility of public sector wage restraint legislation similar in content to a Province of Nova Scotia statute (Tab J, Brief of the Plaintiffs on Relevant Statutes). The Nova Scotia legislation had received Royal Assent on December 18, 2015, but was not proclaimed for a period of one and one-half years. The constitutionality status of that legislation is presently before the Nova Scotia Court of Appeal. On August 9, 2016, an Advisory Note was prepared for Cabinet, which recommended:

> 1. In the short term government should establish a committee/entity through which public sector collective bargaining mandates are set and communicated to sector employers. Alternatively, as a number of current health sector agreements will expire in 2017 and 2018, a public services sustainability model similar to Nova Scotia could be considered.

(Exhibit 3, Tab 4)

[14] On September 16, 2016, Cabinet approved that recommendation and the Public Sector Compensation Committee ("PSCC") was struck. The voting members of the PSCC consisted of six Cabinet ministers, along with non-voting staff, which included Michael Richards ("Richards"), Deputy Secretary to Cabinet and Deputy Minister of Intergovernmental Affairs; Elizabeth Beaupré ("Beaupré"), Assistant Deputy Minister, Health Workforce Secretariat Division; Richard Stevenson ("Stevenson"), Assistant Deputy Minister, Labour Relations Division; and, Gerry Irving ("Irving"), Secretary to the PSCC.

[15] The PSCC first met on September 21, 2016, and undertook discussions related to a public sector contract extension for a minimum of one year. This was to be applied to all outstanding public sector negotiations and was referred to as a "wage pause". The directive provided to employers, who were negotiating collective agreements, was that they were to extend all current agreements for a one year period with a zero per cent compensation increase. Further, Irving was directed to return to PSCC with legislative options for consideration.

[16] The PSCC met a number of times to discuss the public sector wage issue, review the Nova Scotia model, and request and secure a legal opinion on constitutionality. However, it was not until the November 21, 2016 Throne Speech that restraint legislation was publically proposed. The Throne Speech stated that such legislation was to be achieved following consultation and dialogue with labour. The purpose of the legislation was to ensure that public sector costs would not exceed the Government's ability to sustain services.

[17] At the PSCC December 14, 2016 meeting, the members approved in principle a public sector compensation legislative model. The proposed legislation included a four year mandate with zero per cent increases for two years. There was proposed to be modest compensation increases in years three and four, as well as the adoption of negotiated "sustainability savings" in those years to possibly increase employee compensation. The ***PSSA*** was substantially based upon the Nova Scotia model and was crafted primarily by Stevenson and Irving. The legislation was considered and drafted in a very short period of time, as it needed to be introduced in the Legislature by March 20, 2017, in order to ensure timely passage. If that date was not met, an approximate one year delay would transpire. As indicated, the ***PSSA*** was introduced on March 20, 2017, and received Royal Assent on June 2, 2017. Between the time of the Throne Speech and the passage of the ***PSSA***, meetings transpired between the PSCC and union leaders. These areas will be reviewed in the Evidence portion of this decision.

[18] Prior to the ***PSSA***, wage restraint measures were secured through the collective bargaining process as demonstrated in 2010. The Government Employees Master Agreement ("GEMA") for the years 2010–2014 achieved a collectively-bargained outcome where the first two years evidenced zero per cent wage increases. Those increases of zero per cent, zero per cent, 2.75 per cent, and 2.75 per cent were reached after 37 bargaining sessions between the Manitoba Government Employees Union ("MGEU") and Government. Also agreed were

enhancements to certain monetary benefits, as well as layoff protection. The 2010 GEMA was collectively bargained in the shadow of the 2008 global financial crisis.

[19] Other examples of wage restraint legislation utilized in this Province included ***The Public Compensation Sector Management Act,*** S.M. 1991-1992, c. 44 ("***PSCMA***"), which was passed on July 26, 1991. Further, on July 27, 1993, the Government passed ***The Public Sector Reduced Work Week and Compensation Management Act***, S.M. 1993, c. 21 (the "***PSRWWCMA***"). In Stevenson's affidavit sworn February 27, 2018, he stated (at para. 18):

> The *PSSA* is similar in objective to wage restraint legislation passed by the government of the day during the 1990s. *The Public Sector Compensation Management Act*, S.M. 1991-92 c. 44 extended collective agreements for a period of one year and cancelled some arbitration awards. *The Public Sector Reduced Work Week and Compensation Management Act*, S.M. 1993 c. 21 imposed mandatory leave without pay on public sector employees and capped the funding available for payment under *The Health Services Insurance Act*. This *Act* was in effect during 1993 and 1994. Subsequent to this legislation, the government was able to negotiate reduced work provisions with the MGEU and the other unions representing core government employees for the years 1995-1998. Moreover, there were successful negotiations of collective agreements with all the plaintiff unions in the years subsequent to those *Acts* being in effect.

[20] Stevenson acknowledged that those pieces of wage restraint legislation impacted labour relations, but was of the view that positive relationships had continued over the years.

THE EVIDENCE

[21] The Plaintiffs provided a significant body of evidence through trial testimony and by filed affidavits (14 witnesses and 34 affidavits and supplementary affidavits of 25 persons). The Government's position was that the relevant and substantive issue in this case was the constitutionality of the ***PSSA***. Therefore, its evidence was restricted to what it considered to be most pertinent to that issue (five witnesses and four affidavits and supplementary affidavits of two individuals). Four of the witnesses called at trial by the defence testified with respect to whether the ***PSSA*** was justifiable in accordance with s. 1 of the ***Charter***. The Defendant asserted that a substantial portion of the Plaintiffs' evidence was unnecessary in the determination of the constitutionality issue. The Plaintiffs have asserted that it is of significance that no one involved in crafting the ***PSSA,*** nor the decision makers, testified or provided affidavit evidence beyond Stevenson and Beaupré. While the evidence outlined in this section is predominantly that presented by the Plaintiffs, it will not be afforded additional weight simply based on the number of witnesses called or volume of affidavits filed.

[22] The witnesses who testified in this matter or who swore/attested to affidavit evidence were all credible and reasonable individuals. It will be noted, where appropriate, that more weight has been accorded to the testimony of certain persons. This case is not a credibility contest. It is a matter that must be evaluated in the context of the evidence and the application of the relevant legal principles.

UNIONS

MFL

[23] MFL President, Kevin Rebeck ("Rebeck"), provided an affidavit (October 16, 2017) and trial testimony. He was involved in a "consultation" process on behalf of the unions that was undertaken with Government as regards a balanced budget and wage restraint legislation. While public sector costs had been identified as a concern in the Throne Speech, Rebeck testified that no prior indication had been afforded to labour that legislation was to be adopted, albeit media reports had referenced a "pause" in public sector wages. He was a member and spokesperson for the labour representatives on the Fiscal Working Group ("FWG") that was struck to consult on wage restraint issues. That group represented five to six union leaders and Government representatives, including Stevenson and Irving.

[24] The first meeting of the FWG transpired on January 5, 2017, with the Finance Minister in attendance. He identified legislation as a possible solution to what Government was referring to as dire financial circumstances in the Province. It was his expectation that consultation with labour would transpire with legislation being one option. All options were said to be on the table and Government was prepared to adopt a "blank slate" approach with respect to legislative content. Stevenson also outlined what transpired at this meeting, including the fact that the Minister was open to suggestions for legislative content through consultation. He also submitted that the Province's fiscal challenges had been outlined, which included the need to replace the emergency communications network (FleetNet) (affidavits February 27, 2018 and April 10, 2019). A presentation with respect to provincial finances was provided. On the same day, an Advisory Note had been prepared by Stevenson and Irving for Richards, which indicated that the four year legislated compensation mandate should be zero per cent, zero per cent, 0.75 per cent, and one per cent. Further, an outline as to what groups should be included or excluded from the scope of the legislation was provided.

[25] The concept of restraint legislation was stipulated by the Finance Minister to be a "tool" available; however, all options were said to be open in achieving the goal of reducing the provincial deficit and returning to a balanced budget scenario. The FWG met on four occasions before the ***PSSA*** was introduced in the Legislature. As indicated, the Minister had pronounced that a "blank slate" existed with any and all legislative options on the table. The Government was said to be looking to the MFL and other unions for advice on how to the balance the Manitoba budget over an eight year period. During this timeframe, Rebeck and the union groups were never told that legislation was actually being drafted. While Rebeck was aware that legislation was possible, it was thought that the unions could work with Government towards a balanced budget scenario through the collective bargaining process.

[26] On January 10, 2017, Rebeck requested clarification from Irving with respect to media reports that draft legislation was being prepared. His correspondence, in part, stated:

> ... I would like to request clarification on the status of any government legislation related to collective bargaining and/or constraining public sector wages or growth in wages. At Thursday's meeting, Minister Cameron Friesen advised us that while the government was committed to introducing legislation this spring (as per last fall's Throne Speech commitment), no legislative drafting had yet begun, and the government was approaching us with a "blank slate" in regards to legislative content.
>
> However, according to media reports from later in the day, Minister Friesen subsequently stated that draft legislation was already prepared or was being prepared and would be shared with MFL shortly. Needless to say, we believe that a fulsome discussion of fiscal options is in order prior to settling on a single legislative course of action.
>
> If there is draft legislation already prepared outlining the government's preferred option, we would be eager to review it as soon as possible – and early in the process, in order that we may provide thoughtful and constructive input.

[27] Rebeck also articulated a number of other questions for Irving's consideration. Irving's answers were received January 16, 2017 (Binder B, Tabs 26 and 27), and indicated that Government was continuing to evaluate options with a focus on ensuring that MFL's and the other unions' submissions would be entertained. A series of correspondence was exchanged between Rebeck and Irving, which ultimately led to a stalemate as Rebeck, as MFL's representative, was of the view that legislation was premature without consideration of other options. Indeed, Rebeck and other union representatives were unaware that draft legislation had been in existence as of December 5, 2016.

[28] The MFL and other unions had prepared a presentation to address Manitoba's fiscal imbalance, which was put forth at the FWG meeting on February 10, 2013. "Addressing

Manitoba's Fiscal Imbalance" was considered by union representatives as being responsive to the PSCC's/Government's indication that all options would be evaluated towards the ultimate achievement of a balanced budget. The commitment within that presentation included a return to balance over an eight year period. The three union issues identified were: that the unions did not want existing contracts reopened; some accommodation should be available to increase compensation if savings could be realized through negotiations; and, the unions saw no need for legislation and wanted to collectively bargain. These alternatives were ultimately rejected. Rebeck testified that it was his understanding that consultation and dialogue would transpire and information would be provided. Such a process could eliminate the need for legislation as the only option. The options contained in the unions' presentation were never responded to, albeit a measure of analysis from the Department of Finance was undertaken (under 24 hours), but never reviewed with Cabinet.

[29] Rebeck made several requests for a response to the merits of the unions' presentation. He indicated that an explanation was never provided as to why legislative intervention was the only option or necessary. He testified that collective bargaining had been regularly utilized in the past - even during periods of fiscal restraint. Such difficult fiscal periods had reflected a collaboration towards a fiscal goal by both the MFL/unions and Government. In this case, Rebeck said that the unions had not been provided with any specific Government financial goals. The non-disclosure made it difficult to develop and propose solutions. The request by unions for consultation on components of the legislation, absent information as to its contents, resulted in an inability to provide meaningful dialogue and feedback. Many of the questions asked and information requested by the unions were never responded to in order to facilitate discussion. Rebeck testified that no meaningful consultation with respect to Bill 28 was ever undertaken by the PSCC/Government with the unions.

[30] At the FWG February 10, 2017 meeting, Sandi Mowat ("Mowat"), President of the Manitoba Nurses Union ("MNU"), provided information about overtime savings that could be achieved. A more formal presentation on the subject took place at the February 24, 2017 FWG meeting and was described by Irving as "amazing". However, this proposal was never pursued by Government.

[31] The final ***PSSA*** draft was completed by March 13, 2017, providing for zero per cent wage increases for the first and second years of the sustainability period, while years three and four illustrated increases of 0.75 per cent and 1.0 per cent. These numbers had been reviewed at the March 8, 2017 PSCC meeting where the final draft of the ***PSSA*** was considered. Included in the proposal before PSCC was the statement: "The surest means of establishing certainty in relation to increases in compensation and the public sector is to set out expectations in legislation" (Exhibit 3, Tab 33, p. 8). The draft Bill was reviewed and approved by Cabinet on March 15, 2017. It was introduced in the Legislature five days later.

[32] The final meeting of the FWG occurred on March 9, 2017. Again, the unions had questions and requested information. Irving responded that the answers would be forthcoming during the Provincial Budget on April 11, 2017. Many questions remained and were asked by Rebeck on behalf of organized labour in correspondence dated April 19, 2017, which, again, went without response. No further meetings of the FWG occurred.

[33] Rebeck testified that the legislation constituted a substantial interference with MFL's ability to represent its membership. Any wages/benefits discussions were removed by virtue of the ***PSSA*** without meaningful consultations. As indicated, many requests were made for information, without the information being supplied. What transpired was said to have constituted irreparable harm and created a loss of faith within the union membership. Public sector wages were arbitrarily determined and imposed and were not the subject of negotiations. As previously indicated, collective bargaining had been utilized by the Government in previous periods of fiscal restraint which included negotiated wage freezes (2010 and 2011).

[34] The Government recognized, as Stevenson indicated in his affidavit evidence, that the ***PSSA*** could result in inequity between various bargaining groups who performed similar

functions. There was no intention to impose sustainability savings more than once on any one group. The Government directed that any inequities between bargaining units would be identified, resolved, and/or mitigated. The ***PSSA*** was said by Stevenson to be similar in objectives to the 1990's legislation, which had also invoked a wage freeze. He indicated that there existed an ability to collectively bargain successfully after that time, demonstrating that the Government/public sector relationship had not been damaged.

[35] Stevenson outlined that some of the inequities have been resolved since 2017, as well as the correction of inconsistencies between the ***PSSA*** and changes in the minimum wage. The Government had concluded that minimum wage law requirements governed if wage increases resulted.

The University of Manitoba Faculty Association ("UMFA")

[36] Greg Flemming, President of UMFA, affirmed two affidavits - September 29, 2017, and February 15, 2018 - with respect to negotiations between UMFA and the University of Manitoba ("UM"). Further, Mark Hudson ("Hudson"), the President of UMFA from 2015–2017, testified in these proceedings. At the time, approximately one-half of UM's funding was provided by the Province. There were approximately 1,200 employees in the UMFA bargaining unit. Greg Juliano was the chief negotiator for UM, while Hudson occupied the same position for UMFA during the 2016 bargaining session.

[37] On September 13, 2016, UM presented a wage proposal after 20 bargaining sessions comprised of a 7.0 per cent wage increase over a four year period – 1.0 per cent/2.0 per cent/2.0 per cent/2.0 per cent. The general wage increase, plus market adjustments, would have resulted in the average salary of UMFA members being increased by 17.5 per cent over four years. At the time, UM's salaries were at the bottom of larger university salary ranges, according to a Canadian research group study. This rating created concerns within UM as regards recruitment and retention and constituted a significant priority. Further, UM President, Dr. David Barnard, had stated during this period that the university was in a healthy financial position. A number of negotiation meetings took place subsequent to the wage proposal.

[38] Government became aware of UM's wage proposal. This resulted in Stevenson advising Juliano on September 30, 2016, that public sector wage controls were likely. On October 5, 2016, PSCC was provided with an update regarding the negotiations which resulted in a meeting the following day amongst Juliano, Stevenson and Irving. At that meeting, Irving advised Juliano that a Government mandate was to be imposed requiring a one-year wage pause. Juliano was instructed to return to the bargaining table with a message to UMFA that the previous wage offer was withdrawn. Further, he was not to mention Government's involvement. On October 24, 2016, Juliano wrote to Irving as follows:

> ... the University fully appreciates the difficult financial situation that the new government finds itself in, and the desire to avoid precedence in settlements which could drive up overall public sector labour costs. However, given that our negotiations with our faculty union have progressed so far, complying with the government's wishes would mean moving backwards from previous offers, and expose the University to a claim of "bad faith bargaining", while severely damaging our relationship with faculty members and our six unions. The University feels that it cannot commit to doing something illegal, which would have serious consequences for our community, unless we have a credible defence and explanation. Therefore, if the government wants the University to bring our faculty bargaining process in line with its new mandate, we are going to need a strong statement from government that this is a directive. We believe the following points would be important to communicate:
>
> - The Government of Manitoba is instructing the University of Manitoba and all public sector organizations with contract negotiations ongoing or upcoming to implement a minimum one-year wage pause; meaning a 0% general increase in the first year of a new agreement.

- In some cases, Government will permit a multi-year contract, where compensation subsequent to the pause is more modest than has been the case during the past few years (under the 2% increases that have been common), and there is a demonstrated plan which can realize actual savings sufficient to fund the increase.

(Binder 5, Tab 20)

[39] Juliano's communication was met with a response from Irving that any future compensation adjustments, beyond the pause year, would require a submission to and approval of PSCC. Further, Irving advised the following day that the wage pause would not constitute bad faith bargaining. There were other meetings held involving PSCC/UM members, as well as communications from Dr. Barnard who requested a reconsideration of the Government's salary pause to facilitate the continuance of good faith bargaining (Binder 5, Tab 24). Dr. Barnard stressed that the new mandate would lead to a divisive state, and would have a devastating impact on the university community. These requests for a reconsideration received no response.

[40] Hudson testified that negotiations with UM had been positively progressing with the parties coming closer to an agreement. UMFA was of the view that there would be contract resolution prior to strike action. On October 21, 2016, Juliano advised UMFA that he was becoming frustrated because of his dealings with Government, but could not share the details. During the course of mediation scheduled for October 27, 29, and 30, 2016, UMFA was told that UM could only offer a one year deal, at zero per cent, because of a Government directive. UMFA was both shocked and frustrated by what was transpiring. Indeed, the mediator opined that he would not have travelled to Winnipeg if he had been aware that UM was removing all previous wage offers from the bargaining table and promoting the imposition of a one year wage freeze. The mediation continued, albeit on the understanding that UMFA had declared an ongoing right to bring an unfair labour practice application.

[41] On October 28, 2016, a joint communication from Hudson and Dr. Barnard was made to all members of the UM community as follows:

> After one day of productive mediation, the University of Manitoba and the University of Manitoba Faculty Association (UMFA) have agreed to communicate jointly to the University community about a dramatic recent development in our ongoing efforts to negotiate a new collective agreement.
>
> From the University of Manitoba's perspective: Over the past several days, the Province has made clear to the University that it has established fresh mandate parameters that seek cooperation in achieving a compensation "pause" throughout the public sector. Public bodies, including the University of Manitoba, are being asked to extend existing contracts for an additional year at zero per cent in order to stabilize public sector compensation levels.
>
> We find ourselves in the unusual circumstance of having a newly articulated Provincial mandate regarding public sector compensation levels that will have a profound impact on the final compensation levels that we will be able to negotiate, despite having already made what we believe to be a fair and reasonable offer on September 13, 2016.
>
> ...
>
> From the University of Manitoba Faculty Association's perspective: This 11th hour action represents illegitimate government interference in a constitutionally-protected

> process of collective bargaining. Mediation continues, and our focus is to advance our Members' priorities through that process. The UM is an independent body whose Board must have the autonomy to engage in all aspects of negotiation. The Province has unnecessarily endangered a complex negotiation through this misguided interference, and its action has jeopardized the educational goals of every UM student. UMFA is currently exploring legal options, and continues to focus on negotiating a fair deal for its members.

(Binder 5, Tab 27)

[42] Strike action commenced on November 1, 2016, for only the third time in the institution's history. The strike was ultimately concluded on November 20, 2016. The parties reached an agreement on certain non-monetary terms with small gains being realized in areas of workload requirements, metrics and collegial governance. Hudson, as President of UMFA, was the recipient of many concerns and frustrations expressed by the union's membership - both during the strike and thereafter. He testified to the significant anxieties created between the bargaining unit and its membership. Hudson indicated that the membership's trust with its union representatives had been undermined and shaken as their number one priority, being salary, could not be addressed. Further, the relationship with UM had weakened as a result of what had transpired.

[43] UMFA submitted an Unfair Labour Practice complaint with the Manitoba Labour Board ("MLB") (Order No. 1651). The MLB issued a lengthy decision and found that UM had committed an unfair labour practice, which interfered with UMFA's rights and ability to collectively bargain (Binder 5, Tab 41). The MLB was satisfied that UM had failed to disclose relevant information on a timely basis and was not transparent during the bargaining process. The described conduct prevented a full and frank discussion of issues arising out of the non-disclosed materials. UM was ordered to pay a financial penalty – 2.5 million dollars, along with an apology to UMFA and all employees in the bargaining unit.

[44] Flemming became UMFA President in 2017, while Hudson continued as a member of the bargaining unit. The one-year collective agreement that had been concluded to end the strike expired in March 2017. Flemming indicated, in his affidavit, that UM immediately acted as if Bill 28 was governing legislation and set the table for the collective bargaining process. The proposed UM offer mirrored its provisions at zero per cent for 2017; 0.75 per cent for 2018; and, 1.0 per cent for 2019. Any benefit improvements negotiated in 2016 would not be implemented. In essence, all bargaining communications from UM demonstrated that the ***PSSA*** was in full force and effect. The union's position was founded on the premise that the legislation had not been proclaimed and negotiations with monetary considerations could take place. Further, the most important issue identified by the membership was, again, that of salary. UM's salaries continued to be the lowest of the larger universities in the country. UM maintained during negotiations that even if wages were collectively bargained in excess of the ***PSSA***, those amounts would be clawed back under the legislation (s. 28).

[45] A tentative agreement was reached on August 31, 2017, with UMFA, under duress, agreeing with the ***PSSA*** amounts. In August 4, 2017 correspondence from UMFA's chief negotiator, Cameron Morrill, to Juliano, noted (Binder 6, Tab 58) at p. 2:

> UMFA reserves the right, should *The Public Services Accountability Act* subsequently be determined to be unconstitutional, to take the position that anything within this collective agreement affected by *The Public Services Accountability Act*, is subject to revision and shall be subject to further collective bargaining at that time.

[46] UMFA was able to achieve a fourth year wage reopener in order to avoid possible strike action. The ratification ballot expressed the following qualification:

> I accept the proposed collective agreement with the proviso that I understand that the wage rates and benefits of any kind found in it are imposed as a result of *The Public*

> *Services Sustainability Act* (Bill 28) and not freely collectively bargained as between my union and my employer. My acceptance is therefore conditional on the legal validity of *The Public Services Sustainability Act*, and subject to revisions of the collective agreement if the Act is found to be unconstitutional.

[47] There were certain non-monetary benefits negotiated which included protection for librarians, workload requirements, collegial processes, the UMFA floor, as well as other matters. In feedback from union membership, the agreement was considered as a "big lose" for UMFA with respect to salary (Binder 6, Tab 62). The membership response exemplified a lack of confidence in the bargaining unit and dissatisfaction as regards payment of dues when collective bargaining on priority issues could not be addressed. The membership's faith in UMFA was damaged in the long-term, according to both Hudson and Flemming.

[48] Ken Stuart undertook collective bargaining on behalf of Unifor's Local 3007 for 450 members at UM. Unifor had served notice to bargain on January 9, 2017. Stuart's affidavit evidence (Documents Nos. 17 and 46) demonstrated that UM commenced bargaining as though the ***PSSA*** governed negotiations, even though it had only been tabled in the Legislative Assembly on March 20, 2017. The union's negotiation package had included several monetary proposals. UM's Chief Negotiator, Lisa Halket, advised that bargaining outside of the parameters of what was then Bill 28 would not be entertained. The prior collective agreement (2014-2017) between Local 3007 and UM had been achieved quickly with open/constructive dialogue. In this case, Stuart indicated that permanent harm was occasioned between the union and its membership.

[49] A new collective agreement was entered into for the period of March 25, 2017–April 2, 2021, with wage increases consistent with the ***PSSA***. While the union continually sought to negotiate more substantive monetary increases and benefits, there was an unwillingness to do so on the part of UM. Stuart opined that the agreement was not freely bargained. Unifor did not recommend acceptance or rejection to its membership. The membership was advised of the impact of Bill 28 on the union's ability to freely negotiate benefits and wage increases, along with the claw back provisions. There were certain workplace condition improvements negotiated. Again, the ratification ballot included a proviso that free bargaining had not transpired and revisions would be sought if a constitutional challenge was allowed.

MGEU

[50] Michelle Gawronsky, MGEU President since 2012, testified at the trial. The MGEU represents approximately 40,000 public sector employees with 87 collective agreements. GEMA is the collective agreement with respect to those workers employed directly by the Province. Over the years, many agreements have been successfully bargained between MGEU and Government after numerous bargaining sessions. The 2010–2014 GEMA agreement represented collectively bargained wage freezes in 2010 and 2011 and 2.75 per cent thereafter. There were other monetary benefits agreed, such as special wage adjustments and increases in the vision care benefit and to the maximum drug plan payment. There was also a memorandum on employment security, which provided for no layoffs of regular employees hired on or before March 26, 2010, for the duration of the collective agreement.

[51] Gawronsky testified that she had met on a regular basis with the prior Premier, Cabinet and MLAs with respect to labour management issues. Since the April 2016 election, she has met with the Premier on only one occasion, being on November 1, 2016. Gawronsky was at the January 5, 2017 meeting attended by Stevenson, Irving, Rebeck, and others as a member of the FWG. She was asked by Stevenson if the MGEU would consider a mandatory reduction of the workweek without pay. Since the 1990s, there has been a 20 day voluntary work week reduction program without pay in effect. On February 22, 2017, PSCC approved a recommendation that discussions with MGEU be entertained on the issue of a mandatory reduced work week program. This was, again, raised on June 12, 2017, by Stevenson in an e-mail to Gawronsky (Binder 12, Tab 198):

> In these very difficult financial circumstances facing the government, a formal program agreed to by the MGEU and the government with fixed closure dates would allow a greater number of participants to enjoy an enhanced work/life balance with corresponding salary savings being realized.

The request for a mandatory reduction in the work week was rejected by the MGEU on June 23, 2017 (Binder 12, Tab 199):

> Although not proclaimed, Bill 28 - *The Public Services Sustainability Act* has been passed by the legislature and received Royal assent. Its current status, as well as its constitutional validity are still very much in question but, presuming that it is proclaimed at some point by the Government, and is not otherwise declared unconstitutional, it provides, in section 14, for parties to negotiate sustainability savings during the sustainability period. In the case of employees covered by GEMA, their sustainability period will begin at the end of the current collective agreement in March 2019. Further, the section provides that such savings can potentially be used to fund an increase to the compensation payable to our members during the last 24 months of the sustainability period.
>
> As such, we do not believe that this is an appropriate time to meet and explore this issue.

There has been no Government follow up on this issue.

[52] Gawronsky expressed frustration because of an inability to sit down and speak with the Premier and/or other Government representatives to potentially resolve or discuss labour issues before they become more acute. Further, at the FWG's meetings, Gawronsky indicated that she had offered on many occasions to meet with Government representatives in order to identify efficiencies that would ensure the maintenance of public services. This offer was never accepted. Gawronsky acknowledged that no specific proposals for legislation were put forward by the MGEU. The MGEU did engage in meetings over a number of matters important to both sides, which included a sexual harassment policy and issues with corrections officers and sheriffs regarding stress, health, accidents, injuries and overtime. Gawronsky testified to a continued willingness to enter into talks to engage in discussions on those and other labour-related issues.

[53] As indicated, GEMA expired in March 2019. Sheila Gordon is MGEU's Director of Negotiations, while Brian Ellis, Director, Negotiation Services for the Labour Relations Division, served as the Government's Chief Negotiator. Gordon, on behalf of the MGEU, asked that Government disclose its monetary mandate prior to bargaining commencing. This approach signalled a variance with the historical practice undertaken at this bargaining table as discussions with respect to monetary issues usually began well into the process. Gordon advised Ellis that there would be no value to enter into collective bargaining if there was an unwillingness to negotiate something more than a zero per cent increase.

[54] Gordon testified that the normal bargaining practices with Government would include seeking the priorities of the MGEU membership to be followed by 30 or more bargaining sessions. Initially, non-monetary issues would be addressed, as those historically are less charged in terms of the two sides being invested. That methodology facilitates the building of trust between the bargaining entities and creates a momentum towards resolution. The monetary issues were not generally considered until towards the end of the process, as early on the suggestion would be that fair and reasonable wages would be negotiated. The Government will generally provide a monetary mandate to its bargaining team closer to the end of negotiations.

[55] On April 10 and 11, 2019, proposals were exchanged between MGEU and Government, with the union's top priorities being wages, benefits and job security (Binder 11, Tabs 174 and 175). Further, to be addressed was the depletion of approximately 2,000 members from the

workforce because of privatization, deletions and through retirement vacancies. Gordon testified that MGEU expected it would be asked to accept the ***PSSA*** mandate. MGEU deemed it was critical to have clarification of whether the ***PSSA*** would be Government's position before commencing the bargaining process with non-monetary issues. Gordon recognized that this, effectively, would turn the negotiating process on its head in the event wages were pre-determined through legislation. As previously indicated, Gordon advised there would be no value to collective bargaining if no wage increases could be expected in years one and two of an agreement. Gordon testified that any MGEU agreements would contain both union takeaways and/or concessions. Additionally, both pension benefits and severances were said to be significantly impacted by the fiscal restraints outlined in the ***PSSA***. It was expected that, if necessary, non-monetary issues could be resolved through arbitration. Gordon conceded that GEMA has salary scales with wage increase steps which are generally 2.0 to 3.0 per cent for those employees entitled in each year until the top of the scale is reached.

[56] After learning that the ***PSSA*** represented the Government's monetary position, Gordon advised Ellis that the MGEU would exercise its rights under ***The Civil Service Act***, C.C.S.M. c. 110 in order to secure binding arbitration (June 25, 2019). Ellis disagreed with the utilization of that process and expressed cautious optimism that the MGEU would change its position and enter into collective bargaining. On July 24, 2019, Gawronsky wrote to the Finance Minister and requested the appointment of an arbitration board pursuant to s. 48(1) of ***The Civil Service Act***. The purpose of the arbitration request was to secure the appointment of a board in order to set an award and determine issues in dispute respecting matters on which agreement could not be reached under the GEMA negotiations. The Finance Minister responded in a letter dated August 9, 2019, expressing Government's commitment to engage in good faith collective bargaining with the MGEU with the goal of reaching an agreement. The Minister declined to put this matter to arbitration and encouraged a return to the bargaining table. Gawronsky reiterated MGEU's request that an arbitration board be appointed on September 4, 2019, which was, again, declined on September 13, 2019. MGEU acknowledged its awareness that non-monetary issues could be bargained; however, arbitration was what was being sought. The MGEU had previously requested referral to interest arbitration, albeit, those processes were averted through collective bargaining (2006 and 2015). As a consequence of the refusal by the Government to put the matter to arbitration, the MGEU applied to the Court of Queen's Bench for an order of *mandamus*. A decision was rendered by Keyser J. on April 16, 2020, allowing MGEU's application for an order of *mandamus* requiring the Finance Minister to appoint an arbitration board.[1]

[57] Gordon testified that a number of collective agreements have been achieved since 2017 at wage levels higher than those reflected in the ***PSSA*****.** These were secured in order to rectify inequities between bargaining units that resulted from the application of the restraint legislation or with respect to healthcare sector reorganization. That being said, Gordon testified that at a later point in time, those bargaining units will be subject to ***PSSA*** mandates.

[58] Gordon indicated in her affidavit of October 18, 2017, that it was generally unnecessary for a government to legislate wage outcomes. Collective bargaining had successfully been utilized in the past to restrict wage increases, as demonstrated by the two year wage freeze in 2010 and 2011. That agreement was in return for bargained job security, as well as other improvements and benefits. However, those types of improvements, benefits and compensation could not be negotiated under the terms of the ***PSSA***. Gordon opined that the ***PSSA*** facilitated the monetary outcome desired by Government without having to offer other incentives or trade-offs. This position resulted in an absence of bargaining power, or leverage, for negotiation by MGEU on behalf of its membership.

[59] Gordon outlined how the ***PSSA*** substantially impacted collective bargaining for certain entities that were in active negotiation, when the legislation received Royal Assent, including: Diagnostic Service of Manitoba Inc. ("DSM Westman Lab"); Main Street Project ("MSP"); Direct Support Workers & Rural Child Development Workers ("Direct Support Workers"); Southern Health/Santé-Sud; St. Amant Centre; Victoria Hospital; St. Boniface Hospital – Trade

Workers; Universite-College St. Boniface; Family Visions Inc.; Manitoba Liquor & Lotteries; and, Dakota Ojibway Child & Family Services ("DOCFS").

[60] With respect to DSM Westman Lab, there were 118 employees in the bargaining unit of technical and professional health care workers represented by the MGEU. There were also two other DSM groups - one in rural Manitoba and one in Winnipeg. These groups undertake laboratory and diagnostic imaging. In Winnipeg, DSM workers are represented by the Manitoba Association of Health Care Professionals (MAHCP). Historically, the wage rates have been identical for all three units. MAHCP/MGEU Rural and Government had negotiated a 2014 –2018 collective agreement for an aggregate 7.0 per cent wage increase over four years. However, the DSM Westman Lab agreement had not been concluded in a similar time frame. Government considered that the DSM Westman Lab was under the ***PSSA*** and, consequently, similar compensation received by the other DSM units was not offered, despite the fact that all three groups did the same work. This caused morale problems, as well as recruitment and retention difficulties. There had been assurances that all three units would have the same increases in August 2016; however, the negotiating meetings soon identified that Government had "issues" with such a stance. It had become apparent through the negotiations between UMFA and UM that Government was undertaking a fresh approach that would profoundly impact negotiations with public sector unions.

[61] The MGEU asserted that the DSM Westman Lab must be afforded the same compensation as had been negotiated with the other two units. The employees were described as being frustrated and angry at the inequity that resulted without free and fair collective bargaining. The members were dissatisfied with the MGEU. This was opined by Gordon to have caused long-term harm between the union and its membership.

[62] The DSM Westman Lab ratified an agreement in line with the ***PSSA*** on June 16, 2017. The ratification was conditional on the constitutionality of the legislation. However, the Government came to recognize the problem and lack of equity between the three DSM Labs sometime after February 27, 2018. Both Beaupré's and Stevenson's affidavits indicated that Government recognized that inequities existed at certain bargaining tables. Accordingly, there was a willingness to enter into agreements that would not be ***PSSA*** compliant. The Government acknowledged that there were unintended consequences at the DSM Westman Lab, including unhappiness amongst employees, along with feelings of unfairness and recruitment/retention problems. On October 10, 2018, the PSSC approved a mandate for the DSM Westman Lab agreement (Binder 4, Tab 153) at a level commensurate with the other DSM bargaining units. The Provincial Health Labour Relations Services ("PHLRS") offered to adjust the Westman Lab's wages to parity with the other bargaining units at 7.0 per cent (October 23, 2018). This constituted a retroactive wage increase in line with the MAHCP and MGEU Rural agreements. However, all units will be subject to the ***PSSA*** mandate upon the expiration of their agreements.

[63] Beaupré's affidavit of April 13, 2018, stated that PHLRS had entered into good faith negotiations with expired or first contract unions with a goal to align contracts with others settled in the public sector. This was to achieve a symmetry of outstanding contracts for those who were likely to be part of the same bargaining unit after healthcare restructuring.

[64] Gordon provided affidavit evidence (March 13, 2018) with respect to the Direct Support Workers and Southern Health/Santé-Sud: EMS Superintendents. Karla Steele also provided affidavit evidence (October 13, 2017, and October 17, 2019); as did Wesley Whiteside (affidavit, October 19, 2017) with respect to negotiations with the Direct Support Workers. Steele was lead negotiator for the unit in question and a notice to bargain had been issued in early 2017. The employer had read a statement at the first meeting held on June 12, 2017, that its position would be consistent with the ***PSSA*** and that monetary proposals outside its framework would not be entertained. There was one classification of workers that were paid $11.01 per hour under the expiring 2015–2017 collective agreement. However, the provincial minimum wage had been increased to $11.15 on October 1, 2017. Pursuant to ***The Employment Standards Code***, C.C.S.M. c. E110, an employer is required to pay the minimum wage. The

employer admitted an issue existed as to how to deal with such a circumstance, given the two year ***PSSA*** wage freeze. Ultimately, the Government agreed to pay the minimum wage to affected employees.

[65] The Direct Support Workers had not received a wage increase since March 2014, as the 2015–2017 agreement had included negotiated wage freezes at 2014 levels. Accordingly, Steele indicated that a fair and reasonable wage increase was expected and proposals were made for monetary benefits. It was the employer's position that no agreement was possible for any type of monetary benefits because of the ***PSSA*** claw back provisions. Further, Steele opined that, in her view, monetary restrictions put in place removed any incentive on the employer to bargain non-monetary terms.

[66] The power to negotiate had been adversely impacted. Further, this unit had very few employment benefits, except those under ***The Employment Standards Code***. Both Whiteside and Gordon advised of the continuing negotiations on this matter. The Government offer continued to mirror the ***PSSA*** restraints, while the MGEU sought a 2.0 per cent annual increase in line with inflationary factors. Resolution was achieved on December 17, 2018, for a two year agreement at 0.75 per cent and 1.0 per cent ending May 31, 2019. This agreement recognized that these employees had already undergone a two year wage freeze. In all other respects, the agreement was ***PSSA*** compliant. The agreement was ratified by a conditional ballot with respect to the ***PSSA's*** constitutionality.

[67] On May 20, 2015, the MGEU was certified to represent a bargaining unit of EMS superintendents employed by Southern Health/Santé-Sud. Darlene Arnott was the union's lead negotiator for the first collective agreement (affidavit, October 19, 2017). The six EMS superintendents were covered under a collective agreement separate from the paramedics they supervised, and had experienced a slower negotiation process because of scheduling issues. In September 2016, the MGEU had renewed a collective agreement for Southern Health/Santé-Sud paramedics, which included a 39.0 per cent wage increase over four years. As a consequence of the timing of that agreement, the superintendents were paid less than those they supervised. Once underway, the superintendents' bargaining unit sought improved monetary terms and employment conditions, such as overtime, shift premiums, cash out of unused sick leave, and travel allowances. The union negotiators were advised of the application of the ***PSSA*** once negotiations began. This was described by Arnott as arbitrary, inequitable and unjustified. It served to create significant morale issues and labour relations harm. The membership questioned the merits of unionization and the paying of dues. The situation was rectified by collective bargaining in February 2018 (Gordon affidavit, March 13, 2018). The EMS superintendents were afforded wage increases in excess of the ***PSSA*** to resolve the inequity of earning a lower salary than those they supervised. However, those individuals were warned to put the extra monetary gains aside, as there could be claw back consequences pursuant to s. 28 of the legislation. However, Government approved the settlement and advised that no claw back consequences would transpire.

[68] Michael Sutherland (affidavit, October 17, 2017) was the MGEU staff representative with respect to a 101 person bargaining unit at the Main Street Project ("MSP"). The MSP provides services to the homeless and vulnerable in our community. Part of its funding is secured through the Winnipeg Regional Health Authority ("WRHA"). The prior four year collective agreement expired on March 31, 2016, with a written notice to bargain forwarded by the MGEU on February 29, 2016. A delay in commencing bargaining had transpired; but, by August 29, 2017, 10 meetings had occurred. The employer's bargaining position reflected compliance with the ***PSSA***. The MGEU was told that wages and benefits could not be improved from that position. The union had proposed a 2.0 per cent increase in each year, with improvements to other monetary benefits, such as sick leave, overtime and shift premiums. Consequently, no collective bargaining was undertaken with respect to monetary benefits and no agreement was secured on relevant non-monetary issues such as a permanent shift schedule, job security and other matters. The power to negotiate non-monetary items was said

by Sutherland to have been negatively impacted. The MSP had previously agreed to wage freezes during the currency of their 2012–2016 agreement.

[69] A collective agreement was subsequently ratified by the MSP bargaining unit on September 18, 2018. The agreement provided for two years of zero per cent increases followed by a 2.0 per cent increase. A letter was to be provided by the employer promising that the 2.0 per cent wage increase in the third year of the agreement would not be clawed back upon ***PSSA*** proclamation.

[70] Darlene Tremblay (affidavit, October 18, 2019) was the MGEU staff representative for certain trades groups at the St. Boniface Hospital, the St. Amant Center, and Victoria Hospital. The collective agreement under consideration was for the April 1, 2016–March 31, 2019, period. These trades groups historically bargained after the operating engineers unit had negotiated an agreement with the WRHA. Accordingly, bargaining had been held in abeyance until the agreement with the operating engineers had been accomplished. On April 20, 2018, Tremblay received a call from a PHLRS representative wanting to proceed with bargaining, as a small window was said to exist where wages over the ***PSSA*** mandate could be offered. A 2.0 per cent increase in 2016 and zero per cent in years 2017 and 2018 was proposed. The employer assured that no money would be clawed back. The agreement was identical to that offered and accepted by the operating engineers. The parties met from May 8–10, 2018, with the union being told that acceptance of the total package had to be achieved by May 18, 2018. It was effectively a 'take it or leave it' opportunity with a short acceptance window. Tremblay set out in her affidavit that the MGEU was unable to put forth proposals and no negotiations transpired.

[71] Tremblay articulated that there was an awareness that Bill 29 had been tabled and that the number of healthcare bargaining units would be decreased under that legislation. While the union was unhappy with the proposal and exhibited frustration, there was recognition that the 2.0 per cent offer would be gone, if not accepted. On May 9, 2018, Beaupré sent MGEU letters with respect to the three collective agreements (Binder 7, Tab 47; Binder 8, Tabs 64 and 84) indicating that the ***PSSA*** would not apply. Further, there was no intention of applying a sustainability period more than once to any group/collective agreement covered by the ***PSSA***. Consequently, upon ratification, the two years of zero per cent increases would be recognized under the ***PSSA***, along with a commitment not to claw back any funds.

[72] Marc Payette (affidavit, October 17, 2019) was a MGEU staff representative engaged in collective bargaining with respect to Red River College ("RRC") and Assiniboine Community College ("ACC"). The prior collective agreement had expired June 23, 2017. These employees had agreed to past wage freezes in return for no layoff clauses in their 2009–2013 and 2013–2017 collective agreements. A new agreement was achieved for the period of June 24, 2017–June 18, 2021. The employer was unwilling to go above ***PSSA*** compensation or agree to the job security provisions that had previously been collectively bargained. There were some amendments to the prior collective agreement, but the protection afforded by the 2017–2021 agreement was considered by Payette to be inferior. These bargaining units conditionally accepted the agreement subject to ***PSSA*** constitutionality. There were certain increases in remuneration in this agreement, albeit Payette testified that many of those increases were required to update figures to reflect changes in the consumer price index, as well to honour changes in legislation, such as to ***The Employment Standards Code***. Additionally, there were agreed letters of intent to undertake a review and discuss issues such as long-term disability and pay scales.

[73] Laura Nelson was the MGEU negotiator on behalf of 352 employees of the University College of the North ("UCN") (affidavit, October 17, 2019). The prior collective agreement had expired March 31, 2018. Further, the 2010–2014 agreement had reflected two years of wage freezes, with the remaining years providing for 2.9 per cent increases. A collective agreement for October 1, 2018–March 31, 2022, for ***PSSA*** amounts was agreed. The MGEU had proposed a memorandum of agreement on employee security, which was rejected. Again, this agreement was conditionally ratified, subject to constitutionality and possible future bargaining.

[74] The Manitoba Liquor & Lotteries ("GOLICO") agreement was the subject of affidavit evidence and testimony by Miranda Lawrence ("Lawrence") (affidavit, October 22, 2019). There were 1,265 employees in this bargaining unit, whose agreement expired March 24, 2018. The employer provided notice that it would not bargain in excess of the ***PSSA*** monetary amounts. Lawrence attested that the priorities of the union membership were wages, benefits and job security. Contracting out was of significant concern to the membership. The union tried to bargain in good faith for improvements in non-monetary areas, particularly with respect to stronger job security provisions. These provisions were considered to be a reasonable trade-off for wage freezes. However, those suggested trade-offs were declined and the employer retained the right to contract out. Further, the employer endeavoured to remove two existing benefits with respect to retirement and wellness allowances. That position was subsequently withdrawn. There were few concrete gains secured in the negotiations which left the union representative feeling embarrassed, "... as they do not even approach a reasonable trade-off for wage freezes (affidavit, October 22, 2019, p. 14, para. 32). Further, Lawrence stated in her affidavit:

> 33. In May 2018, MGEU prepared a bargaining bulletin that went to members of this bargaining unit outlining the tentative settlement. The bargaining bulletin was frank in stating that bargaining had been very difficult in light of the PSSA, and it referenced the constitutional challenge to the PSSA as well as the injunction motion that was heard on May 29, 2018. The bulletin nevertheless tried to portray bargaining in a somewhat positive light for the purposes of ratification and morale....
>
> 34. For example, the bulletin described the amendment to the contracting out language (article 12.01 above) as a "big gain", whereas MGEU views it is a very minor gain, and inferior to what MGEU wanted to actually achieve. The bulletin described maintaining the status quo of benefits like the fitness allowance and retiring allowance in terms of having "prevented" rollbacks and concessions. The bulletin bragged that MGEU had strengthened harassment language to say that "employees are entitled to a respectful and safe workplace which is free from discrimination, harassment and violence" – this is a basic legal right already protected by legislation (in Manitoba the *Workplace Safety and Health Act* and the *Human Rights Code*) and is not a new gain.

[75] The MGEU representative had been told that, "nothing with an essence of monetary would be negotiated". There were, as indicated, certain negotiated improvements, none of which reflected the members' priorities. A further example of secured improvement was that previously a doctor's certificate after a three day absence was necessary. This was changed from "shall be provided" to "may be provided". This March 25, 2018–March 24, 2022 collective agreement was, again, conditionally approved.

[76] Arnott was also lead negotiator for the DOCFS bargaining unit, which was certified in June 2016. There were 42 employees in this unit, which included social workers, team leaders and other like positions. The parties had met six times with respect to the first agreement, with the employer stating that monetary issues must be ***PSSA*** compliant. The MGEU wanted to bargain monetary terms, which included wages, bank time, placement on the salary scale, merit increases, overtime, shift premiums, vacation pay, sick leave pay, bereavement leave, maternity and paternity benefits. However, all such proposals were rejected with the existing DOCFS policies expected to govern. It was indicated that any bargaining in excess of the ***PSSA*** would create an employee debt when the legislation was proclaimed.

[77] Arnott expressed in her affidavit that the MGEU had sought to bargain non-monetary terms and conditions. However, the wage freeze resulted in affording the employer with little incentive to negotiate on such issues. The desire to unionize to improve terms and conditions of employment had been defeated. This caused frustration within the membership and questioning of the value of unionization and payment of dues. Arnott indicated that internal

tensions had been created, along with morale, recruitment and retention issues. A tentative agreement was reached September 23, 2019, on ***PSSA*** terms from April 1, 2017–March 26, 2021. This agreement was ratified with a conditional ballot.

[78] There are a number of other ongoing "negotiations" proceeding with the MGEU, including GEMA. There are, of course, other collective agreements that will expire in the upcoming years.

Canadian Union of Public Employees ("CUPE")

[79] Walter Skomoroh represented CUPE Local 2836 with respect to therapists employed with the Rehabilitation Centre for Children (affidavit, March 12, 2018). Physiotherapists and occupational therapists at other locations were under separate collective agreements, including those involving MAHCP. The CUPE collective agreement expired March 31, 2014, with bargaining beginning on November 21, 2016. The unit was seeking wage parity with MAHCP-represented physiotherapists and occupational therapists. Meetings took place, and finally, on January 21, 2018, PHLRS acknowledged and accepted wage parity with workers at MAHCP, provided there was an agreement adjusting lunch breaks, along with no guarantee with respect to back pay. The employer indicated that acceptance was needed by January 26, 2018. The agreement was as follows:

April 1, 2014 – 1.5 per cent;
April 1, 2015 – 1.5 per cent;
April 1, 2016 – 2.0 per cent plus 1.75 per cent market adjustment; and,
April 1, 2017 – 2.0 per cent plus 1.75 per cent market adjustment.

[80] This agreement constituted parity with MAHCP workers and was ratified with a retroactivity-based clause. The employer will seek to impose the ***PSSA*** restraint on the next agreement. Beaupré confirmed in her affidavit of February 27, 2018, that the Rehabilitation Centre for Children and the CUPE collective agreement increases were to align those holding similar positions in the healthcare sector after restructuring had transpired as a consequence of Bill 29. Accordingly, for equity purposes, there was a need for their increases to result in wage parity with similar bargaining units.

[81] Elizabeth Carlyle ("Carlyle") (affidavit, October 17, 2017) negotiated on behalf of the Community and Intercultural Support Workers with the Winnipeg School Division ("WSD"). Provincial funding constitutes 60.0 per cent of their financial resources. The WSD has historically expended this funding as it saw fit. The August 29, 2013–August 29, 2016 agreement expired, resulting in a written notice to bargain being rendered September 1, 2016. The parties met for three bargaining sessions, commencing in February 2017, prior to the introduction of the ***PSSA*****.** The WSD advised that its budget was tight and restraint was necessary, albeit property taxes could be raised to enhance revenue. At a second meeting (May 23, 2017), CUPE representatives were advised that the ***PSSA*** would impact bargaining and would apply to the WSD, even though the legislation was not yet enacted or proclaimed. The union had proposed removal of Article 11.09 with respect to a sick leave issue. The WSD declined, as it entailed a cost consequence contrary to the ***PSSA***. The union members were updated with respect to negotiations on June 22, 2017, and registered disillusionment.

[82] The September 12, 2017 meeting between the WSD and CUPE representatives resulted in the employer again advising of the need for ***PSSA*** compliance, which, by then, had become enacted legislation. The WSD's position was that it would discuss monetary issues after the conclusion of bargaining on non-monetary matters. This was the usual practice for collective bargaining. However, the union concluded that there would be less incentive for the WSD to agree to non-monetary issues when monetary matters had been pre-determined. CUPE requested job security provisions, which were declined. Carlyle indicated it was usual for the union to bargain trade-offs, such as lower compensation in return for increased job security (affidavit, October 17, 2017). This did not transpire in these circumstances. There have been no new dates scheduled for collective bargaining subsequent to WSD cancelling a September 26, 2017 session. Carlyle indicated that the ***PSSA*** has had a negative impact on collective

bargaining, including restricting the ability to negotiate and advance the priorities of the union membership.

[83] Marilyn Mottola (affidavits, October 19, 2017, and October 18, 2019) acted as the CUPE representative handling long-term healthcare housing units and branches of the workers within those units. These included: ArlingtonHaus, Extendicare (Oakview Place), and Revera Long Term Care Inc. (operating as Kildonan Personal Care Centre). Terri Kindrat of PHLRS had advised these employers of the necessity of ***PSSA*** compliance.

[84] With respect to ArlingtonHaus, its Chief Executive Officer, Gary Ledoux, on August 4, 2017, forwarded an e-mail to Kindrat seeking assistance in responding to Mottola's request for information (Binder 12, Tab 14):

> I am writing to ask for your assistance in responding to a written request from the CUPE Representative following our negotiation meeting yesterday on a new CA for ArlingtonHaus (CUPE Local 1629). Please see the attached correspondence from Marilyn Mottola.
>
> At the insistence of the Union we returned to the bargaining table to finish the non-monetary issues from our March 2017 bargaining sessions, and to begin the monetary negotiations (the old CA expired on April, 2016).
>
> At the outset of the monetary discussion, based on your previous e-mails (see above) and discussions, I read a statement that made it clear we were directed to comply with the parameters of Bill 28 (also see attached). They asked for a copy of this statement which I declined.
>
> We then presented our written counter offer for wage increases for 2016-17, 17-18, 18-19 and 19-20 reflecting the 0%, 0%, .75% and 1% levels respectively, and noted all other "additional remuneration" are frozen and non-negotiable (CUPE had asked for 9.5% over the four years along with increased leave provisions, shift premiums, etc)
>
> Predictably, the CUPE rep informed us they would not accept Bill 28 as the basis for negotiations and reminded us it is not as yet proclaimed and the Union has launched an injunction against the legislation. Further, she indicated this could be considered an unfair labour practice. The discussion then ended after we were presented with their letter. As indicated, we would like a response within two weeks or notice we are unable to respond in that time frame. We also agreed to book Friday, October 27th as a tentative date to resume bargaining.
>
> In essence they are really asking two questions in their letter: first on what basis are we applying Bill 28 provisions to our negotiations and secondly who directed us to do so and is it in writing. To note the only written documents we have received on the directive to follow Bill 28 are emails from you and Gina...
>
> As Bill 28 is government driven and public sector wide, we will require the exact wording for our response from PHLRS and the WHRA.
>
> Please let me know when we might expect a draft to review...

As the e-mail indicated, the employer had been directed by the funder that all negotiations with CUPE were bound by the conditions of the ***PSSA***.

[85] Ms. Kindrat responded to Ledoux's e-mail on August 4, 2017, as follows:

> The discussions that we have been having over email and on our conference call to look at the potential impact of Bill 28 are very different discussions than how I would

> have suggested you actually verbally present the current reality to the union at the bargaining table.
>
> I would definitely have preferred to have had some input on that opening statement and how you would have specifically presented these issues at the table.
>
> In my brief conversation with Kim the other day I did make a comment about not actually referencing Bill 28 to the union but I did not realize that your bargaining was actually happening in the next day or two so I did not push the issue further or provide more clarity. I did reference that at other bargaining tables we had started with a reduced mandate or something like 0%, 0%, 0.5%, and 0.75% to talk about the financial challenges.
>
> At the other tables that the PHLRS has been doing we have been speaking about the "provincial financial challenges" and the "available funded mandate" – with no actual reference to Bill 28 at the bargaining table so that we would avoid this type of response.
>
> Your opening statement is quite likely an unfair labour practice.
>
> I am going to give some thought to possible next steps on this one to try and get this back on track in the right vein of messaging.

[86] Ultimately, Beaupré indicated that ArlingtonHaus, Revera, and Extendicare (Oakview Place) were not covered by the ***PSSA*** (supplementary affidavit of April 13, 2018). The Government had not informed the employers of this until May 4, 2018. On June 27, 2018, CUPE and ArlingtonHaus settled a renewed collective agreement containing wage increases that were outside the ***PSSA*** parameters.

[87] An Extendicare collective agreement covered April 1, 2014–March 31, 2017, with a written notice to bargain put forth on January 31, 2017. The first meeting of the parties occurred May 23–25, 2017. The union included monetary proposals in its bargaining position. It also requested to be informed as to whether the ***PSSA*** applied to that workplace and whether the employer had been provided with a mandate from Government. It was CUPE Local 1475's position that it wanted to engage in collective bargaining without ***PSSA*** limits as the legislation had not been proclaimed. Kindrat advised of the need for ***PSSA*** compliance. Extendicare is a for-profit facility which was able to pay higher wages, albeit the employer was not prepared to bargain outside of the parameters of the ***PSSA*** as directed. Mottola indicated that the application of the ***PSSA*** restraints constituted a direct interference with free and fair collective bargaining.

[88] Extendicare, like ArlingtonHaus, was not informed by Government that they were not covered prior to May 4, 2018. CUPE and Extendicare settled a renewed collective agreement containing wage increases and additional remuneration above that stipulated in the ***PSSA***. The members of both these Locals questioned the value of a union and the dues that they were paying.

[89] Allen Bleich (affidavit March 13, 2018; supplemental affidavit October 18, 2019) was the national representative for CUPE Local 4860, being the Personal Care Centre Workers at the Kildonan Personal Care Centre (the "Centre" or "Revera"). The Centre was operated by Revera, a private for-profit organization. The prior collective agreement of November 1, 2012 –October 31, 2015, expired. The parties first met, with the assistance of a conciliator, to collectively bargain on January 23 and 24, 2017. The union took the position that this Local was entitled to the same increases as provided to Revera's other Personal Care Centre Workers. Such increases were at 2.0 per cent; 2018 at 1.5 per cent; and, 2019 at 1.0 per cent. Bargaining commenced firstly on non-monetary issues.

[90] On February 27, 2017, Revera was prepared to provide the same increases as afforded to employees at its other centres, provided the union pull back on certain other monetary proposals. The first meeting subsequent to the introduction of the ***PSSA*** occurred on March 27, 2017, with Revera indicating uncertainty as to the legislation's applicability. Inquiries were made of Government as to the ***PSSA's*** application to Revera without response. On August 4, 2017, the employer offered the union those amounts reflected in the ***PSSA*****.** By November 2017, the employer was unwilling to amend the wage package, as it was certain the ***PSSA*** applied because of receipt of some WRHA funding. Revera was not prepared to bargain outside the parameters of the legislation without clarification of the ***PSSA's*** applicability. This position was regarded by the union as being representative of substantial interference with free and fair collective bargaining by Government. The membership experienced frustration as a result of what had transpired.

[91] Beaupré's affidavit (April 13, 2018) indicated that the Centre was not covered by the ***PSSA***. Accordingly, on November 16, 2018, CUPE and Revera settled a collective agreement with wage increases and other remuneration beyond that stipulated in the ***PSSA***. CUPE first became aware, through Beaupré, that the Centre was not ***PSSA*** covered on April 13, 2018. It was subsequent to that time that meaningful collective bargaining commenced.

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 63 ("IATSE")

[92] Stuart Aikman, Business Agent and Secretary of IATSE (affidavits of October 18, 2017 and March 14, 2018), outlined the union's negotiations on behalf of stagehands at theatre venues, in the City of Winnipeg. The August 15, 2010–August 8, 2015 collective agreement between IATSE and the Manitoba Centennial Centre Corporation ("MCCC") had expired and an intention to bargain was conveyed on March 9, 2015. It was agreed that no bargaining would transpire until agreement was reached between the MGEU and MCCC, being a similar bargaining unit. Those entities reached a five year agreement on June 22, 2016, with increases of 1.0 per cent, 1.0 per cent, 2.0 per cent, 2.0 per cent, and 1.0 per cent over its currency. Consequently, bargaining between IATSE and MCCC began on September 15, 2016. The union was seeking retroactive increases from 2015 at 2.0 per cent for each year.

[93] On November 17 and 18, 2016, the union was told that the Government mandate was not favourable as there could be no monetary increases for the years 2015 and 2016. The union stressed that such a position would result in no wage increase until 2019, being 0.75 per cent. That was argued to be incompatible with the MGEU employees who performed similar functions and would have 1.0 to 2.0 per cent increases over the same period. Aikman indicated that such a result would have a tremendous impact on employee morale, including significant frustration. Additionally, this unit had previously bargained zero per cent wage freezes in 2010 and 2011.

[94] Tanya Cole, labour relations officer and lead negotiator on behalf of MCCC bargaining with IATSE, reported to Ellis. As a consequence of their communications, she presented certain "what if" scenarios to the union representative on February 22, 2018. The proposal was that a window would be open until the end of March 2018, during which the MCCC would offer the same package as accepted by the MGEU on behalf of its membership retroactive to August 9, 2015, and continuing to August 1, 2020. The union requested legal advice as to whether a claw back might transpire upon proclamation of the ***PSSA***. Cole advised that she had spoken with legal counsel and verbally committed to a written settlement agreement acknowledging that no roll back would occur.

[95] On March 12, 2018, IATSE and MCCC entered into a collective agreement, which included the statement, "[t]he parties recognize that once ratified, this agreement is the one in effect on March 19, 2017". This "timing" preceded the introduction of the ***PSSA*** by one day. The agreement represented parity with MGEU workers, albeit it was ratified with the members

being told of the claw back potential. The Government has advised that the ***PSSA*** sustainability period for IATSC workers will begin in February 2020.

[96] Stevenson's supplementary affidavit of April 10, 2018, indicated that the agreement will be honoured and not impacted by the ***PSSA***. It was reached pursuant to instructions from PSCC to the Labour Relations Division to enter into bargaining with those groups suffering inequities with similar bargaining units.

Manitoba Association of Healthcare Professions ("MAHCP")

[97] Walter McDowell was the labour relations officer for MAHCP who acted for membership in a bargaining unit of Imaging Equipment Service Technologists employed by the WRHA in the Regional Clinical Engineering Program (affidavit, March 13, 2018). Additionally, he acted on behalf of MAHCP members who were in the bargaining unit of Psychosocial Clinicians I, Psychosocial Clinicians II and Supportive Care Coordinators employed in Winnipeg by CancerCare Manitoba. McDowell was responsible for negotiating the first collective agreement for both groups. Bargaining did not commence until October 2017. The Psychosocial unit was first certified in December 2016. It was anticipated that its membership would dovetail into an existing agreement between MAHCP and CancerCare. However, CancerCare was of the view that a separate agreement was required.

[98] On October 10, 2017, PHLRS, through Keely Richmond, a Labour Relations Consultant, proposed that the existing agreement between MAHCP and CancerCare was appropriate for the bargaining unit, with the exception of the monetary amounts because of the ***PSSA*** mandate. The union's view was that there needed to be equitable payment for unit members when compared to others delivering the same services (a 2.0 per cent increase in 2017, as achieved in the MAHCP/CancerCare Agreement). No response was received with respect to that position until a February 21, 2018 meeting. PHLRS put forth what was described as a "unique" proposal for the period of December 29, 2016–March 31, 2018. A 2.0 per cent retroactive wage increase to April 1, 2017, was proposed. The window for acceptance was short, as it was non-compliant with the ***PSSA***. The proposed wage figures would not achieve parity with their counterparts and a significant wage gap would exist. That being said, despite the frustration of the membership, the agreement was conditionally ratified under duress.

[99] McDowell expressed the membership's view that acceptance of the proposal was necessary or face ***PSSA*** wage freezes. The same bargaining process occurred with the Imaging Equipment Service Technologists who also received a 2.0 per cent increase retroactive to April 1, 2017, and certain other monetary benefits. There was no specific reference to the ***PSSA*** and, again, the agreement was not compliant. It was ratified under duress with a notice to bargain submitted in March 2018. The membership's frustration was said by McDowell to be evident.

[100] Beaupré stated in her April 13, 2018 affidavit that PHLRS entered into good faith negotiations with those unions with expired contracts, or who were negotiating first contracts. The goal was to align those contracts with settled contracts in the healthcare sector. Those agreements would be honoured and not impacted by the ***PSSA*** proclamation, particularly, by its claw back provisions.

International Union of Operating Engineers Local 987 ("IUOE 987")

[101] Marc Lafond (affidavit, March 14, 2018, and testimony at trial) was the business manager of IUOE 987. He represented eight bargaining units, each with a collective agreement for maintenance and trade workers at Manitoba Healthcare facilities. The expiring collective agreement encompassed a period of April 1, 2012–March 31, 2016. The union requested conciliation with respect to bargaining a new agreement. Between March 4 and November 8, 2016, eight bargaining sessions transpired with the employer who had advised that it was without a mandate to negotiate monetary terms. On November 3, 2016, IUOE 987 was offered a one year collective agreement at zero per cent (2016). This was contrary to what similar bargaining units had earlier achieved - being 2.0 per cent increases for the same period. The

Government mandate for bargaining came from the PSCC and was relayed by Irving. As a consequence, no meetings transpired until February 21, 2018, at which time the employer tabled an offer to settle all monetary and non-monetary issues on a "best case" scenario. That scenario was a three year collective agreement containing wage increases of 2.0 per cent in year one, zero per cent in year two, and zero per cent in year three. This offer required acceptance by February 28, 2018. Additionally, the employer wanted concessions on certain other benefits.

[102] The union was of the opinion that the offer could violate the ***PSSA*** and result in a claw back situation for its membership. Initially, Government would not provide written confirmation that no such claw back would transpire. Further, Lafond testified that the offer lacked decency, particularly monetarily, and because other benefits such as overtime and bereavement leave were being reduced. The reorganization of healthcare bargaining units pursuant to Bill 29 was also a factor in the consideration of the offer. The offer was declined in March 2017, but accepted the second time it was proposed subsequent to a letter from Beaupré dated March 13, 2018 (Binder 13, Tab 20). In that letter, Beaupré stated:

> The ***PSSA* does not apply** to this agreement. If the ***PSSA*** is proclaimed it will apply to the subsequent agreement entered into between the employer and your union (April 1, 2019). Moreover, government has indicated that it has no intention of applying the sustainability period more than once to any collective agreement covered by the ***PSSA***. Therefore, if the tentative agreement is ratified, the two years of 0% will be recognized under the ***PSSA***.
>
> Given the misunderstanding regarding the ***PSSA***, the employer is willing to renew its last offer and is further willing to allow this letter to be circulated to your union members. The letter indicates the government's commitment that it will not apply the ***PSSA*** to the tentative agreement (and therefore there will be no claw back) and that it will recognize the two years of zeros as the first 2 years of the sustainability period if the ***PSSA*** becomes law.
>
> [emphasis in original]

[103] A tentative memorandum of settlement was entered into between the union and the WRHA on April 27, 2018. Subsequently, the union has provided notice to bargain a renewed collective agreement, albeit no bargaining has occurred.

[104] There are numerous other collective agreements to be bargained from IUOE 987, as is the case with other unions representing public sector employees. Those collective agreements have not been concluded.

Public Service Alliance of Canada ("PSAC")

[105] Both Erin Sirett (affidavit October 12, 2017) and Mathieu Brulé (affidavit March 9, 2018) were bargaining representatives for PSAC; they provided information with respect to a collective agreement with Brandon University ("BU"). A portion of funding for that institution comes from the Government. Local 55601 was bargaining agent for 160 research and student assistants at BU, who had entered into a first collective agreement for the period of September 1, 2013–August 31, 2016. Sirett was the lead negotiator for the second collective agreement and was cautioned in January 2017 that the ***PSSA*** would govern BU's position. The union's response was that good faith bargaining needed to be undertaken between the parties.

[106] The employer focussed on non-monetary issues and agreed to delay bargaining on monetary matters until Bill 28 received Royal Assent (June 2, 2017). The first bargaining session thereafter occurred on November 28, 2017, at which time BU was asked by Sirett if there was a willingness to negotiate monetary terms outside of the legislation's parameters. It was the membership's top priority. Sirett was advised that no negotiations of monetary terms would transpire, as mandated by Government. These negotiations were opined by Sirett to have affected the union's relationship with its membership, which was a relatively new

bargaining unit (2012). What transpired was said to have frustrated and undermined the legitimacy of unions and their ability to represent their membership.

[107] Brulé replaced Sirett on December 6, 2017, as lead negotiator for bargaining unit Local 55601. By that time, a tentative deal had been secured (November 28, 2017), based upon a four year collective agreement commencing September 1, 2016, and ending August 31, 2020. The wage increases reflected the terms of the ***PSSA*** and ratification was undertaken on February 7, 2018. The agreement was conditionally accepted by membership with respect to the legal validity of the ***PSSA*** and, accordingly, subject to revisions if that legislation was found to be unconstitutional.

[108] Brulé articulated in his affidavit that this was not a freely bargained collective agreement, but, instead, was ***PSSA*** imposed. BU's representation opined that free bargaining had transpired and reserved the right to oppose any attempt to reopen the collective agreement.

[109] There are other collective agreements PSAC settled after the passage of the ***PSSA***, which are reflective of the terms of the ***PSSA***. There are others that remain outstanding.

United Food and Commercial Workers Canada Local 832 ("UFCW 832")

[110] Martin Trudel (affidavit October 16, 2017) was the director of negotiations for UFCW 832 and primarily responsible for collective bargaining. This bargaining unit represents employees in the assisted living industry – FASD Life's Journey Inc., ACL Interlake, and Epic Opportunities. Each of these workplace employers receive a significant amount of provincial funding, but are independent non-profit organizations. Collective bargaining for the three work places began just before or just after the tabling of the ***PSSA***. After reviewing s. 7 of the legislation, there was uncertainty as to whether the ***PSSA*** was applicable. Accordingly, the Government was asked to respond to such queries, as employers were reluctant to discuss monetary terms without clarification. This resulted in uncertainty, delays, doubt and, once more, frustration. The union had previously agreed to wage freezes in these work places, but had been able to bargain for enhanced benefit packages or improved working conditions. In the view of the union, such enhancements could not necessarily be bargained under the ***PSSA***. Again, the relationship between the union and its membership was said to have been harmed because of delay, displeasure, and the feeling that union representation was essentially worthless. It was the union's position that the ***PSSA*** did not apply to these workplaces. The employers remain reluctant to discuss monetary issues without clarification as to the applicability of the ***PSSA***.

[111] Phil Kraychuk (affidavit October 16, 2017, and testimony at trial) was the coordinator of Health and Safety for UFCW 832 which was the certified bargaining agent for educational assistants within the Fort La Bosse School Division ("FLBSD"). The expiring collective agreement (July 1, 2014–June 30, 2017) was to be the subject of collective bargaining subsequent to a Notice to Bargain dated April 12, 2017. Craig Wallis, a labour relations consultant with the Manitoba School Boards Association ("MSBA"), advised that the ***PSSA*** would impede bargaining because of the need for compliance. In the event an agreement was achieved which reflected higher monetary increases or enhanced benefits, any excess would constitute a debt due from the employees. The parties exchanged proposals on June 28, 2017, with UFCW 832 putting a number of monetary improvements on the table. The FLBSD offered monetary amounts in accord with the ***PSSA*** and, consequently, no further bargaining has transpired. Again, the membership was described by Kraychuk as angry, as wages were their top priority. There had been certain agreements already achieved, such as educational assistants no longer being required to eat their lunch before 11:00 a.m. or after 1:00 p.m. However, as indicated, collective bargaining was adjourned in the fall of 2017 without further sessions being held. UFCW 832 has reached out on two occasions and inquired as to whether the wage offer could in any way be altered, albeit such requests have gone without a response.

The FLBSD has not received a mandate or been directed by the PSCC with respect to its position at the bargaining table.

Brandon University Faculty Association ("BUFA")

[112] Jon-Tomas Godin (affidavit October 17, 2019, and trial testimony) was the chief negotiator for BUFA. BU, a self-governing body, is 80.0–85.0 per cent funded by the Province. BU has, in the past, expended monies from all sources as it deemed appropriate. The collective agreement in existence was April 1, 2015–March 31, 2019. The wage increases from 2015 to 2017 were 2.0 per cent, with 2.5 per cent in place for 2018. Godin estimated that adherence to the ***PSSA*** would result in an estimated 10.0 per cent employee salary reduction because of inflationary increases over the four year term of a new collective agreement. Recruitment and retention would also be affected.

[113] BUFA proposed a five-year agreement, which would permit collective bargaining and a significant monetary increase in year five. Having the fifth year would facilitate time to plan for increased remuneration. BUFA asked if BU was willing to accept such a proposal on January 9, 2019. On January 30, 2019, BU responded that an appropriate collective agreement would be representative of four years as stipulated in the ***PSSA***, or a five-year collective agreement with language to allow the parties to meet four years later to bargain wages and other remuneration. The fifth year, in essence, would constitute a new round of negotiations with no guarantee of any wage recapture or increase.

[114] A tentative deal was reached September 4, 2019, with both BU and BUFA acknowledging the detrimental effect of the ***PSSA*** on bargaining. This acknowledgement was stipulated in a Memorandum of Understanding (Godin affidavit, p. 10).

[115] The ratification ballot, under duress, included a phrase that the agreement was not freely collectively bargained, with acceptance being conditional on the legal validity of the ***PSSA***. Godin acknowledged that a number of changes in the articles of the collective agreement had been achieved, which were reflective of employer acceptance of certain BUFA benefit proposals for its members, such as: 10 paid sick days could be used as family leave, an increase in research days for professional staff from five to 10, and the establishment of working groups to explore certain issues. There was additional money made available for research, four new positions were created, and a re-opener clause was agreed if the ***PSSA*** was found to be unconstitutional.

Manitoba Teachers' Society ("MTS")

[116] Norman Gould (affidavits February 13, 2018, and March 12, 2018) was MTS president and provided affidavit evidence at trial. There are 38 local teachers' associations in the Province, with each bargaining separately. All have distinct collective agreements, which expired on June 30, 2018. Teachers cannot strike because of prohibitive legislation, but can access binding arbitration. On February 8, 2018, Government issued a news release and the Education Minister held a news conference announcing a plan to legislate a central bargaining structure, which would eradicate the 38 local associations. This process would streamline the procedure towards the creation of one central bargaining table. MTS was not advised of this plan until one hour before the news conference. A bill has not as yet been introduced with respect to a central bargaining structure. At the news conference in question, the Minister spoke as if wages had already been frozen by virtue of the ***PSSA***. The freeze would stabilize the single biggest education cost.

[117] Thomas Paci ("Paci"), also on behalf of MTS, provided trial evidence. Bargaining staff were assigned to each of the 38 Local teacher associations (approximately 15,000 individuals represented). Both Local and general proposals were determined by membership and all locals bargained separately with their respective School Divisions. However, it has generally been the case that all agreements are patterned after the successful bargaining of the first collective agreement. Prior to 2017, no Government mandate had ever been provided as to wages and it occupied no role at the bargaining table. School Divisions are funded by the Province and by a local levy, with each Division setting its own budget. In those circumstances where a collective bargaining impasse occurs, the matter proceeds to binding interest-based

arbitration. Paci indicated that interest-based arbitration is a costly process, and has only been used 10 times since 2000. During that same period, 300 agreements have been settled by collective bargaining – usually after 10–12 sessions. From 2014–2018, all collective agreements had been resolved without arbitration.

[118] As indicated, all collective agreements expired June 30, 2018, with the ***PSSA*** creating uncertainty and with Government at the bargaining table for the first time. MSBA's position was that it would be unwise to bargain because the ***PSSA*** could be proclaimed at any time with its retroactive effect, as well as a need to await the results of a civic election. MTS was of the view that the ***PSSA*** was not law and violated the ***Charter***. Further, Government was said to be interfering with the collective bargaining process and the good relationship between MTS and MSBA. There was a perceived need by MTS to protect the purchasing power of its membership as a freeze would result in a wage reduction because of inflationary factors.

[119] As a result of the impasse, arbitration dates were set for the Louis Riel School Division (November 25–December 6, 2019) and Pembina Trails School Division (April 3–May 4, 2020). The costs of such processes are estimated to be 100 thousand dollars for each arbitration. It was MTS's position that Government intervention created a situation that placed MSBA under an obligation to abide by the ***PSSA*** wage restraints. While MTS was prepared to collectively bargain, on some level, it was not prepared to do so as regards acceptance of imposed and predetermined wages. That being said, MSBA had not extended an offer to MTS with respect to this matter.

Other Unions

[120] There were many other unions impacted by the introduction of the ***PSSA***, which have not been documented within these reasons for decision. There are also those who have not begun the bargaining process, there are many who have not settled on a collective agreement, and there are those that have capitulated to the ***PSSA*** mandate under the auspices of a conditional ballot agreed to under duress.

[121] The Professional Association of Residents and Interns of Manitoba ("PARIM") is recognized as the exclusive bargaining agent for approximately 600 medical residents employed by the WRHA at various sites (by Shared Health Inc. as of July 1, 2019). PARIM had a collective agreement with the WRHA for the term of July 1, 2014–June 30, 2018. The September 5, 2018, bargaining mandate from PSCC for the next collective agreement was in keeping with ***PSSA*** figures. Consequently, PARIM referred all outstanding collective bargaining issues to interest arbitration. The arbitration hearing dates occurred in June 2019 with the employer putting forth a proposed four-year collective agreement containing the ***PSSA*** percentage increases, along with no raising of other monetary benefits. PARIM put forth a three-year collective agreement with wage increases above the ***PSSA*** limits. This proposal reflected parity with other medical residents across the country. Those increases were:

- July 1, 2018 - 1.5 per cent (plus a 1.27 per cent market adjustment for a particular classification known as PGY-1);
- July 1, 2019 – 1.25 per cent; and
- July 1, 2020 – 1.50 per cent.

PARIM was also seeking other monetary benefits. The Arbitration Board issued its award on September 6, 2019, in accord with the wage increases sought by PARIM, which exceeded what would be allowed under the ***PSSA***. Additionally, the Board ordered other monetary benefits, along with retroactivity. (Binder 15, Tab 79)

[122] Doctors Manitoba concluded an agreement with Government on July 15, 2019, that does not accord with the provisions of the ***PSSA***. That agreement was for four years. Additional investments provided by Government resulted in increased compensation for certain eligible members that went beyond the ***PSSA*** mandate. However, those areas of heightened compensation were expected to be wholly offset by reduced costs in six identified and specific areas. This was argued by Government to be precedential for the principle of negotiated sustainability savings. There was no specific costing or allocation of the cost savings, nor was

the additional investment contingent upon the cost savings being realized. It is inconsequential to funds flowing that actual savings transpire. This is a very different scenario from what has been enacted for the public service. The provisions applicable to it stipulate that potential savings must be identified and agreed upon with only a portion allocated for increased employee compensation – all subject to Treasury Board approval.

[123] The Doctors Manitoba agreement falls under a different part of the ***PSSA*** (Part 3) which deals with professional entities. There are no negotiated sustainability savings provisions. Further, the 2015–2019 agreement also endeavoured to find savings over the term of the agreement (50 million dollars). (Binder 4, Tabs 156 and 157)

[124] I have concluded that the reliance by Government on this agreement as an example of negotiated sustainability savings is, at best, superficial.

[125] As indicated, there have been a number of agreements ratified since March 2017 that are not reflective of the provisions of the ***PSSA***, including:

1. MGEU / Westman Laboratories; Direct Support Workers, Southern Health – EMS Superintendent; MSP; St. Amant Centre, Victoria Hospital and St. Boniface Hospital trades;
2. CUPE / Rehabilitation Centre for Children;
3. IATSE / Centennial Concert Hall;
4. LALA / Legal Aid Lawyers' Association;
5. Doctors Manitoba;
6. IVOE / WRHA operating engineers – eight collective agreements through one Memorandum of Settlement.

Many of those agreements are expected to be impacted by the ***PSSA*** at the time of negotiation of their next collective agreement. Further, many were put forth as an attempt to align wages between groups who perform similar workplace functions.

EXPERT EVIDENCE IN THE AREA OF LABOUR RELATIONS

Plaintiffs' Expert - Dr. Robert Hebdon

[126] Dr. Robert Hebdon prepared, on behalf of the Plaintiffs, two reports with respect to this matter dated September 19, 2017 and July 16, 2019. He is currently a professor with McGill University's Faculty of Management. Dr. Hebdon has extensive experience in teaching, publications, workplace conflict, dispute resolution and privatization. He has also served as an arbitrator and participated at the bargaining table.

[127] Dr. Hebdon discussed, in his trial evidence and within his reports, the processes and practices of collective bargaining. The rights to strike and to seek arbitration were said to serve as appropriate dispute settlement mechanisms to resolve stalemates that occur during the course of negotiations. These mechanisms operate to create pressure on the other party. "The threat of the strike in Canada results in freely negotiated settlements in more than 95% of all negotiations in both the public and private sectors" (p. 2, September 19, 2017 report). He testified that there are many different negotiation strategies, but of importance is the trust relationship between the parties involved. A positive relationship results in the effective implementation of a collective agreement, as it produces better outcomes and productivity.

[128] Dr. Hebdon described the distinct stages in collective bargaining (pp. 4-7, September 19, 2017 report). After the parties secure input from their respective constituents, proposals are exchanged. The practice is then to deal with non-monetary issues in order to produce positive momentum and, strategically, as there may be important non-monetary issues which can be bargained before and during a consideration of monetary issues. There is a constant reassessing and re-evaluation of the parties' positions - items to be negotiated are dropped, solidified, or a consensus reached. However, Dr. Hebdon indicated that (at p. 5, September 19, 2017 report):

> If wages and benefits are resolved, the parties are likely to encounter difficulties in generating support for any noneconomic issues. To put it simply, neither side will want to lock out or strike over issues of lesser importance. In addition, with

> monetary issues settled the union will have suffered a significant loss in bargaining power.

Wages are usually the top union priority as the membership endeavours to maintain pace with the cost of living or secure gains to achieve equity with like entities. Indeed, Dr. Hebdon indicated that money is the top priority in 77.0 per cent of strike actions.

[129] A freely negotiated collective agreement was opined to be the optimal achievement, as it creates an ownership interest for all involved. The imposition of a settlement, such as with wage restraint legislation, causes a negative impact on the parties' relationships and may "chill" the process on a go-forward basis. The union will be seen by its membership to have lost power, accompanied by an expectation of future freezes. Dr. Hebdon said that research has demonstrated that the imposition of legislative wage restraint creates the probability of an impasse transpiring in subsequent rounds of bargaining: (pp. 8-9 of his September 2017 report):

> Government intervention not only discourages free collective bargaining in a tough climate of restructuring and economic pressures but, understandably, it creates a cynicism on the part of unions and employees toward the institution of collective bargaining.

There is evidence in this case of cynicism, distrust and frustration on the part of the unions and their memberships, as illustrated in the evidence of Sheila Gordon and by others who have testified or provided affidavits. The anger displayed by union membership as a consequence of the UMFA negotiations was well described by Hudson and Flemming.

[130] Dr. Hebdon summarized that wage control legislation has the following general effects (at p. 10, September 2017 report):

> *1/ A reduced probability of freely negotiated settlements in future rounds of bargaining after a government intervention occurs because expectations of a further intervention chills the bargaining process. This is especially problematic in a climate of public sector restructuring where tough decisions must be made between labour and management.*
>
> *2/ Government intervention is likely to cause a cynicism on the part of unions and their members about the institution of collective bargaining. There is also a significant probability that this distrust will manifest itself in the rejection by the union's membership of recommended settlements by the union's leadership and other forms of internal union conflict.*
>
> *3/ Evidence shows that intervention by governments reduces wage settlements compared to those without such interventions.*
>
> [Italics in original]

[131] Dr. Hebdon concluded that the ***PSSA*** excludes collective bargaining with respect to wages and other monetary benefits for a four year period. Consequently, based on his experience and research, he opined that meaningful collective bargaining was untenable. This is based upon the fact that (at p. 11, September 2017 report):

> ... monetary issues are pivotal to the exercise of bargaining power of both labour and management. The parties know that when monetary issues are settled it is almost impossible to generate pressure on any other issues because they are central to the negotiations. Thus, by predetermining pay rate increases in favour of management the union is left with almost no ability to exercise bargaining power on non-monetary issues.

[132] It was further explained by Dr. Hebdon that the union/membership relationship will be damaged, as their priorities can no longer be reflected in an agreement. As was determined from the trial evidence, frustration and cynicism has taken root in the Manitoba public sector over the Government's wage restraint stance. In 2010, the MGEU bargained two consecutive years of zero per cent wage increases in return for job security provisions in the GEMA. Many other public sector unions collectively bargained agreements that also reflected similar wage freezes. Such wage freezes were freely bargained and, ultimately, accepted. There will always be compromises during the course of collective bargaining, as evidenced by zero per cent wage increases for job security provisions. Dr. Hebdon opined that no pressure or leverage is created when monetary issues cannot be traded off for other benefits, such as job security (at p. 10):

> There is no compelling reason why any Manitoba employer would agree to enhanced job security when wages have been previously imposed by fiat and other monetary issues are subject to the ***PSSA*** sustainability saving process. Employers are under no pressure to negotiate on the topic of job security.

[133] Under the ***PSSA***, Dr. Hebdon opined that strikes will, in all likelihood, be "futile", as union leverage has been eliminated through the imposition of wage and monetary benefit restrictions. It is expected that union membership's frustrations will grow over the four years. This sense of frustration will be directed at Government, management, and at the union's representatives. The union was described as having virtually no leverage to obtain gains on any non-monetary issues. Dr. Hebdon indicated (at p. 15, September 2017 report):

> While not legally preventing strikes, the ***PSSA*** renders them futile since monetary issues have been predetermined. There is evidence from the literature on industrial conflict that when restrictions are placed on strikes then conflict may be redirected away from strikes to such other expressions as grievances, health and safety complaints, and job actions (e.g., overtime bans, work-to-rule campaigns, slowdowns).

[134] Dr. Hebdon determined that Government had available options other than legislative wage restraint. Those options included hard bargaining, which involves the employer delivering a tough message about the necessity of restraint. During these bargaining sessions, unions are advised that excessive monetary packages will result in job losses through layoffs or contracting out. In such circumstances, a union will generally leverage lower wage increases for other benefits, such as job security. Another option would have been cooperative bargaining, which begins with management delivering a tough message with respect to finances. In those circumstances, the union will ask management to open its financial books for consideration. The parties then proceed in a cooperative manner to achieve solutions, often through cost-cutting. Both of these approaches preserve the concept of collective bargaining. Other ways that have been identified to cut costs include "Rae Days" or "Filmon Fridays".

[135] Dr. Hebdon acknowledged that some collective bargaining can continue under the ***PSSA*** with respect to non-monetary issues. He was in agreement with the suggestion, under cross-examination, that non-monetary issues can be important and, at times, more so than money. However, it was his view that meaningful collective bargaining under the ***PSSA*** scenario was unworkable. He opined that it was rare to get trade-offs on non-monetary issues without the leverage afforded by monetary bargaining. Dr. Hebdon acknowledged that the GOLICO agreement resulted in certain non-monetary improvements, as did the agreements negotiated by UMFA, BUFA, RRC and ACC. However, those gains were characterized as being minimal in nature and even embarrassing, such as shown with GOLICO. Dr. Hebdon agreed that there will be collective agreements reached, however, the most effective bargaining power transpires when monetary matters are on the table. The ***PSSA*** was described as unfairly tilting the

collective bargaining balance towards management. Further, it could well take a long time to repair and heal the many damaged relationships.

[136] Dr. Hebdon addressed s. 13 of the ***PSSA***, which allows for the possibility of negotiating additional remuneration in years three and four of the sustainability period. Treasury Board approval is required, but not guaranteed, for any increases in remuneration. Section 14 sets out that such increases may be funded from a portion of any negotiated sustainability savings. These are defined as an ongoing reduction of expenditures as a result of measures agreed to reduce or avoid costs found in a collective agreement. Dr. Hebdon was of the view that such sustainability savings were unlikely to result in any increased remuneration in years three and four of the ***PSSA***. In part, this was as a result of these negotiated sustainability savings being permitted or disallowed in the sole discretion of the Treasury Board. Further, no incentive is created to negotiate such savings in order to preserve services with no protection from layoffs and other issues that include the membership being entitled to only a portion of any savings secured.

[137] In Dr. Hebdon's report of July 16, 2017, he replied to certain aspects of the Defendant's expert - Dr. Richard Chaykowski's report. He addressed the issue of management rights in the context of negotiated sustainability savings. Management retains all rights and privileges unless those rights are restricted by a collective agreement or by legislation. Consequently, there are many areas that an employer can address towards achieving sustainability savings without union approval. An example might be savings achieved by cutting the number of nurses on a shift. This is a management right and no union approval or acceptance is needed. It was considered to be unlikely that any savings not in an agreement would be shared with employees. As previously indicated, negotiated sustainability savings for years three and four must come from within a collective agreement. Further, pursuant to s. 14 of the ***PSSA***, any cost reduction must be ongoing, which would rule out one-time actions, such as days without pay. There must be an actual reduction in expenditures and, accordingly, a "cost" must be attached to any such item. Additionally, any change to existing articles in a collective agreement would require the consensus of the parties. Importantly, union memberships are only entitled to apply for a portion of any identified and negotiated savings to increase their compensation in the last two years of the four year sustainability period. It is up to Treasury Board to approve both the savings and the proportion of remuneration that might be attributed to membership. Dr. Hebdon's view was that management will not give up rights not contained within an agreement and then share savings with union membership. Additionally, it would not be realistic for the unions to "share" benefits which are likely to accrue to their detriment.

[138] There are potential savings areas, such as the standardization of over-time at a time and a half remuneration, rather than double time. However, from the union's perspective, this would mandate forfeiting funds to the employer as the cost savings would be apportioned to membership by Treasury Board. The query posed by Dr. Hebdon was why would union membership negotiate sustainability savings only to share those with management? This would result in a management gain. The sustainability savings concept in years three and four was opined by Dr. Hebdon to result in a disincentive. It also asks the union for agreement in advance without knowing what percentage the Treasury Board might apportion, if any (a conditional acceptance could be proposed by the union as a protection against an unsatisfactory apportionment by Treasury Board). In such circumstances, management would be required to give up nothing for a gain while the union would be undertaking a concession. Dr. Hebdon was of the view, additionally, that the savings exercise was "... fraught with practical hurdles about costing. The devil is in the details" (p. 8, July 16, 2017 report).

[139] Dr. Hebdon provided an example of his perceived concerns as follows (at pp. 8-9):

> Under the ***PSSA***, wages have been fixed at zero for two years. It is important to note that with an annual inflation rate around two percent, public employees in Manitoba are already suffering a cut in real wages[1]. In Principle #4, the Government has now also tabled a set of topics, each of which proposes a further cut in an existing benefit or working condition from the current collective agreement.

> The trade-off that unions must make in order to increase their third or fourth-year wage increase is biased against them. For example, assume that the cost of the concession (such as losing double time) was agreed to be .5% of payroll and the portion approved by Treasury Board to be 50% union, 50% management. Then the union might add .25% to their third-year wage increase (i.e., from .75% to 1%). In this example, management gets a net gain of .25% of payroll (.5% benefit - .25% cost) and the union suffers a net loss of .25% of payroll (.5% cost - .25% benefit). Thus, management can achieve a rollback in the union contract without paying the full value for it. This process has been labelled negotiations under the ***PSSA***, but it really isn't because the context of cost restraint has been legislated not negotiated. The union has little bargaining leverage because wages have already been unilaterally determined by Government.

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[1] According to Statistics Canada, "the Consumer Price Index (CPI) rose 2.4% on a year-over-year basis in May, up from a 2.0% increase in April". https://www150.statcan.gc/n1/daily-quotidien/190619/dq190619a-eng.htm

[140] Dr. Hebdon stated (at p. 11):

> When union members must endure 'pain' during tough times, unions will often try to find ways to accomplish restraint in an equal and fair manner. For example, to enhance the job security of all employees. To the extent possible, union members should bear an equal burden of 'pain'. The principles of fairness and equity dictate that the sacrifice should not be borne by a few. However, the Government proposes to reduce compensation for select groups or classification of employees.

According to Dr. Hebdon, there is no reason why the union membership would table their own proposals in order to engage in concession bargaining without bargaining power.

Defendant's Expert - Dr. Richard Chaykowski

[141] Dr. Richard Chaykowski, of Queen's University, prepared, on behalf of the Government, a report entitled, *The Role of the PSSA in Relation to the Process and Outcomes of Collective Bargaining in the Manitoba Public Sector*, dated October 11, 2019. Dr. Chaykowski's expertise is in the field of industrial relations with public policy teaching experience. He described himself as a social researcher. Dr. Chaykowski identified no practical experience at the collective bargaining table. The principal focus of his evidence related to the ability of the Manitoba Government to sustain public service levels while facing economic constraints, particularly where labour costs continually rise.

[142] Dr. Chaykowski acknowledged that the ability to strike imposed a cost on an employer through leverage and, ultimately, through trade-offs. During the collective bargaining process, each side will develop goals and objectives. The outcome of collective bargaining is determined by the relative bargaining power of each party and is often dependent on whether the economy is robust or in recession. Additionally, restraining costs will result in a need to address recruitment and retention issues.

[143] Dr. Chaykowski disagreed with Dr. Hebdon with respect to whether monetary issues always constituted the most significant bargaining power factor. He opined that each bargaining session is dependant upon the goals and objectives of the union and often job security is of higher priority than wages or benefits. Collective bargaining over a wide range of non-monetary issues could transpire under the ***PSSA***, such as hours of work, safe staffing, stress, shortages, etc. Dr. Chaykowski indicated that a strike over non-monetary issues would not be futile, as any strike action will impose a cost on the employer. Those costs may often be political, but constitute leverage. While Dr. Chaykowski was in agreement that wages are often the most important issue, he determined non-monetary topics could also be significant,

resulting in trade-offs to maximize the well-being of the union membership. Mutual gains may be achieved for both sides dealing only with non-monetary issues.

[144] Dr. Chaykowski opined that Dr. Hebdon had mistakenly conflated the scope of the trade-offs with the extent of bargaining power. In his view, even with compensation restraints, collective bargaining could still transpire, as well as strike action. The objective of the ***PSSA*** was said to facilitate Government's ability to meet the goal of enhancing fiscal sustainability with a four-year limit. It does not constitute a permanent restraint. Further, negotiated sustainability savings could be achieved and shared in years three and four of an agreement creating a "soft cap" situation. Additionally, there are always other remuneration enhancements, such as promotions, reclassifications and "steps" within an employee's salary structure.

[145] In Dr. Chaykowski's view, there were many areas to be considered for negotiated sustainability savings in years three and four which would improve employment flexibility and productivity, including scheduling and cross-training. These areas could result in employee engagement and motivation to work together with the employer to ensure and maintain productivity. Further, negotiations could result in expenditure reductions. There were mutual gains to be made and agreements on approach. In his view, the need for Treasury Board approval should not have an adverse effect.

[146] The average Canadian wage increase in the first year of collective agreements between 2007 and 2016 was 4.4 per cent. Over that entire period, increases ranged at 1.14–4.4 per cent. In Manitoba, a 1.75 per cent increase over a four-year period, as mandated by the ***PSSA***, would be within that range and, accordingly, should not be considered as a drastic wage restraint measure.

[147] Dr. Hebdon's opinion was submitted by Dr. Chaykowski to be misplaced with respect to the impact of legislation on future good faith bargaining. There was no reason to expect a chilling as regards future negotiations. It was argued that such a concept only occurs when government imposes a collective agreement, thereby constituting a major intervention in the employer/employee landscape. In Manitoba, a soft cap was imposed and, accordingly, was not a major intervention — such as had occurred with the federal ***Expenditure Restraint Act***, S.C. 2009, c. 2 ("***ERA***"). The ***ERA*** set an absolute hard cap for a five-year period and overrode and rolled back collective agreements and arbitration awards. Dr. Chaykowski's report articulated that a number of negotiations were successfully concluded between affected parties after the ***ERA's*** effect had terminated and collective bargaining proceeded forward. In his opinion, the ***PSSA*** poses as significantly less interventionist than the ***ERA,*** because of the soft cap and the ability to undertake strike action.

[148] Dr. Chaykowski also addressed that relationships between unions and their membership would not be irreparably harmed, as was suggested by Dr. Hebdon. There was said to be no research to illustrate such a finding. Further, the ***PSSA*** has set a soft cap that does not intervene in the collective bargaining process by virtue of imposing a settlement. Additionally, an avenue exists to secure increased compensation in years three and four. Dr. Chaykowski opined that there are always constraints in collective bargaining; however, the ***PSSA*** does not hinder negotiations, trade-offs or limit bargaining power. The capacity to strike or lockout remains available, and non-monetary matters, such as job security, are open for discussion. The strike tool could be utilized if the non-monetary issue was of significant importance. In his view, all sources of power and leverage for collective bargaining have remained intact.

[149] Dr. Chaykowski was significantly challenged, during cross-examination, on his findings through recourse to opinions he had previously rendered in his own writings and tribunal findings. In the decision of ***Labourers' International Union of North America,***[2] the Ontario Labour Relations Board determined that (at para. 51):

> In response Local 1081 filed a response by Professor Richard P. Chaykowski, of Queen's University. His report seeks to discredit and undermine the assumptions and data of the O'Grady Report, but fails to come to grips with the primary assumptions

> contained in the report. It also includes a great deal of legal and policy analysis that was not part of the O'Grady Report and is more appropriate as counsel's submissions on behalf of his client rather than an expert (and theoretically independent) opinion.

The Board found Dr. Chaykowski's report to have been of little assistance (paras. 72 and 75).

[150] The ***Ontario Nurses' Assn.***[3] case also considered a report prepared by Dr. Chaykowski and determined both his report and his testimony exhibited (at para. 79):

> ... significant weaknesses in the extent of his review of interest arbitration awards, and his understanding of the principles (replication and comparability in particular) on which they were premised was revealed. We do not therefore accept his conclusions on this point. More importantly, we do not see how those conclusions are at all pertinent to the task before us.

[151] Dr. Chaykowski acknowledged that collectively bargained settlements were preferable to those imposed by legislation. In a published article, he concluded that employees have been subject to periodic wage restraint legislation and "... meaningful bargaining has, in effect, been suspended" (*Prospects for the National Joint Council in the Renewal of Labour-Management Relations in the Canadian Federal Public Service,* 9 Canadian Lab. & Emp. L.J. 387 (2002), p. 388 (HeinOnline)). This conclusion was said to be isolated to the Ontario situation and that province's pattern of interventionist restraint legislation. Dr. Chaykowski continued to suggest that the ***PSSA*** does not infringe on the collective bargaining process and only sets monetary limits. All other options were opined to be available for bargaining purposes. The Ontario and Manitoba environments were described as being very different.

[152] Dr. Chaykowski agreed, under cross-examination, that union-management relationships were important. A contentious relationship could be a major determinant on the level of outcomes and conflicts that exist during the bargaining process. The relationship pattern was opined to be determined by previous experiences and by the personnel involved. Further, such relationships could affect productivity during the course of a collective agreement. Indeed, strikes could arise out of a poor relationship. While a collective agreement is the formal outcome of the bargaining process, Dr. Chaykowski acknowledged that there are many informal outcomes, such as the tone of the union-management relationship.[4] Indeed, Dr. Chaykowski opined in a chapter he authored at p. 276 of *Canadian Labour and Employment Relations*:[5]

> Governments have also recognized that two of the primary "costs" associated with ineffective and conflictual negotiations include the possible damage to the union-management relationship itself and the potential costs associated with a work stoppage due to a strike or lockout. In the case of soured union-management relations, the effects may show up during the term of the collective agreement through lower trust and morale, an unwillingness to work together, or a reluctance to facilitate workplace change and innovation – each of which could have negative consequences for productivity.

Such areas were not mentioned in Dr. Chaykowski's report on the ***PSSA***. He acknowledged that he had not read the affidavits filed in this matter, which demonstrated and outlined the difficulties that "bargaining" under the shadow of the ***PSSA*** have engendered with unions, their memberships, and employers.

[153] Dr. Chaykowski authored *Building More Effective Labour-Management Relationships*,[6] and, in particular, a chapter entitled "Systemic Pressures on Ontario Public Sector Industrial Relations". At pp. 49-50, he stated:

> The emerging context for the industrial relations system in the Ontario public sector is especially challenging. There are several sets of immediate pressures on the system. The first set includes economic and demographic pressures. The projected low growth rates in the Ontario economy, the slowing growth in the labour force, and

> the increased elderly dependency ratio, together with the high government deficit and large accumulated debt, place enormous pressure on the government to reduce labour costs. Attempts to restructure delivery in the broader public sector may yield some of the efficiencies required to reduce the rate of expenditure growth, but the magnitude of labour costs as a proportion of program spending makes compensation restraint an obvious target for government restraint.
>
> The difficulty associated with achieving large concessions through collective bargaining creates strong incentives for the government to alter the playing field by introducing restraint legislation. This option has been exercised over the long term at the federal level, and ad hoc restraint legislation continues to be an option that the federal government exercises in labour relations. The Ontario government now also has an established track record of resorting to restraint legislation. This pathway impacts the broader industrial relations system and creates pressures on the labour-management relationship.
>
> Resort to restraint legislation erodes the model of free collective bargaining. While there are already considerable limits on collective bargaining in the public sector, the limits have been well-defined and generally accepted by unions and the government as within the bounds of acceptability (e.g., with respect to essential services). Restraint legislation that imposes outcomes or limits strikes, however, undermines a labour relations model that embraces the principle that negotiated contracts are superior. Restraint legislation therefore serves to weaken the shared ideology that binds the broader industrial relations system by tending to politicize industrial relations – precisely because the government of the day utilizes substantial ad hoc legislation to pursue point-in-time policies irrespective of the established framework within which the parties have agreed to conduct labour relations.
>
> At the level of individual labour-management relationships, restraint legislation also frustrates the fundamental interests of labour and management to self-determine the terms and conditions of their individual employment relationship and to negotiate a "reset" on issues that have built up into problems during the term of the contract. The current model of industrial relations envisages issues that arise during the term of a collective agreement as being resolved through rights arbitration, or carried over into the subsequent round of collective bargaining. Restraint legislation tends to frustrate this process and undermine the agreement to trade off the right to engage in industrial action over major issues during the term of a contract for rights arbitration and the right to strike during the next round of collective bargaining. The imposition of contract terms therefore also undercuts attempts to build more positive, cooperative labour-management relations.

Dr. Chaykowski, when questioned with respect to his comments on the effect of wage restraint legislation on collective bargaining, opined that it was unrelated to the Manitoba situation and was, again, applicable only to Ontario. The fact that wage restraint legislation had previously been enacted in Manitoba was considered not to be indicative of a frequent resort to such a measure. Further, the ***PSSA*** was not regarded as being particularly intrusive because of a soft cap with possible initiatives for negotiated increased compensation in years three and four. Additionally, collective agreements have been achieved since the introduction of the ***PSSA***. That being said, Dr. Chaykowski acknowledged that no sustainability savings for years three and four have as yet been negotiated. In the event no such savings are achieved, in his view, that aspect of the legislation would be considered as "flawed", and the percentage increases in the ***PSSA*** would constitute a hard cap.

[154] In an article written by Dr. Chaykowski entitled "From Non-Union Consultation to Bargaining in the Canadian Federal Public Service" found in *Voice and Involvement at Work: Experience with Non-Union Representation*,[7] he indicated:

> During the period since unionization and collective bargaining was introduced in 1967, successive governments continued to engage in tactics such as wage freezes, back-to-work orders, or suspension of interest arbitration, which have been characterized as "government unilateralism" and which in any event have served, by definition, to circumvent and weaken the collective bargaining process and framework.

Such a process has, according to Dr. Chaykowski's article, served to limit the efficacy of the collective bargaining system (p. 278). Again, he indicated that this was written with respect to federal legislation and was inapplicable in Manitoba, as no successive interventions have transpired.

[155] Dr. Chaykowski opined that the ***PSSA*** does not hinder collective bargaining. His references and opinions were directed at the legislation itself. The power to collectively bargain exists, and there are trade offs to be made. There was said to be no research indicative of the position that the legislation will affect relative bargaining power itself. He acknowledged that the economy, the characteristics of the employer and the union, and the public and political environments pose as significant factors in the determination of bargaining power. Further, the outcome of negotiations is often determined by relative bargaining power and what can be achieved. In this case, the ***PSSA*** does not entirely limit behaviour, as there can be collective bargaining on matters other than wages. As indicated in the article contained in "Building More Effective Labour-Management Relationships", at p. 50:

> The difficulty associated with achieving large concessions through collective bargaining creates strong incentives for the government to alter the playing field by introducing restraint legislation.

Again, Dr. Chaykowski denied that such pressure was created on labour-management relations in Manitoba, as other matters could be collectively bargained (Appendix 6). In terms of negotiated sustainability savings, it was considered to be mutually advantageous to cooperate and determine if a benefit could be secured.

SECTION ONE ISSUE

Testimony – Richard Groen

[156] Assistant Deputy Minister, Fiscal Management – Treasury Board Secretariat, Richard Groen ("Groen"), testified as a defence witness in this matter. He testified that a change of Government transpired as a consequence of the April 2016 election. The new Government was sworn in on May 3, 2016, and delivered a budget on May 31, 2016. Groen's functions, and that of his department, includes supplying information to Government, such as economic updates, impacts going forward, and progress in reducing the deficit. At the time of the Budget Speech, provincial spending was projected to exceed revenue by over one billion dollars. That figure would have represented the largest deficit in Manitoba history. Those estimates were based on what had transpired in the prior year, as well as economic projections. However, the Annual Report of 2015/16, as reviewed by the Auditor General of Manitoba ("AGM"), revealed that the actual deficit was 846 million dollars. This represented approximately 15.0 per cent less debt than the actual estimation.

[157] Groen advised that budgeted expenditures had been exceeded every year through the eight-year tenure of the New Democratic Party's governments, and provincial debt doubled from 10 billion dollars to 21 billion dollars. The approach of the new Government was to bring the deficit down to a balanced position, as well as other policy objectives and initiatives. Additionally, the Financial Stabilization Account ("Rainy Day Fund") stood at its lowest point in 14 years, being 115 million dollars. Groen also acknowledged that there were increasing

demands for more programming and spending. Further, each 1.0 per cent increase in public sector wages had an estimated 100 million dollars cost.

[158] Groen testified that in 2015/16, revenue experienced average growth of 3.8 per cent, while expenses grew on average of 4.7 per cent. The Government was looking for ways to reduce spending, including the cancellation of certain capital projects. The payroll and benefits costs for the public sector stood at 9.6 billion dollars, representing 55.2 per cent of the budget. Groen indicated that even with a zero per cent wage increase, compensation costs would increase each year because of merit steps or promotions at an average rate of 2.0 per cent – a 200 million dollar adjustment.

[159] It was the Government's desire to move towards a balanced budget with the gap between Gross Domestic Product ("GDP") and debt narrowing over an eight year period. Groen acknowledged that lowering the provincial sales tax ("PST") from 8.0 per cent to 7.0 per cent represented a loss of revenue in the amount of 395.4 million dollars; however, that action was anticipated to create revenue in excess of 97 million dollars and to stimulate economic growth. Further, there were unexpected "headwinds" costs that needed to be addressed, such as FleetNet and funds to preserve the Legislative Building structure.

[160] Under cross-examination, Groen acknowledged that his was an advisory role to assist Government in making decisions on the correct fiscal course to follow. The purpose of the Finance branch is to provide information and advice. The Government has self-created priorities. He acknowledged that advice was not always asked for by Government, nor was it always taken when given. The role of his department in budgets was comprised of fact checking. Further, Groen testified that there is a range with respect to budgets - bullish or bearish. The 2019 budget illustrated that range through the illustration that, by 2022, the Province could have a surplus of 202 million dollars or a deficit of 208 million dollars (Binder 3, Tab 115, p. 49). It is the purpose of the Treasury Board Secretariat to verify the range, not the actual dollar figures or the best course to follow.

[161] Groen acknowledged that it was not uncommon for a new government to say the financial books inherited from the prior administration were worse than had been anticipated. Indeed, budget documents generally were said to have political statements and be critical of prior regimes. Budgets are often utilized as a platform to point out what a government thinks it has done successfully.

[162] Groen acknowledged that the recurring theme in recent budgets has exemplified deficit reduction and the move to a balanced budget within eight years. Other priorities have included lowering taxes and, in particular, the altered indexing of personal tax brackets. Such tax initiatives represent a loss of revenue for Government; however, they are expected to have a positive influence on the strength of the economy. Groen recognized that Manitoba has a higher growth rate than certain other provinces.

[163] Groen was unaware of the 2016 PSCC mandate of a one-year wage pause. Further, he was unaware of what, if any, financial consultation had transpired before the PSCC approved the ***PSSA*** public sector compensation model. The Treasury Board Secretariat was never asked for an analysis with respect to the impact on public versus private sector growth, nor was any similar type of analysis performed. Further, no financial analysis was requested with respect to expiring public sector contracts and the impact of the ***PSSA*** through to 2023. Groen acknowledged as correct the statement in Rebeck's affidavit (para. 99) that the Finance Minister had said there were no estimates of the financial impact of public sector wage controls. The Treasury Board Secretariat never undertook an analysis of the positive or negative effects on the economy of a public sector wage freeze.

[164] Groen testified that the 2016/17 budget projections showed a deficit of 911 million dollars, while the actual deficit as determined in the Annual Report for that fiscal year was 764 million dollars (15.0 to 20.0 per cent better). A similar pattern occurred with the 2017/18 budget, which anticipated a projected deficit of 840 million dollars, while the actual deficit was 695 million dollars (15.0 to 20.0 per cent better). The 2018/19 budget deficit projection

was 521 million dollars, but instead an actual deficit of 163 million dollars (30.0 per cent of the projection) occurred.

[165] The Rainy Day Fund was acknowledged by Groen to have the purposes of stabilizing funds for core operations or be utilized to pay down the debt. The 2017/18 budget signalled that 10 million dollars would be placed into the Rainy Day Fund with an indication that 50 million dollars would be injected in each of the next two years. The purpose of these capital injections was to have a fund that represented 5.0 per cent of core provincial expenditures. In the 2018/19 year, the Government placed 407 million dollars into the Rainy Day Fund. This represented the largest ever investment in Manitoba history. Groen indicated that the ability to make such a financial transfer should be recognized as positive economic growth. The placement of that capital into the Rainy Day Fund resulted in the realization of 82.0 per cent of the 5.0 per cent target of core provincial expenditures.

[166] Groen acknowledged that reduction of personal income taxes is a continuing goal of the Government. In 2017, 21 million dollars of tax reductions was realized by Manitobans, while 28 million dollars was saved in 2018, as many payors were removed from the tax rolls or their tax burden was diminished. As previously indicated, economic growth was expected to increase because of the removal or lessening of the tax burden for some Manitobans.

[167] Groen recognized that the reduction of the PST and the income tax reductions represented the largest tax cuts in Manitoba history. Further, small business tax deductions were increased, resulting in a further loss of revenue. The lost revenue from income tax alone was estimated to be 153 million dollars. That being said, Groen testified that growth has improved and the Province's economy has strengthened. Growth was at 2.2 per cent – up from 2015, when it stood at 1.3 per cent. He acknowledged that the consumer price index also increased during these years and in 2018 and 2019 was 2.1 per cent. The annual inflation rate in Manitoba is the second highest in the country.

[168] A chart shown to Groen illustrated that from 2017 to 2019, under ***PSSA*** wage restrictions, the consumer price index was such that a Manitoba public sector wage earner would have lost 5.68 per cent in purchasing power. Groen responded that such losses might well be offset by tax relief, as 31,000 persons had been removed from the requirement of paying taxes or a lessening of their tax burden had occurred.

[169] In the 2018/19 budget, basic taxes were again reduced, along with a 325 million dollar reduction in revenue by virtue of lowering the PST. Groen acknowledged that if the 325 million dollars loss in PST revenue had not transpired, the Province would be in a surplus position. He acknowledged that the AGM has said the amount of debt Manitoba chooses to carry, and the deficit it incurs, is very much a matter of public policy – priorities and choices.

[170] Groen agreed that the November 19, 2019 Throne Speech indicated a continuation of the plan to lower personal taxes, as well as removing other revenue-creating fees. Identified as budgeted expenditures were infrastructure projects and the investment in an Idea Fund. The purpose of the Idea Fund was for departments to suggest savings that would free up resources to invest in services, if approved.

Testimony – Garry Steski

[171] Garry Steski ("Steski") is the current Assistant Deputy Minister of the Financial Treasury Division. The purpose of that Division is to manage cash inflows and outflows and to minimize the variances between those "flows". Steski's functions include borrowing funds for the Province and the management of its investment portfolio. Borrowing occurs regularly for capital expenditures and debt repayments. Over the last several years, the Province has borrowed six to seven billion dollars each year from a borrowing syndicate, which includes Canada's major banks. This is usually done in increments of 300 million dollars at 20 to 50 intervals. The present cost of borrowing is estimated to be 4.8 million dollars a year. The payments to cover borrowing costs are staggered throughout the year, dependant on the maturity dates of the bonds.

[172] Bond rating agencies such as Moody's, Standard & Poor's (S&P), and Dominion Bond Ratings Service (DBRS) determine, in large part, the credit rating of a province. The credit rating determinations are made through analysis of debt, surplus, accounts, liquidity, and other factors. Manitoba's rating was downgraded in 2016, but is rebounding. It is important to have liquidity through Crown corporations and the Rainy Day Fund in case borrowing becomes difficult, such as when borrowing costs escalate.

[173] Under cross-examination, Steski acknowledged that he makes no budgetary decisions. His concern is the provincial credit rating. He looks to the past for guidance in order to forecast the future outlook. In his view, the recurring over-statement of the deficit by Government was not a negative. He conceded that Government's decision to cut taxes, and, thereby, lower revenue was an action the bond rating agencies were unlikely to view positively. Concern has been expressed by the bond rating agencies with respect to there being no evident "hurrying" in the reduction of the deficit to zero until approximately eight years will have passed. Steski indicated that, at present, the Government is expanding funding, but not revenue. The challenge that will exist is the ability to secure revenue with the concurrent risk of not reaching targets because of recurring tax reductions. Manitoba has experienced high borrowing activity because of Hydro projects, which is now trending down. Steski testified he is not concerned with borrowing costs.

Testimony – Aurel Tess

[174] Aurel Tess ("Tess") has performed the function of the Provincial Comptroller for the last four years. He is Manitoba's Chief Financial Officer. Tess prepares financial accounts and develops centralized policies. It is his function to author provincial financial statements, which are in accord with Public Sector Accounting Standards ("PSAS"). Tess testified that there are 170 reporting entities to be reconciled and consolidated for budgetary purposes. Tess goes through the budget projections and actual deficits. All Public Accounts are finalized by September 30th of each year, with the AGM reviewing those accounts and providing an opinion (Exhibits 13–15 and 18).

[175] The AGM, over the past two years, was acknowledged by Tess to have expressed disagreement with the Province's accounting practices for two reporting entities, being the Workers Compensation Board ("WCB") and the Manitoba Agricultural Services Corporation ("MASC"). With respect to WCB, Tess testified that WCB's revenues were not included in the 2017/18 or 2018/19 financial statements. The Government position with respect to this exclusion was because it exercises no meaningful control over that entity, nor does it have access to its assets or reserves. Government does have a hand in board nomination. Accordingly, it was opined not to be appropriate to include WCB's revenues or assets in the financial statement. With respect to MASC, trust funds had been established for insurance programs for agricultural producers to assist when losses were incurred. The AGM has taken issue with the timing of when certain aspects of those funds are posted. Tess indicated that these disputes with the AGM continue and the parties are endeavouring to achieve a resolution.

[176] Tess agreed that the AGM has the statutory duty, as an independent body, to review provincial accounting policies and accounts. It is Government's goal to secure an unqualified AGM opinion each year to signify that it has met PSAS standards and produced a reliable financial statement. In those circumstances where the AGM provides a qualified opinion, caution must be exercised in relying on the Province's financial statements. It is Tess who signs the statement of responsibility for the financial statements each year (Exhibit 19).

[177] The AGM must look at the financial statements and Annual Reports to ensure compliance with PSAS. In the past, the net income of Government business enterprises was evaluated with the WCB included in the financial statements. The office of the AGM had reviewed the WCB inclusion in 1997 and considered it to be appropriate. There have been no statutory or other changes since that time, which would be indicative of a need to adopt a varied approach.

[178] The background to this dispute was set out by Tess in an April 24, 2018 letter to AGM Norm Ricard ("Ricard") (Binder 4, Tab 124). This was responded to on June 15, 2018, with Ricard indicating that (Binder 4, Tab 125):

> The WCB has been included in the GRE since the first summary financial statements in 1989. In 2005, the criteria under Public Sector Accounting Standards (PSAS) changed, and at that time, the OAG and the Department of Finance performed an analysis of all relevant entities and concluded that the WCB was controlled by the Government and should continue to be consolidated.
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> Since 2005 (13 years) there have been no changes to the control indicators in the PSAS and no significant relevant changes to the Workers Compensation Act (the Act). We are not aware of any other event that has taken place to indicate a reassessment of control is needed.

Several meetings occurred subsequent to this exchange of correspondence. However, in September 2018, the WCB was removed from the Government Reporting Entity ("GRE"), in contravention of the AGM's opinion. This removal was at the direction of Government.

[179] As a consequence of the removal of the WCB, the AGM's report (Binder 3, Tab 118) issued a qualified opinion which was described by Ricard as (at p. 1):

> Issuing a qualified audit opinion is not something I took lightly. It is the single most important communication an auditor can have with the users of financial statements. A qualification highlights where users need to be cautious when relying on the financial statements it is attached to.
>
> My staff and I care deeply about ensuring the public sector financial statements we audit comply to both the letter and the spirit of the applicable accounting standards. In so doing we believe we are having a strong impact in ensuring public sector entities provide the Legislative Assembly with meaningful, comparable, consistent and fairly presented financial statements.

Ricard proceeded in the report to outline the meaning of a qualified statement and set out the two qualifications that involved the removal of the WCB from the GRE. Additionally, with respect to MASC, it was stipulated that an unauthorized Government transfer of 265 million dollars to trust funds, not yet created, had been recorded. Accordingly, those funds were part of the GRE and should have been reflected in the Province's financial statements.

[180] Tess acknowledged that a news release was put forth as a consequence of the AGM's report on September 28, 2018, which highlighted "[t]he exclusion of entities from the government reporting entity that are still controlled by government does not provide a complete picture of the financial position and results of government" (Binder 3, Tab 119). The statement also indicated "[t]he removal of the WCB from the government reporting entity means the WCB's net revenue was not recorded in the summary financial statements, overstating the reported deficit by $82 million" (Binder 3, Tab 119). This, along with the MASC funds, resulted in an over-stated deficit of 347 million dollars. This represented half of the reported deficit for that year.

[181] In 2018/19, Tess acknowledged that Government, again, disregarded the AGM's opinion and the Annual Report excluded the WCB and MASC from the financial statement. Once more, the AGM authored a qualified audit opinion (Binder 3, Tab 120). In the event that the two entities had been included, the Province would have shown a nine million dollar surplus.

[182] Tess testified that the Government's movement of funds into the Rainy Day Fund, had no affect on the Province's financial statements. He said that such a transfer did not impact the deficit, debt or bottom line as such funds are utilized only for emergency purposes. It is a benefit to have liquid assets to respond to emergency situations.

[183] Tess, under cross-examination, acknowledged that governments make decisions in terms of budget numbers to establish a bearish to bullish range. As long as the figures were within that range, the budget would be considered by his department as reasonable. It was also accepted that the Rainy Day Fund could be evaluated as an asset and serve to reduce debt. Tess accepted that the 407 million dollars placed in the Rainy Day Fund in 2019 could have been utilized to pay down the Province's deficit situation.

Testimony of Plaintiffs' Section 1 Expert – Eugene Beaulieu

[184] Dr. Eugene Beaulieu was called on behalf of the plaintiffs to provide evidence with respect to Manitoba's fiscal position commencing in 2016. Dr. Beaulieu is a professor of economics at the University of Calgary and described himself as an empirical economist. He did not consider his expertise to be in the field of public sector accounting. Dr. Beaulieu prepared a report dated July 20, 2019, and an addendum on October 18, 2019.

[185] The Manitoba economy and fiscal position since 2016 was described by Dr. Beaulieu as strong, stable and growing. It was not in a crisis situation. The description by the Premier at the time of the 2016 budget was that Manitoba must incorporate an "all hands on deck" approach with respect to the provincial fiscal situation. Dr. Beaulieu took issue with such a position, indicating that the finances of the Province were not dire, albeit the deficit needed to be managed and addressed. Extreme measures such as the ***PSSA*** were opined to be unnecessary; a prudent, moderate approach was considered to be the more appropriate course of conduct.

[186] As suggested by Dr. Di Matteo (Section I expert witness for the defence), cutting of expenditures, increasing revenues and a combination of those measures would constitute an appropriate methodology to reduce the deficit. There was no need to incorporate such a drastic measure to bring the Province to a balanced budget ("balance") position in a timely way. There was said to be a requirement to investigate options and determine those best suited to resolve the deficit issue. In Dr. Beaulieu's view, a structural deficiency in the financial area did not exist. When compared to other provinces, the economic and fiscal position of Manitoba was considered to be comparable. Indeed, other provinces, such as Quebec, were in a surplus position by 2017 by virtue of adopting moderate budget practices, but not the utilization of restraint legislation.

[187] In Dr. Beaulieu's opinion, a wage freeze was a drastic and unnecessary measure. Manitoba was not considered a provincial outlier with respect to its fiscal behaviour, and no risk of default was evident. Between the years 2011 and 2017, all provinces increased their debt levels (report, p. 22). Manitoba was considered to be in the mid-range of the debt increases. It was thought necessary to take measured and responsible actions to eliminate the deficit. Dr. Beaulieu stated (at p. 29):

> At this point, it is worth pointing out that the Manitoba government does not face a binary choice between doing nothing and taking extreme measures to address the fiscal imbalance such as contained in *The Public Services Sustainability Act*. Another option is to make measured and responsible adjustments in provincial budgeting to reduce and eliminate the deficit.

In his view, it would be prudent to reach balance after eight years through measured adjustments to the budget. Further, Manitoba has demonstrated an increase in GDP at a rate consistent with the average rate of real economic growth forecasts for Manitoba by the five largest Canadian banks. There has been a slowing of the growth rate, albeit that decline predates the increase in the budgetary deficit and increase in debt as compared to GDP rates. The decline was not thought to be caused by budgets or debt levels.

[188] The bond ratings for the Province were also considered by Dr. Beaulieu (at p. 36):

> The bond ratings by Moody's and S&P reflect what we have already observed from examining the health of the Manitoba economy. We have seen that Manitoba has been operating with a government budget deficit since 2009 and that this has contributed to a growing provincial public debt. However, the magnitude and the relative size of

> the Manitoba deficits and debts are in line with other provinces. The bond rating services have down-graded Manitoba's rating, as would be expected but once again, Manitoba is not an outlier in this regard. All provinces have had deficits since 2009 and all have had increasing debt-GDP ratios.
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> The debts and debt-ratios are a concern but are not a crisis. This is seen in the bond ratings. The financial institutions consider Manitoba to be stable with a diverse economy with strong real GDP growth and low unemployment. The strong economic growth and the low interest rates supports the level of debt and the debt-GDP ratios.
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> However, there is a risk if Manitoba does not take measured and prudent action to reduce and eliminate the fiscal deficit. Moody's does express some concern over Manitoba's extended period of deficit budgets and credits Manitoba with strong economic fundamentals, mature institutional framework and prudent government practices. The credit rating assessments agrees with our conclusions that a prolonged period of deficit is a challenge but can be dealt with using moderate and prudent fiscal management.

The bond companies have considered Manitoba's economy to be stable, diverse and strong with a gradual move to reducing and eliminating the fiscal deficit. The low unemployment rate was also found to be favourable. In 2016, Moody's referenced four provinces with a lower bond rating, while S&P had six lower than Manitoba. In essence, the magnitude and size of the Manitoba debt and deficit was opined to be in line with other provinces and required moderate and prudent action. The bond ratings companies had not signalled a need for urgent action. A measured and pragmatic approach was said to be required to reduce the deficit, along with attention to debt servicing costs (around 6.0 per cent of program spending).

[189] As previously indicated, Dr. Beaulieu testified, and his report sets out, that Manitoba was not facing a financial crisis and had not been during the entirety of the period under consideration leading to the introduction of the ***PSSA*** and thereafter (at p. 44):

> A prudent and measured economic response to the fiscal situation at the time would take actions to reduce the deficit over time. This is the language of the budget, and as we saw above, this is what bond rating agencies see as a sound economic response to the long run of budget deficits in Manitoba. The economy was strong and robust when the legislation was introduced as is well understood and it is economically prudent for the budgetary adjustments to be undertaken gradually and effectively.
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> The budget confirms the government's commitment to return to balance by end of their second term. Again, this reflects a sensible and prudent approach to restoring the budget to balance. *The Public Services Sustainability Act* was not required to achieve these goals.
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> In order to restore the budget to balance the government needed to focus on a combination of reducing spending and increasing revenues. Yet the 2017 Budget introduced a number of measures that either reduce revenue or increased spending and at the same time *The Public Services Sustainability Act* put a large and unfair burden of reducing expenditure on public employees.

[190] Dr. Beaulieu opined that the Government's PST decrease was a measure adopted that went in the wrong direction with respect to deficit reduction. The 1.0 per cent reduction in revenue approximated a loss of 325–350 million dollars annually. There were other moderate spending cuts which were evaluated as being appropriate, as well as projected improvements on the revenue side. The significant contributions made to the Rainy Day Fund were inappropriate and operated to increase the expenditure side of the budget "... that is

incongruous with the idea of bringing into law ***The Public Services Sustainability Act*** that legislatively freezes wages for two years, with 0.75% increase in the third year and 1% in the fourth year" (p. 43). Dr. Beaulieu also indicated (p. 45):

> It is surprising and difficult to understand how a government taking draconian actions like *The Public Services Sustainability Act* would contribute to a fund designed to help with budgetary shortfalls when they are trying to reduce the deficit and limit debt accumulation.
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> It is ironic that the fund was created to try and help balance out government borrowing requirements over time. The intent is to grow the fund during times of surplus and contract it in times of deficit to lessen the requirement for external borrowing. Instead this action in the budget borrows $110M to contribute to a savings fund. This action adds directly to the deficit and runs counter to the objectives of the government and their aim to balance the budget.
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> Instead of contributing to this fund, the government should be moderately drawing down the fund by $15M to $20M per year for the next five years. This would lessen the borrowing requirements on the province and remain consistent with the intent of the fund. Once the province returns to balance, the government can begin to contribute positively to the stabilization fund.

[191] In Dr. Beaulieu's opinion, the intent of the Rainy Day Fund was to reduce the deficit and limit debt, as well as funding for unforeseen circumstances. In surplus years, funds could well be added. However, the substantial investment in the Rainy Day Fund added directly to the deficit and ran counter to Government's objectives and its aim for a balanced budget. Dr. Beaulieu's recommendation was that the Government should moderately draw down from the Fund over the next five years. This would serve to lessen the province's borrowing requirements. Further, this would recognize the intent of the Fund. Dr. Beaulieu stated (at p. 45):

> We presented evidence above that the deficit was relatively small, and this is seen with the low deficit-GDP ratio. However, the budget could have been lowered further but for the contributions to this fund. Based on the 2017 Budget, the deficit-GDP ratio would decline from 1.4% of GDP in 2016/17 to 1.37% in 2017/18, 1.11% in 2018/19 and 0.86% in 2019/20. As discussed above these are manageable numbers and in line with the other provinces and the federal government.
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> However, if the budget did not contribute to the Fiscal Stabilization Fund, the deficit to GDP ratio would be even lower than forecast in the Budget. It would have fallen to $499M or 0.7% of GDP by 2019/20. For a government intent on balancing the budget, it is unclear why it would borrow an additional $110M over three years, adding to the deficit, in order to hold cash within the Fiscal Stabilization Fund.

[192] Dr. Beaulieu responded to Tess's position that adding to the Rainy Day Fund had no effect on the debt or deficit. This contention was described as being inaccurate. Historically, the Rainy Day Fund was regularly drawn from, as was evidenced at Exhibit 21. This occurred until approximately 2002/03. The lessening of the gross debt would clearly impact the interest charged on borrowed funds which require regular repayment. It remained Dr. Beaulieu's opinion that the 407 million dollars injected into the Rainy Day Fund should have been utilized to reduce the Provincial debt. Further, the changes in indexing of personal tax brackets also served to add to the deficit in each year, as did the lowering of the PST by virtue of reducing Government revenue. In essence, Dr. Beaulieu's opinion was that the wrong policy directions/choices were undertaken in Manitoba. Further, the increasing consumer price

index has demonstrated a loss of purchasing power for workers because of inflation. Other areas outlined by Dr. Beaulieu included:

- the economic situation in 2008 and 2009 when the ***ERA*** was utilized was much different than what fiscally existed in Manitoba commencing in 2016;
- since 2016, the Government's deficit projections have been significantly overstated, and particularly so in 2019;
- much of what transpired reflects Government policy choices;
- budgeting irregularities, as noted by the AGM, have highlighted the removal of assets from financial statement consideration and served to increase the net debt by one billion dollars;
- the Government actions of lowering revenue by virtue of reducing the PST and tax brackets, diverting funds to the Rainy Day Fund, along with the AGM's issues, should be of concern to all Manitobans.

[193] Dr. Beaulieu opined that the ***PSSA*** is unnecessary and out of line with standards and measured fiscal policy responses and economic budgeting. It has served to place the onus and burden of the Province's financial position on the public service (p. 48):

> The Public Services Sustainability Act will have minimal impact on the overall budget with a bill that unduly hurts provincial employees and faces constitutional challenges based on limiting the rights of workers to engage in collective bargaining – all during good economic times with strong economic growth forecasts.

[194] Under cross-examination, Dr. Beaulieu agreed that debt servicing costs are a concern and that an increasing debt translates to higher borrowing costs. This could impact programming. The debt servicing costs constitute the fourth largest Government expenditure behind health, education and families. Dr. Beaulieu also acknowledged that interest rates have been at historic lows and could rise, which would impact debt servicing and, perhaps, public services and programs. This might result in a downgrade of the Province's credit rating, albeit since 2008, the Manitoba economy has been growing with no financial crisis evident.

[195] Dr. Beaulieu acknowledged that governments have many priorities, including deficit reduction, albeit, in Manitoba, the policies are proceeding in the wrong direction. This was evidenced by the reduction of the PST, being a consumption tax. This has served to reduce revenue by approximately 325–350 million dollars annually, with the increase in a tax payer's discretionary income opined to have been negligible. In his experience, such a consumption tax reduction does not serve to create an increase in spending. The move to balance is sensible and prudent, albeit the ***PSSA*** is a measure that is drastic in nature. Further, the 2019 budget did not stipulate that urgent action was required or was being taken, nor did the 2019 Budget include projected revenues from legalized cannabis sales (a 6.0 per cent social responsibility levy is assessed on all sales). On reflection, the ***PSSA*** was opined by Dr. Beaulieu to constitute a severe action. Recently, the budget has prioritized programming and capital spending over a return to balance. These Government actions have served to increase the debt burden and has extended the time needed to return to balance. Additionally, none of the bond rating agencies have said that drastic measures or urgent steps were needed.

[196] Dr. Beaulieu accepted that many public sector workers have available wage "steps" of 3.0 to 3.5 per cent and, accordingly, have not had their wages reduced. However, those who have exhausted their step increases are affected by a zero per cent increase without an ability to increase purchasing power, which will have been reduced by inflationary factors. It was also acknowledged that the ***PSSA*** restrains growth on expenditures; however, it does not cut expenditures.

Testimony of Defendant's Section 1 Expert - Dr. Livio Di Matteo

[197] The defendant called Dr. Livio Di Matteo, professor of economics at Lakehead University, to provide an analysis of the Manitoba Government debt (Report, January 17, 2019). Dr. Di Matteo specializes in public finances. He testified that debt is a necessary fiscal and economic tool which is often the subject of public policy issues. He indicated (at p. 2):

> Governments can raise revenues from taxes such as the personal income tax, sales tax or property tax as well as other sources.[2] However, if expenditures exceed revenues, then it can borrow funds, that is, incur a deficit whereas if revenues exceed expenditures there is a surplus. In general, the sum of all deficits (and surpluses) is the gross debt and when government financial assets are subtracted from the debt one obtains the net public debt. More specifically, net debt in Manitoba's budget is the sum of all provincial borrowings, guarantees and other obligations net of financial assets. In other words, total liabilities net of total assets.
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> [2] Other revenue sources for a provincial government can include other taxes, user fees, contributions to social security plans, sales of goods and services as well as investment income.

[198] Dr. Di Matteo testified that debt is not necessarily a problem, but is an area that needs to be managed responsibly. However, chronic deficits are more difficult to justify when an economy is not in a recessionary period. A deficit is expected when the economy is in recession; however, Manitoba has shown real GDP growth since 2009. Since the 2009/10 fiscal year, Manitoba has run nine consecutive deficits with the 2018/19 forecasts also indicating a deficit position. Further, the net provincial debt has grown "... from 11.6 to a forecast 25 billion dollars and the debt to GDP ratio from 22.9 per cent to an estimated 34.3 per cent as estimated in the 2018 Manitoba Budget" (Report, pp. 3-4). Dr. Di Matteo opined that a narrowing of the gap between revenues and expenditures is needed.

[199] The 2008 financial crisis and recession was analyzed and Dr. Di Matteo opined that, "... Manitoba's economy appears to have recovered quickly after the economic downturn" (p. 5). He indicated that the Manitoba financial situation was serious and the total net public debt ranked fourth highest out of the 10 provinces in 2017-2018. As time has progressed, Manitoba was said to have evolved as one of the more indebted provinces.

[200] Dr. Di Matteo stated (at pp. 8-9):

> Acquisition of debt by government can be a function of explicit policy needs such as needed infrastructure financing or the result of dealing with a climate or social catastrophe. It is also influenced by economic conditions such as an economic downturn that can affect both tax revenues and expenditures. While governments do make expenditures for investments in human capital and physical infrastructure, during a downturn, deficits are ultimately the result of spending that cannot be met by incoming revenues and should disappear once the economy recovers. Deficits that continue during economic upturns reflect structural imbalances in revenue and spending and may reflect explicit choices by governments to not curtail spending.
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> ...
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> Debts and deficits are a tool and there are occasions when their use is required but long-term fiscal sustainability demands that they be used responsibly particularly in light of the interest rate on borrowed money and debt service costs required to service that debt. The Dynamics of deficits and debt over the long term are ultimately shaped by the relationship between the level of the interest rate (r) on the debt and the growth rate of the economy (g). During the periods where r>g, deficit financing results in debt rising faster than GDP making deficit finance a potential source of instability when it comes to the public finances.[18] When r<g it is actually possible to run deficits and at the same time actually reduce the debt to GDP ratio as interest payments on the debt grow more slowly than the economy. Indeed, Manitoba, like other provinces has benefitted by the fiscal dividend afforded by the lowest interest rates in half a century.[19]

[18] It should be noted that if debt rises faster than GDP, a premium may be demanded for borrowing by lenders and the rise in interest rates could make debt even more unsustainable.

[19] Interest rates in Canada rose, gradually at first, in the period after 1945 and reached a peak of 15 percent in 1981 before beginning a decline that saw them bottom out at about two percent by 2015. Data Source: Jorda, Schularick and Taylor (2017) and http://www.macrohistory.net/data/.

[201] When debt increases, it is likely that costs to manage that debt will also increase, thereby making money unavailable for other services. Further, the Province's credit rating could be affected, which will increase borrowing costs. A deficit and debt can reduce a government's ability to respond to recessions, economic slow downs or catastrophic events.

[202] Dr. Di Matteo indicated that it is not uncommon to have budget forecasts vary from the actual fiscal results as determined at year-end, as has been seen in Manitoba over the last several years. A budget was described as simply a planning document with projections which can be affected by less expenditures than were anticipated or more revenue generated, amongst other factors. At this time, the debt is growing faster than the economy which, again, will likely increase credit borrowing costs. There was said to exist an imbalance with revenue not keeping up with expenditures. While the Manitoba fiscal situation was described as challenging, Dr. Di Matteo "wouldn't characterize it as a crisis". It is a situation where steps are needed to be taken.

[203] Dr. Di Matteo relied upon the Fiscal Sustainability Report 2018 authored by the Federal Office of the Parliamentary Budget Officer ("PBO") (Exhibit 22) in his report and testimony. This report projects, over time, a province's sustainability and its fiscal gap. The fiscal gap was described as the difference between current fiscal policy and a policy that is sustainable over the long-term. "The fiscal gap represents the immediate and permanent change in revenues, program spending, or a combination of both, expressed as a share of GDP, that is required to stabilize a government's net debt-to-GDP ratio at its current level over the long term" (p. 2). The fiscal gap could affect the sustainability of public programs and services. Dr. Di Matteo indicated that steps are needed at this time to address the gap, as the longer the wait, the larger the gap. It is important not to wait for a crisis situation before taking action, at least small steps are needed. The current ratio for Manitoba demonstrates the largest fiscal gap of the 10 provinces at 4.5 per cent and is illustrative of a need to increase revenues and reduce expenditures. He opined, based upon the PBO report (at p. 12):

> As a result, the responses required to bring expenditures and revenues in line will require either raising tax rates – which will have affects on business activity and growth – or cutting spending, or some combination thereof. If Manitoba continues on its current fiscal course and given demographic and economic growth assumptions, the PBO baseline estimate is that Manitoba's net debt to GDP ratio could rise from 37.2 percent in 2017 and reach 104.9 percent by 2042.[29]

[29]Naturally, if higher economic growth assumptions are used or substantial immigration makes the demographic profile "younger" then outcomes may improve.

[204] Dr. Beaulieu responded to the PBO's Fiscal Sustainability Report 2018 (Exhibit 22) and Dr. Di Matteo's reliance upon it. The PBO report was opined by him to be an estimate and a hypothetical. Essentially, the report reflects what will happen to debt over a time period if nothing changes in terms of government policies. Consequently, the PBO's findings must be regarded as instructive with respect to possible ramifications if policies directed at deficit reduction are not undertaken

[205] During the course of cross-examination, Dr. Di Matteo acknowledged that the Manitoba economy recovered quickly after the 2008/09 recession. It was described as robust compared to others and not in crisis in 2016 or thereafter. It was said to be in the middle of the pack.

Dr. Di Matteo conceded that debt may be affected by political choices and, certainly, through the course of elections that result in a change of administration. Further, it was accepted that net debt has increased in all jurisdictions. He also acknowledged that policy choices made by government are not always economically sound, but may well be the popular course of conduct with the electorate. The task of government should be to make plans and exercise fiscal prudence through the many available options at its disposal. One of those options would be to increase revenue by raising taxes, which could come at a cost of slowing the economy. The fact that the deficit continues to grow during an economic upturn period was opined to reflect the structural imbalance in revenue and spending. This could be demonstrative of explicit government choices in not curtailing spending. It was acknowledged that choices to reduce revenue could slow deficit reduction such as the 395.4 million dollar loss of revenue through tax savings, as were indicated in the Manitoba budget for 2019/20 (Binder 3, Tab 113, p. 45). That was described as a cost to Government and a benefit to the tax payer. The increase in personal exemptions was the largest tax cut in Manitoba history. Dr. Di Matteo indicated that to forego revenue in the short-term will put money into tax payers' hands and may stimulate the economy and increase revenue.

[206] With respect to the Rainy Day Fund, Dr. Di Matteo accepted that in 2017, 10 million dollars was added to the Fund; 2018 – 50 million dollars; 2019 – 50 million dollars; and, the 2019 budget provided that a further 407 million dollars would be placed into the Fund (Binder 3, Tabs 113 and 116, p. 143). Dr. Di Matteo was asked whether it would have been more prudent to pay down the debt to lessen the debt servicing costs rather than putting such significant monies into the Fund. He acknowledged that the Fund must be regarded as an asset. However, it was the Government's choice to put monies into that Fund.

[207] Dr. Di Matteo opined that Government should abide by the opinion of the AGM with respect to accounting practices. Further, he acknowledged being unaware that a large portion of the reflected Provincial debt is comprised of Manitoba Hydro projects. Additionally, he agreed that the 2019 budget illustrated further tax cuts, certain revenue fee cuts and two Idea Funds, as well as highway and infrastructure spending with no stated plans to reduce debt.

CASE LAW

Health Services [8]

[208] In British Columbia, the ***Health and Social Services Delivery Improvement Act*** *[SBC 2002] Chapter 2* (the "***HSSDIA***") was passed as a response to challenges being experienced in the health care system. There was no meaningful consultation with labour before it became law. The ***HSSDIA*** introduced changes to transfers and multi-worksite assignment rights, contracting out, the status of contracted out employees, job security programs, layoffs, and bumping rights (p. 392):

> It gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues.

The ***HSSDIA*** voided parts of collective agreements which were inconsistent with its provisions.

[209] Chief Justice McLachlin (as she then was), speaking for the majority of the Supreme Court of Canada, found that the ***HSSDIA*** infringed s. 2(d) ***Charter*** rights and was not saved as being reasonably justifiable under s. 1. The Court's analysis considered:

> 19 At issue in the present appeal is whether the guarantee of freedom of association in s. 2 (*d*) of the *Charter* protects collective bargaining rights. We conclude that s. 2 (*d*) of the *Charter* protects the capacity of members of labour unions to engage, in

> association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it 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. If the government substantially interferes with that right, it violates s. 2 (*d*) of the *Charter* : *Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.
>
> 20 Our conclusion that s. 2 (*d*) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2 (*d*) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2 (*d*) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in International law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2 (*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.

The Court undertook an extensive review of the rights of workers and their ability to collectively bargain over workplace environment issues, wages and other areas. It was determined that there is a constitutional right to collectively bargain (at para. 86):

> Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.

[210] The majority in the ***Health Services*** decision explored the issue of collective bargaining and determined that s. 2(d) guarantees the process through which workplace goals are pursued. This includes a duty on government employers to agree to meet and discuss those goals. There was found to be a right to a process, but "... it does not guarantee a certain substantive or economic outcome" (***Health Services,*** para. 91). Section 2(d) was said to protect the good faith process of collective bargaining and not a particular bargaining model or outcome.

[211] A breach of the s. 2(d) freedom of association right will occur when the essential integrity of the process of collective bargaining has been compromised – a substantial interference. Generally speaking, that inquiry has two parts:

> 129 To amount to a breach of the s. 2(d) freedom of association, the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(d). Two inquiries are relevant here. First, substantial interference is more likely to be found in measures impacting matters central to the freedom of association of workers, and to the capacity of their associations (the unions) to achieve common goals by working in concert. This suggests an inquiry into the nature of the affected right. Second, the manner in which the right is curtailed may affect its impact on the process of collective bargaining and ultimately freedom of association. To this end, we must inquire into the process by which the changes were made and how they impact on the voluntary good faith underpinning of collective bargaining. 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 unlikely to have adversely affected the employees' right to collective bargaining. Both inquiries, as discussed earlier, are essential.

Further, McLachlin C.J. stated:

> 92 To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.
>
> 93 Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> 94 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.

[212] ***Health Services*** established a substantial interference test and required that each situation be evaluated on a contextual and fact-specific basis.

[213] The Court also considered whether the s. 2(d) violations were justified pursuant to s. 1. That analysis was undertaken through the "... four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society" (para. 138). It was determined that the legislation considered in the ***Health Services*** case violated s. 2(d) rights because it undermined the workers' ability to engage in meaningful collective bargaining and was not saved pursuant to s. 1.

MPAO [9]

[214] The Supreme Court of Canada addressed the constitutionality of the exclusion of RCMP members from the collective bargaining regime as established under the ***Public Service Labour Relations Act***, S.C., 2003, c. 22 ("***PSLRA***") (s. 2(1)(d)). At the time, the Royal Canadian Mounted Police Regulations, 1988 (s. 96) created a Staff Relations Representative Program as the primary mechanism through which RCMP members could raise labour relations issues. However, wages were excluded from consideration. The scheme denied members the same collective bargaining rights as possessed by others in the public service. RCMP members are not legislatively permitted to unionize or engage in collective bargaining (***Public Service Staff Relations Act***, R.S.C., 1985, c. P-35 and now under the ***PSLRA***).

[215] As indicated, RCMP members were subject to a non-unionized labour relations scheme as imposed by regulation. Their interests were represented directly to management by elected staff relations representatives. This process was characterized as consultative. The Supreme Court of Canada stated that the RCMP members had been denied the guaranteed right of freedom of association and meaningful collective bargaining free from employer control. Substantial interference was found. It was determined that s. 2(d) guarantees, in the labour relations context, a meaningful process to pursue workplace goals.

[216] In considering a purposive and contextual approach as required for ***Charter*** cases, the right to collectively bargain was considered to have been denied to RCMP members. McLachlin C.J., speaking for the majority of the court, determined:

> [70] The same reasoning applies to freedom of association. As we have seen, s. 2 (d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2 (d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> [71] The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . ." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2 (d).
>
> [72] The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2 (d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.

Further, it was stated:

> [82] Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.

> [83] But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.

[217] The Court held that s. 2(1) of the ***PSLRA*** substantially interfered with the freedom of association rights of RCMP members. A meaningful collective bargaining process to afford members with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests was found to be non-existent. Further, such restraints were not saved by s. 1 as being a reasonable limit prescribed by law as could be demonstrably justified in a free and democratic society.

Meredith [10]

[218] McLachlin C.J. and LeBel J., on behalf of the Supreme Court majority, considered the federal Treasury Board decision to limit RCMP wage increases for the years 2008 to 2010, as well as to curtail certain other statutory provisions. The Treasury Board had previously acted on recommendations received from the Pay Council, an advisory board, and had announced increases for the years 2008 to 2010. However, the global financial crisis resulted in the Treasury Board revisiting and rolling back those increases. The rollback was three years in duration. The ***ERA*** imposed limits on public sector wage increases and stipulated that any terms or conditions providing for increases above those set out were of no effect. This case was heard together with a related appeal challenging the constitutionality of the RCMP's labour relations regime (***MPAO***) where the RCMP wage determination process had been found to be unconstitutional.

[219] In ***Meredith***, the Court indicated that the test applicable for determining whether state action had substantially impaired employee's collective pursuit of workplace goals had been set out in ***Health Services***. Because of the passage of the ***ERA***, the affected RCMP members had experienced a rollback of scheduled wage increases from those previously recommended by the Pay Council and accepted by Treasury Board. Other allowances were also impacted. The Attorney General acknowledged that wages were an important issue, but submitted that the ***ERA*** restraints were time limited, were shared by all public servants, and did not remove wages from collective bargaining. Consequently, these limitations were found not to rise to the level of a s. 2(d) violation. The court found:

> [28] The facts of *Health Services* should not be understood as a minimum threshold for finding a breach of s. 2(d). Nonetheless, the comparison between the impugned legislation in that case and the ***ERA*** is instructive. The *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2, introduced radical changes to significant terms covered by collective agreements previously concluded. By contrast, the level at which the ***ERA*** capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the ***ERA*** did not preclude consultation on other compensation-related issues, either in the past or the future.
>
> [29] Furthermore, the ***ERA*** did not prevent the consultation process from moving forward. Most significantly in the case of RCMP members, s. 62 permitted the negotiation of additional allowances as part of "transformation[al] initiatives" within the RCMP. The record indicates that RCMP members were able to obtain significant

> benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Service pay was increased from 1% to 1.5% for every five years of service — representing a 50% increase — and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved. Actual outcomes are not determinative of a s. 2 (d) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the ***ERA*** had a minor impact on the appellants' associational activity.

[220] The majority of the court held that the ***ERA*** and the government's conduct did not substantially impair the RCMP members' rights to collectively pursue workplace goals through collective bargaining.

Gordon [11]

[221] This case also dealt with the ***ERA***, which was responsive to the 2008 global economic crisis. The government implemented the ***ERA*** to set wage increases for all public servants. This case concerned an appeal by two unions who represented 88.0 per cent of unionized employees in the federal public service. The effect of the ***ERA*** was a partial rollback of wage increases or awards that had already been negotiated, but exceeded ***ERA*** limits. Additionally, wage increases in future agreements were precluded.

[222] The Ontario Court of Appeal considered the substantial interference test in keeping with ***Health Services***, ***Meredith***, and ***MPAO***:

> [44] Under the substantial interference test, the question is "whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted": *BC Health Services*, at para. 92. In each case, "[t]he inquiry ... is contextual and fact-specific": *BC Health Services*, at para. 92.
>
> [45] The court explained, at para. 93 of *BC Health Services*, that, generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries:
>
> > The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

[223] Of importance in ***Gordon*** was the evidence that collective bargaining had transpired in the shadow of impending wage restraint legislation. The Treasury Board Secretariat had endeavoured to undertake good faith "hard" bargaining before the implementation of the legislation. The Ontario Court of Appeal held that the power equilibrium between the employer and the unions had been maintained throughout the negotiations and prior to the ***ERA's*** enactment. The unions were able to utilize the strike option. Further, the government was found to have no duty to consult with the unions when drafting the ***ERA***, as freedom of association does not impose such an obligation. The Court accepted that wages were a significant bargaining issue. However, the evidence disclosed that the legislative cap on wage increases was consistent with what bargaining units had achieved in advance of the legislation without the cap in place.

> [124] It is common ground that by the date of the ***ERA***'s enactment in March 2009 the large majority of unionized of federal employees covered by it had already reached collective agreements consistent with it. A minority did not reach settlement.

[224] Consequently, the ***ERA's*** wage cap was consistent with the results of free, good faith, collective bargaining. Further, no wage freezes were imposed. The cap on wage increases was found not to have constituted substantial interference with the collective bargaining process and, therefore, not contrary to s. 2(d) of the ***Charter***. Further, it was determined that the unions were able to make some progress on non-monetary matters with resultant changes in workplace conditions. The court concluded that if they were wrong in that assessment, the infringement of s. 2(d) rights was justified under s. 1 of the ***Charter***. The government was responding to and showing leadership during an international financial crisis.

[225] An application for leave to appeal to the Supreme Court of Canada was denied (***John Gordon, et al.***).[12]

Dockyard Trades [13]

[226] The British Columbia Court of Appeal upheld a lower court decision that the rolling back of a one year wage increase awarded to federal dockworkers through binding arbitration did not rise to the level of substantial interference. Accordingly, a breach of s. 2(d) of the ***Charter*** was not found. It was the dockworkers' contention that the rollback had unjustifiably infringed upon their s. 2(d) rights to collectively bargain. The test for consideration was as set out in the ***Health Services*** decision.

[227] The facts demonstrated that an Arbitration Board had issued its wage award on January 20, 2009, before the ***ERA*** was introduced in Parliament. Collective bargaining had been ongoing since 2006, with only a few outstanding issues unresolved before the financial crisis occurred. When government decided to undertake restraint legislation, it endeavoured to continue collective bargaining until the last moment. A negotiate first approach was adopted prior to the enactment of legislation. The arbitration award provided for a 5.2 per cent wage increase as of October 2006, with wage increases in 2006 through 2009 that were within the limits subsequently enacted by the ***ERA***.

[228] Garson J.A. reviewed what she described as an evolving area of the law, beginning with the ***Health Services*** decision through ***Fraser***;[14] ***MPAO***; ***Meredith***; ***SFL***;[15] and, ***Syndicat canadien***.[16] The applicable principle/tests arising out of those cases was stated to be:

> [81] In summary, I would frame the applicable principles/test arising out of *Health Services*, *Fraser*, *MPAO*, *Meredith*, *Saskatchewan Federation of Labour* and *Syndicat canadien* as follows:
>
> a) Section 2(d) of the *Charter* guarantees the right to meaningfully associate in the pursuit of collective workplace goals (*Health Services*, *Fraser*, *MPAO*).
>
> b) Section 2(d) likewise guarantees the right to a meaningful process of collective bargaining, although it does not guarantee outcomes (*Health Services*, *Fraser*, *MPAO*).
>
> c) Meaningful collective bargaining involves the ability to make representations and have them heard in good faith (*Fraser*).
>
> d) Legislative or state action will infringe on s. 2(d) where it substantially interferes with meaningful collective bargaining (*MPAO*).
>
> [82] On the basis of the foregoing, it appears that the Court has not always applied the formalistic two-part test set out in *Health Services*, which (to repeat) requires the following inquiries:

a) whether the subject matter of a purported interference is sufficiently important that interference with it would impede collective activity; and

> b) whether the government conduct or legislation nevertheless preserves principles of good faith negotiation.

> [83] In my view, the authorities indicate that the appropriate inquiry is a holistic, contextual, or blended one. The question of substantial interference should be approached contextually, taking into account the nature of the matter subject to the interference, the effect of the interference, and the context or exigent circumstances in which the interference occurred. If, on an assessment of all of those factors, it can be said that the interference was "substantial", then s. 2(d) is infringed. I do not understand the jurisprudence to stipulate any particular form of pre-legislative consultation; rather, it is a contextual examination driven by the circumstances driving the enactment of the legislation (see also this Court's reasons in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 at paras. 57, 58, 72, 79 ("*BCTF*")).

[229] In reviewing the facts of the case, Garson J.A. found that the rollback of the arbitrated wage increase did not undermine the capacity of the union to engage in collective bargaining and effectively pursue its goals (para. 91). There was determined to have been sufficient good faith negotiations and consultations prior to the ***ERA's*** enactment. The level of interference that transpired was insufficient to establish a breach, as the government had utilized its best efforts to consult in good faith and to negotiate:

> [93] ... Fiscal and economic context cannot be ignored. The government met its constitutional obligations through its attempts to negotiate until the last moment, and to signal the potential effects of the impending legislation. Its response was proportional to the looming fiscal emergency. Moreover, I do not think it can be said, as contended by the appellants, that this legislation compromised the essential integrity of the collective bargaining process. It is not my view that this legislation can be said to significantly impair or thwart the associational goals of the Dockworkers. The legislation simply does not have that reach.

Syndicat canadien

[230] In ***Syndicat canadien***, the Quebec Court of Appeal found certain CBC employees had experienced a rollback of collectively bargained wages that exceeded the ***ERA*** parameters. Additionally, there was an obligation to repay any amounts received in excess of the limits, an inability to negotiate monetary terms with the employer, and a negative impact upon pensions. The employees were not consulted in advance of the legislation. The ***ERA*** affected collective agreements already signed by the parties and those to be negotiated within the five year mandate of the legislation. The Court was satisfied that the ***ERA*** constituted an interference in collective bargaining, both in purpose and in effect. A salary freeze had not been imposed. The question to be answered was whether the legislative provisions capping wage increases for a period of time constituted a substantial interference resulting in a s. 2(d) violation.

[231] The court considered the ***Health Services*** test in arriving at the conclusion that substantial interference had not occurred. This conclusion was based upon the fact that a right to collectively bargain was maintained for the consideration of working conditions that were non-monetary in nature. Accordingly, the employees were not deprived of their right to associate in a meaningful way in the pursuit of collective workplace goals:

> [59] ...The fact that wage increases are not prohibited but are instead capped, and 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 an 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.

[232] Consequently, no violation of s. 2(d) rights was found, and any violation would have been justified under s. 1 of the ***Charter***. Essentially, what the Court determined was that it was the "degree or intensity" of the restraint measures imposed on the collective bargaining rights that required analysis:

> [30] It can therefore be posited at the outset – and the appellant does not dispute – that the *ERA* did indeed affect the collective agreements signed by the parties and, for a time, affected the parties' ability to freely negotiate the terms of a new collective agreement with their employers. Whether this constitutes *substantial interference* with freedom of association guaranteed to the parties and their members under s. 2(*d*) of the *Charter*, however, is the debate the Court must settle here.
>
> [31] For there is indeed a debate. It is difficult to see how we can accept the respondents' claim that *any* statutory amendment of freely negotiated clauses in a collective agreement inevitably constitutes substantial interference with the ability to negotiate of those who enjoy freedom of association. This proposition, as stated, would mean that the contents of a collective agreement, by its mere existence, take on a sort of immutable constitutional status through the effect of s. 2(*d*). Not only has this never been stated in the relevant case law, but it seems far removed from the nuanced and contextual analyses that the Supreme Court proposes in even its most recent judgments. While it is conceivable that a government's statutory, regulatory or other measures modifying or neutralizing certain clauses in a collective agreement may have such an impact, the question is to what degree or intensity, and the measure must sufficiently interfere in the process to violate the *Charter*. This is what we saw in *Health Services*, where the Supreme Court held that certain statutory provisions constitute a substantial interference with the exercise of freedom of association, while others do not.[35]

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[35] *Health Services,* supra *note 12 at paras. 123 and 125*

[233] It was also noteworthy that the wage levels set out in the ***ERA*** were consistent with those negotiated by way of mandate with other bargaining units in the fall of 2008. Further, the ***ERA*** did not impose a salary freeze, nor did it prohibit bargaining on certain other monetary matters, such as vacations.

Canadian Union of Public Employees, Local 675 [17]

[234] In this case, the Quebec Court of Appeal held that the ***ERA*** had placed certain limits on the union's freedom of association. However, these limitations did not amount to a substantial interference of s. 2(d) rights. In the event that conclusion was in error, such interference was justifiable pursuant to s. 1 because of the global financial crisis.

[235] The ***ERA*** had rolled back a collectively bargained wage increase to CBC's administrative and support personnel and to 350 members of the Association des réalisateurs du Quebec. The union contended that the rollback unjustifiably infringed their s. 2(d) rights to collectively bargain.

[236] While the Quebec Court of Appeal determined that there was interference by virtue of the creation of a wage cap, that interference was not found to be substantial in nature. There existed the ability for continuing consultation and good faith negotiations. Further, the right to strike was not curtailed. The wage cap was limited in nature and, therefore, would not undermine future collective bargaining efforts. Alternatively, any infringement constituted a justifiable economic management policy pursuant to s. 1 of the ***Charter***.

Alberta Union of Provincial Employees, 2014[18]

[237] The Alberta Union of Provincial Employees sought an injunction to stay the operation of the ***Public Service Salary Restraint Act***, SA 2013, c P-43 ("***PSSRA***"). The union represented 24,000 Crown employees that had collectively bargained with the employer through much of 2013. However, the issue of wages remained unresolved with the union initiating a Compulsory Arbitration Board procedure. In November 2013, Alberta introduced the ***PSSRA***, which came into force in December 2013. The provisions provided that the extant 2011 agreement would be deemed in effect until 2017 if a collective agreement was not reached by March 2014. Further, the ***PSSRA*** provided a wage freeze until March 2015, with 1.0 per cent increases in each year thereafter. The ***PSSRA*** terminated the Compulsory Arbitration Board process.

[238] The union was successful and secured an interlocutory injunction staying the operation of the ***PSSRA***. Justice Thomas determined, after considering cases such as ***Dockyard Trades***, ***Meredith***, ***Health Services*** and others, that a ***Charter*** breach could well have occurred. It was stated at para. 110:

> ... While wage capping legislation by all levels of Government in Canada has become almost routine, laws such as *PSSRA*, with its very broad and very focused effect on one group, is not. This unique legislation is a blanket that covers all aspects of the employment relationship between Alberta and the employees in the Crown bargaining unit. It is the broad scope of this legislation which is under challenge and which distinguishes the Applicants' challenge to the *PPSRA* from any run-of-the-mill *Charter* attacks on legislation that restricts employee compensation. That is what convinces me that the public interest consideration cannot weigh so heavily as to tip the balance in favor of the Respondent. Rather, it tips the other way in favor of staying the effect of this broad-reaching legislation until its constitutional validity can be fully evaluated by a trial.

Alberta Union of Provincial Employees, 2019[19]

[239] The Alberta Union of Provincial Employees and the Alberta government entered into several three year agreements, which included a two year wage freeze with an option to reopen negotiations in the third year. Those agreements dictated that if the parties could not reach a collectively bargained agreement, that either party could trigger binding arbitration by written notice. Certain of the agreements mandated that the arbitration proceeding had to be held by June 30, 2019. The arbitrator was prohibited from overriding that deadline.

[240] The union triggered the arbitration process in advance of the June 30, 2019 deadline. However, the April 16, 2019 provincial election had resulted in a change of government. The ***Public Sector Wage Arbitration Deferral Act***, SA 2019, c. P-41.7 ("***PSWADA***"), was introduced on June 13, 2019, and came into force on June 28, 2019. The ***PSWADA*** operated to defer the commencement, continuation or completion of arbitrations and the rendering of arbitration decisions related to the wage-reopener until October 31, 2019. As a consequence, the union brought an application for an interim injunction staying the operation of the legislation so as to permit the arbitration to continue.

[241] The Alberta Court of Queen's Bench granted the interim injunction, finding that ***PSWADA*** interfered with the union's s. 2(d) rights which constituted a serious issue to be tried. The legislation was found to create a substantial interference with associational activity that could cause irreparable harm to the union membership.

[242] The Alberta Court of Appeal overturned the injunction decision (***Alberta Union of Provincial Employees***),[20] finding that the decision summarily determined the claim and that the wrong test had been utilized to evaluate whether the legislation constituted an unjustifiable breach of ***Charter*** rights.

Mikisew [21]

[243] This case involved the question of whether a duty to consult exists with a stakeholder who will be affected by newly enacted legislation. The Mikisew Cree First Nation brought an application for judicial review before the Federal Court submitting that the Crown had a duty to consult on the development of legislation which had the potential to adversely affect their treaty rights. The Court reviewed issues such as parliamentary sovereignty and the procedural requirements of the legislative process. This case was considered in the context of Indigenous rights.

[244] Justice Karakatsanis (Wagner C.J. and Gascon J. concurring) stated that:

> [32] For the reasons that follow, I conclude that the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.
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> ...
>
> [36] Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority.... Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

[245] Justice Karakatsanis indicated that parliamentary privilege is demonstrative of the law-making process being beyond the reach of judicial interference:

> [38] Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such *executive* requirements into the *legislative* context would be an inappropriate constraint on legislatures' ability to control their own processes.
>
> [emphasis in original]

Justice Brown, in concurring reasons, found that the judicial imposition of a duty to consult did not exist in the course of the legislative process.

[246] Justice Rowe also commented on the duty to consult and asked four poignant questions which represented practical issues surrounding whether such a duty exists (para. 165). He also indicated:

> [164] ... Imposing a duty to consult at this stage could effectively grind the day-to-day internal operation of government to a halt. What is now complex and difficult could become drawn out and dysfunctional. Inevitably, disputes would arise about the way that this obligation would be fulfilled. This is why the separation of powers operates the way it does. The courts are ill-equipped to deal with the procedural complexities of the legislative process....

[247] Justices Abella and Martin concurred that the appeal should be dismissed; however, they were of the view that the enactment of legislation with the potential to adversely impact s. 35 ***Charter*** rights gave rise to a duty to consult. Justice Abella found that there was an obligation to consult, particularly when legislation might adversely impact Indigenous and treaty rights.

[248] One of the cases relied upon by Justices Abella and Martin was ***British Columbia Teachers' Federation***,[22] where the majority of the Supreme Court endorsed a dissenting opinion by Justice Donald of the British Columbia Court of Appeal. Justice Abella stated:

> [94] ... the majority of the Court endorsed Donald J.A.'s approach to collective bargaining rights under s. 2 (*d*) of the *Charter* in the British Columbia Court of Appeal that would permit courts to consider a lack of consultation in the legislative context. Donald J.A. in his dissent held that Parliament could not act unilaterally through legislation to amend employment terms without satisfying its constitutional obligations to engage in pre-legislative consultation as a substitute for collective bargaining under s. 2 (*d*). Similar to the duty to consult in the Aboriginal context, freedom of association in the labour relations context guarantees the right to a meaningful process in which to pursue workplace goals...
>
> [95] In his reasons, Donald J.A. recognized that it made no difference to the employees' s. 2 (*d*) rights whether the terms of employment were captured in a traditional collective agreement or through the passage of legislation (para. 287). Even in the legislative context, a *Charter* breach could be grounded in the government's failure to consult in good faith prior to enactment. Donald J.A. was alive to the responsibility of the courts to monitor and restrain government actions to maintain a check on power imbalance in the labour relations context. "[A]n obligation to consult in this context does not unduly restrict the Legislature any more than all the other rights and freedoms enumerated in the *Charter* restrict the Legislature" (para. 293). Nor does the honour of the Crown under s. 35 of the *Constitution Act, 1982* .

BCTF [23]

[249] This case involved a consideration of whether certain sections of the ***Education Improvement Act***, S.B.C. 2012, c. 3 infringed teachers' s. 2(d) rights to freedom of association. The legislation effectively nullified terms that were part of the teachers' collective agreement and provided that similar terms could not be re-negotiated or included in a new collective agreement. The majority decision held that the consultations and bargaining leading up to the legislation facilitated a meaningful process of collective bargaining. Accordingly, the legislation was found not to infringe s. 2(d) ***Charter*** rights. The dissenting decision of Justice Donald found that the province had failed to consult in good faith and, accordingly, an infringement of s. 2(d) rights transpired that could not be justified pursuant to s. 1 of the ***Charter***. His findings were adopted by the Supreme Court of Canada.[24]

[250] Justice Donald reviewed the substantial interference constitutional test for s. 2(d) compliance as set out in ***Health Services*** and determined that pre-legislative consultation should be considered when government was found to have unilaterally deleted important terms in a collective agreement:

> [283] The freedom of association protected under 2(d) of the *Charter* in the labour relations context is the right of employees to associate in pursuit of workplace goals and to a meaningful process within which to achieve these goals: *Fraser* at paras. 40-43. This freedom is breached if government legislation or actions substantially interfere with collective bargaining in purpose or effect in such a way that does not respect a process of good faith consultation: *Health Services* at para. 129.

Further, Justice Donald stated:

> [284] ...Collective bargaining is protected in the sense that substantial interference with past, present, or future attempts at collective bargaining can render employees' collective representatives effectively feckless, and thus negate the employees' right to meaningful freedom of association. Actions by government that reduce employees' negotiating power with respect to the employer can satisfy this standard of substantial interference: *MPAO* at para. 71. At the very least, interference of such a degree that the associational process is rendered effectively futile would qualify as substantial interference: *Fraser* at para. 46.

[emphasis in original]

[251] Justice Donald noted the importance of reviewing these cases in a purposive and factual context. A government who has consulted and provided a union with the meaningful opportunity to influence changes will likely not be considered to have breached s. 2(d) rights. Conversely, where legislation is passed without affording a union with the opportunity to meaningfully influence the changes, a breach, arguably, may be found to have transpired.

[252] Pre-legislative consultation can, in such circumstances, replace collective bargaining if it constitutes a meaningful substitution. There must be evidence of good faith on the part of the government in terms of the analysis of whether a breach has transpired: ***Health Services***. Consultation was found to be relevant in terms of assessing a government's actions. Justice Donald stated:

> [334] To summarize, good faith negotiation, from a constitutional perspective, has been described by the Supreme Court of Canada as requiring parties to meet and engage in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other. Parties' positions must not be inflexible and intransigent, and parties must honestly strive to find a middle ground.

It was determined that governments could take firm positions; however, they must be open to compromise. In the case of ***BCTF***, it was found that government had closed its mind to alternatives. Accordingly, the government failed to consult in good faith and was in breach of s. 2(d) of the ***Charter***. The s. 1 analysis determined that the infringement of freedom of association was not justifiable pursuant to s. 1.

SFL[25]

[253] This case involved a newly elected Saskatchewan government that had introduced legislation which served to limit the ability of essential services public sector employees from exercising a right to strike.

[254] Justice Abella outlined relevant history involving labour relations as follows:

> [1] In the *Alberta Reference* (*Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313), this Court held that the freedom of association guaranteed under s. 2 (*d*) of the *Canadian Charter of Rights and Freedoms* did not protect the right to collective bargaining or to strike. Twenty years later, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 S.C.R. 391, this Court held that s. 2 (*d*) protects the right of employees to engage in a meaningful process of collective bargaining. The rights were further enlarged in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII), [2011] 2 S.C.R. 3, where the Court accepted that a meaningful process includes employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith. And, most recently, in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 S.C.R. 3, the Court recognized that a process of collective bargaining could not be meaningful if employees lacked the independence and choice to determine and pursue their collective interests. Clearly the arc bends increasingly towards workplace justice.

[255] The Court reviewed the evolution of s. 2(d) decisions in the context of labour relations that have transpired since then Chief Justice Dickson's dissenting reasons in the ***Alberta Reference***[26] case. That dissent was said to be influential in the development of a more "generous approach" in the recent jurisprudence (para. 33). Justice Abella, on behalf of the

Court, focused on the historical context and found that the right to strike represented an essential and meaningful value and objective of the collective bargaining process. The ability to strike was determined to be a necessary component of the process that facilitates workers' meaningful participation in pursuit of collective workplace goals. The right to strike was held to be a lever promoting equality in the bargaining process. The impugned legislation was found to be unconstitutional and a violation of s. 2(d). This was accompanied by a declaration of invalidity for a one year period. Justice Abella stated:

> [77] This brings us to the test for an infringement of s. 2 (*d*). The right to strike is protected by virtue of its unique role in the collective bargaining process. In *Health Services*, this Court established that s. 2 (*d*) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining (para. 90). And in *Mounted Police*, McLachlin C.J. and LeBel J. confirmed that
>
> > [t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. . . . Whatever the nature of the restriction, *the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2 (d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining*....
>
> [emphasis in original]

OPSEU [27]

[256] The Ontario government enacted legislation with respect to unionized education workers who were governed by a collective agreement that was due to expire in August 2012. Ontario approached bargaining discussions in the context of seeking cost saving measures related to salary, retirement, sick leave and pension contributions. A consensus on a new agreement was not reached. Consequently, legislation was passed to govern the resolution of the unresolved contract issues.

[257] The government's actions were found to have substantially interfered with the meaningful process of collective bargaining, as unilateral amendment of the bargaining process had transpired without consultation or input. This conduct was not demonstrably justified in accordance with s. 1 of the ***Charter***.

[258] Justice Lederer reviewed the process that had been undertaken between the parties and their negotiations leading up to the introduction of the impugned legislation. He then reviewed the law, which included ***Health Services*** and ***MPAO***, to assist in the determination of whether the actions of Ontario had substantially interfered with the meaningful process of collective bargaining: he was required to resolve "[w]hat is required is a fact-based inquiry into... whether the process of voluntary, good faith collective bargaining between employees and the employer has been... significantly and adversely impacted" (para. 133). It was found to be impossible for true collective bargaining to have taken place with what had transpired in this matter.

Correctional Officers [28]

[259] The ***Correctional Officers*** case involved an appeal from the Quebec Superior Court that had declared para. 113(b) of the ***Federal Public Sector Labour Relations Act***, S.C. 2003, c. 22 unconstitutional and suspended the declaration of constitutional invalidity and the effects of the judgment for a 12 month period. The appeal was allowed by the Court of Appeal who

agreed with the trial judge's opinion that para. 113(b) substantially interfered with the right of freedom of association, but held that the legislation was saved pursuant to s. 1.

[260] Justice Davis of the Superior Court was found to have done a thorough s. 2(d) analysis after reviewing the relevant case law and arriving at the determination that substantial interference with the right of association had occurred. The union had sought to address staffing and pension benefits through the collective bargaining process. Section 113(b) prohibited the consideration of those issues for collective bargaining purposes. It was found that the impugned legislation left no room for genuine collective bargaining on issues of crucial importance to the employees, and, hence, substantial interference existed. However, the operation of s. 1 served to justify the infringement on freedom of association. This finding was based on the conclusion that the legislation was only minimally impairing and there was proportionality between the measures adopted and the objectives of s. 113(b).

MFL et al [29]

[261] Justice Edmond of this court considered the ***PSSA*** in terms of whether an interlocutory injunction was appropriate which would have acted to restrain, enjoin and prohibit the Government from proclaiming ss. 9-15 of the ***PSSA*** or, alternatively, enjoining or staying s. 31 or ss. 9-15 of the ***PSSA***.

[262] Justice Edmond was not satisfied that an injunction was appropriate in the circumstances. However, he reviewed the legislation and the interactions between the parties and concluded:

> [28] Evidence was filed regarding the consultation and dialogue which the plaintiffs allege amounts to a failure by the Government to meaningfully consult with public sector unions, to provide information about the *PSSA*, provide financial disclosure and explore any fiscal solution suggested by the unions.
>
> [29] Notwithstanding representations made and questions asked by the unions, the Government did not provide the unions with the requested financial disclosure and did not answer the unions' question as to why it was not prepared to rely on the collective bargaining process to determine compensation for public sector workers.
>
> [30] Rather than rely upon the collective bargaining process, the Government chose to pass the *PSSA* and the certainty offered by legislation through mandated maximum increases in rates of pay to public sector workers.
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> ...
>
> [32] Even though the *PSSA* has not been proclaimed into effect, the Government employer bargaining positions have been consistent with and based upon the maximum increases in rates of pay prescribed in the *PSSA* (except as noted below).
>
> ...
>
> [89] ... This case is unique in the sense that the evidence establishes the Government is applying the *PSSA* even though it has not been proclaimed.

Fraser [30]

[263] In 2002, Ontario enacted the ***Agricultural Employees Protection Act,*** which served to exclude farm workers from the operation of the ***Labour Relations Act***. Instead, a separate labour relations regime was crafted for farm workers. A constitutional challenge was brought on the basis that the Act infringed on farm workers' rights under ss. 2(d) and 15 of the

Charter. The challenge was based on ineffective protection for the members' rights to organize and bargain collectively. Additionally, farm workers were excluded from protections accorded employees in other sectors. An infringement was not found in this case; however, Chief Justice McLachlin and Justice LeBel provided important comments with respect to s. 2(d) rights and the interpretation of these types of cases:

> [43] ... It is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations. The protection for collective bargaining in the sense affirmed in *Health Services* is quite simply a necessary condition of meaningful association in the workplace context.
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> ...
>
> [46] ... what s. 2(*d*) protects is *the right to associate to achieve collective goals*. Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(*d*) protects a right to collective bargaining...
>
> [47] ... What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(*d*) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.
>
> [emphasis in original]

POSITION OF THE PARTIES

The Plaintiffs' Position

[264] The Plaintiffs have submitted, through argument, case law, and lengthy briefs that an infringement of s. 2(d) ***Charter*** rights has occurred by virtue of the enactment of the ***PSSA***. The remedies sought are those outlined in paras. 1(c), (d), (e), (f), and (i) of the Re-Amended Statement of Claim.

[265] The Plaintiffs have outlined their interpretation of the law and how it should be applied to the evidence in this case as supported by expert opinions provided by Drs. Hebdon and Beaulieu. Professor Patrick Mecklem of the University of Toronto also provided a report on the International law aspect of this case, but was not called as a witness. The unions submit that Government failed to perform its duty to consult prior to the enactment of the ***PSSA***. Further, a duty to collectively bargain was also argued to exist on a pre-legislative basis. The Plaintiffs relied upon examples of where, in their view, substantial interference with the collective bargaining process had transpired in order to substantiate the s. 2(d) breach.

[266] The Plaintiffs also maintain that it is not premature to consider the constitutionality of the ***PSSA*** as it is an enacted law. The fact that the legislation has not been proclaimed is of no consequence, given the Government's/employer's reliance and invocation of the ***PSSA*** during the course of many negotiations and dealings with the various public sector unions.

[267] In the event a violation of s. 2(d) of the ***Charter*** is found, the Plaintiffs maintain that the breach cannot be saved by virtue of s. 1. The legislation simply cannot be reasonably justified based upon a consideration of all the facts and evidence, particularly as relates to Manitoba's financial circumstances at the relevant time. Those fiscal circumstances were reviewed in the context of the evidence supplied by the Defendant's witnesses and based upon the expert reports.

The Defendant's Position

[268] The Government argued with reliance on submissions, case law and a lengthy brief, that the ***PSSA*** is constitutional, and does not infringe on freedom of association as protected by s. 2(d) of the ***Charter***. Indeed, collective bargaining on wide-ranging and important workplace issues can transpire under the legislation. The bargaining that has taken place has all been accomplished by virtue of Government mandates and policies as the ***PSSA*** has no legal affect because of the absence of proclamation. Accordingly, a constitutional violation cannot be found to exist in these circumstances where Government has set strict fiscal policies and mandated that hard bargaining be undertaken to support those policies.

[269] The Government maintained that as the ***PSSA*** has not been proclaimed, it must be queried whether a court can address the constitutionality of a statute that may never become law. The Defendant maintains that this constitutional challenge is not "ripe" for consideration by the court.

[270] In the event a s. 2(d) breach is found, based upon substantial interference with the right to collectively bargain, the Government maintains that the legislation is constitutional, being justified in a free and democratic society in accordance with the ***Oakes*** test.

ANALYSIS

The Status of the *PSSA* – "The Elephant in the Room"

[271] The ***PSSA,*** as previously indicated, was introduced in the Manitoba Legislature on March 20, 2017. The legislation was passed on June 1, 2017, and received Royal Assent the following day. It has not been proclaimed into force, and it is unknown if that will ever occur. As s. 11(2) of ***The Interpretation Act***, C.C.S.M. c. 180 states:

> **Effective day of proclamations**
>
> 11(2) A proclamation may state that the Act or any provision of the Act is proclaimed into force on the day the proclamation is issued or on a later day.

Further, Ruth Sullivan in *Sullivan on the Construction of Statutes*,[31] at pp. 725-726, indicated:

> 24.13 ***Effect of enactment.*** The enactment of a statute occurs at the completion of the formal enactment process when a bill is assented to by the sovereign. At this point the statute becomes law in the sense that it forms part of the body of rules that are recognized by the courts as law. The meaning of the statute is determined as of this day and the statute may be taken into account in interpreting other legislation from this day on. However, unless the statute has commenced or come into force, it is not binding on the public nor is it able to produce beneficial legal effects.[3] It is also incapable of conflicting with other legislation.[4]

Further, at p. 727:

> 24.18 ***Rules governing commencement.*** The key inaugural event in the operation of legislation is commencement. Upon commencement, legislation becomes binding and can be applied with legal effect to whatever facts come within its description.

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3 The implications of this rule are illustrated in *Alfonso v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1221 (CanLII), [2002] F.C.J. No. 1660, [2003] 2 F.C. 683 (F.C.); *Canadian Indemnity Co. v. Canada (Attorney General)*, [1974] B.C.J. No. 759 (B.C.S.C.)

4 *Schneider v. British Columbia*, 1982 CanLII 26 (SCC), [1982] S.C.J. No. 64, [1982] 2 S.C.R. 112, at 139 (S.C.C.).

Legislation may be proclaimed at the time it is enacted or proclamation may be delayed. Further, there are those circumstances, several of which are apparent in Manitoba, where proclamation of enacted legislation has never occurred. Situations exist where Government chooses to delay proclamation for various reasons which may include the need to prepare the

necessary administrative machinery, to await certain events, or to achieve a political goal. It is not within the purview of the courts to proclaim legislation.

[272] Bill 9 (***The Public Services Sustainability Amendment Act***) was introduced in the Manitoba Legislature in November 2019. The amendments do not operate until the amended legislation comes into force. As was indicated in *Sullivan on the Construction of Statutes* (p. 745):

> 24.68 It is possible to amend legislation that has not come into force. When the amending legislation operates, the new provision becomes part of the amended legislation, but it does not come into force until the amended legislation does.[83]

83 See *Potter Distilleries Ltd. v. British Columbia*, [1981] B.C.M. No. 1278, 132 D.L.R. (ed) 190 (B.C.C.A.)

[273] The amending legislation should not to be considered in the context of these reasons. I take judicial notice of the existence of Bill 9. However, no weight or consideration will be afforded to it in the existing circumstances given a lack of evidence as to its meaning or intent and the absence of the ***PSSA's*** proclamation. Further, it is of no relevance as it has not been enacted.

[274] The Government contends that the ***PSSA*** has no legal effect and may never become law. It submits that all collective bargaining has been undertaken in accordance with Government mandates and policies and not as a consequence of the ***PSSA*****.** Consequently, the legislation cannot be the subject of a constitutionality review. It is contended that, because of the ***PSSA's*** status as non-proclaimed legislation, the court cannot exercise a role in determining its constitutionality, as any decision would, at best, be theoretical. It was submitted not to be within the purview of the courts to rule or grant a remedy until such time as the ***PSSA*** has been proclaimed.

[275] In the on-line version of *Continuing Consolidation of the Statutes of Manitoba* (updated to February 11, 2020), there are in excess of 550 statutes. At this juncture, only 14 are identified as "not yet enforced" and "coming into force on a date to be fixed by proclamation". It is an unusual practice, particularly after almost three years have passed since Royal Assent, to have failed to proclaim any part of the ***PSSA***. The Government argues that one of the reasons for non-proclamation may relate to a consideration that the ***PSSA*** does not properly address its policy goals. That position could be substantiated by virtue of the Bill 9 amendments. That being said, there was no evidence to suggest a reason for Government's failure to proclaim the ***PSSA***. Indeed, the ***PSSA*** has largely been adopted from similar Nova Scotia legislation. That legislation was not proclaimed for approximately one and one-half years after Royal Assent. Manitoba is following the same agenda. Stevenson and Irving, in an analysis of the Nova Scotia legislation, stated that, "[t]he government believes that not proclaiming the legislation has worked well in setting the framework of what it believes is its 'ability to pay'" (Binder 1, Tab 10).

[276] I am satisfied that the ***PSSA*** has played a significant and substantial role in what has transpired with respect to labour relations in Manitoba since 2016. Whether it is proclaimed legislation or not, the Government and public sector employers have governed themselves in accordance with its provisions and mandated wage figures. It is clear from the evidence, both in statements made during negotiations and in the conduct of Government, that Government has proceeded as if the ***PSSA*** had been proclaimed and was in effect. It is disingenuous to suggest that Government's negotiating mandates and policies are simply that and not the ***PSSA*** sword of Damocles hanging over the unions with respect to wage restraint and the retroactivity claw back provisions. The retroactivity aspect of the ***PSSA*** has been repeatedly referred to throughout the various bargaining scenarios described in the evidence as being the omnipotent threat hovering over negotiations that would be realized with its proclamation.

[277] I acknowledge the proposition put forth by Professor Peter Hogg,[32] at p. 59-21, as follows:

> A case is not "ripe" for decision if it depends upon future events that may or may not occur.[87] In that situation, the case would involve a premature determination of what is still only a hypothetical question. For example, a challenge to the constitutionality of a bill that has not been enacted would not be ripe: the bill may never be enacted or may be significantly amended before enactment.[88]
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> ---
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> 87 See Sharpe (ed.), note 8, above, 340-342 (by Sharpe); Strayer, note 8 above, 211-215; Sossin, note 8 above, ch. 2. For the law of the United States, see Tribe, note 8, above, 334-344.
> 88 Governments occasionally direct references to determine in advance the constitutionality of an unenacted bill. Since the answers to reference questions are advisory only, on a reference, no doctrine or ripeness restrains the courts from answering hypothetical questions.

Such a position is accurate; however, the ***PSSA*** has been enacted by virtue of Royal Assent and is no longer a bill. The ***PSSA*** is law - albeit without legal effect. The Government is effectively applying the ***PSSA*** to collective bargaining scenarios with the public sector. It may reference its position as a mandate or policy; however, the content of the mandate provided to public sector employees stems from, and is consistent with, the legislation and, particularly, the threat of the retroactivity claw back provisions. There is no question that those provisions have impacted what has transpired between employers and unions in this province. The evidence of that impact was clear through the trial testimony of the Plaintiffs' witnesses and filed affidavits. I am satisfied that appropriate and substantive evidence has been put before the court to establish that a constitutional consideration of the ***PSSA*** is not premature. Courts, in the past, have determined cases which have addressed hypothetical questions: ***Mills.***[33]

[278] The test with respect to ripeness is the "flipside", as that related to mootness: ***Borowski***.[34] A two-step analysis is required to determine whether the concrete dispute has disappeared and, if so, should the court exercise its discretion to hear the matter. Where a live or real controversy exists, as it does here, the court has the discretion to determine the case. A concrete dispute is very apparent with respect to the constitutionality and impact of the ***PSSA***. Further, Hogg stated, "... probably the rule for ripeness is the same as for mootness, namely, that the court should generally not decide a case that is unripe for adjudication, but has the discretion to do so" (at p. 59-21). I chose to exercise that discretion, as this case requires adjudication for the reasons as stated.

[279] The decision in ***BCAG v. AAG*** [35] considered the doctrine of ripeness with respect to a constitutional challenge of legislation that was not proclaimed. In that case, declaratory relief was sought by the applicants as regards constitutionality, while an application was brought by the Respondent to strike pleadings. The act in question had not been proclaimed. The pleadings were struck on the basis that the action related to a hypothetical future right which had not, as yet, arisen. The decision in ***Ewert***[36] was relied upon. I am satisfied that the ***BCAG v. AAG*** decision is distinguishable based, in part, on the significant body of evidence that has been presented in this case. Further, no motion to strike pleadings was undertaken by the defendant. The plaintiff in ***BCAG v. AAG*** did not seek any remedies beyond a declaration. The court held in ***BCAG v. AAG*** that the constitutional challenge could be recommenced in the event the statute was proclaimed.

[280] I am satisfied in the context of this case, and with the evidence provided, including the conduct of Government, that it is appropriate to rule on the constitutionality of the ***PSSA*** despite the fact it may never be proclaimed. This law is effecting and impacting collective bargaining in the Province of Manitoba despite its unproclaimed status. This is particularly so when one considers the threat of the ***PSSA's*** retroactivity provisions which serve to claw back wage agreements or other monetary benefits that are not in compliance with the legislation. Reference to the risk of the claw back provisions was repeatedly voiced in the union's affidavit evidence and by the testimony of the witnesses called on its behalf. Additionally, Justice

Edmond also determined, in considering the Plaintiffs' request for an interlocutory injunction, that, despite the ***PSSA's*** non-proclamation, the Government's bargaining positions have been consistent with those amounts prescribed in the legislation. Further, the evidence established that the ***PSSA*** restraints were being applied, even if not proclaimed. I concur with those conclusions and find that a constitutionality review of the ***PSSA*** shall be undertaken.

The Duty of Pre-Legislative Consultation

[281] The Plaintiffs are seeking, pursuant to the Re-Amended Statement of Claim para. 1(e), a declaration that s. 2(d) ***Charter*** rights were violated by virtue of the Government's failure to engage in a good faith process of negotiation and meaningful consultation prior to the enactment of the ***PSSA***. The Plaintiffs suggest that the decisions in ***Meredith*** and ***BCTF*** have established a pre-legislative consultation requirement that would provide unions with an ability to outline their goals and undertake the opportunity to meaningfully influence change.

[282] It is the position of the Defendants that parliamentary sovereignty requires that a government be in a position to introduce legislation absent any duty to consult, or even provide notice to affected entities in advance of the law-making process. As was stated by Sopinka J. in ***Reference Re Canada Assistance Plan (B.C.)*** [37] at pp. 559–560, "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle". He added that, "[a] restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself". The Defendants submit that these constitutional principles were reaffirmed in the ***Mikisew*** decision by Justice Karakatsanis:

> [32] ...the law-making process – that is, the development, passage, and enactment of legislation – does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.
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> ...
>
> [36] Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority.... Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

Further, Justice Brown, in ***Mikisew,*** stated:

> [117] ...the entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference. As this Court explained in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 28, the making of "policy choices" is a legislative function, while the implementation and administration of those choices is an executive function. This precludes judicial imposition of a duty to consult in the course of the law-making process.
>
> ...
>
> [124] ... In a similar vein, although legislation which substantially interferes with the right to collective bargaining protected by s. 2 (*d*) of the *Canadian Charter of Rights and Freedoms* can be declared invalid, "[l]egislators are not bound to consult with affected parties before passing legislation" (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 157). In short, while the Constitution's status as the supreme law of Canada operates to render of no force and effect enacted legislation that is inconsistent with

> its provisions, it does not empower plaintiffs to override parliamentary privilege by challenging the process by which legislation was formulated, introduced or enacted.

[283] The Defendant submitted that there are many practical problems that would arise in the context of a mandated duty to consult. Such a process would inhibit the legislative function and, arguably, create significant dysfunction.

[284] In this case, the evidence demonstrated that the PSCC, as early as September 21, 2016, had undertaken serious consideration of a legislative wage restraint option with respect to public sector compensation (Exhibit 3, Tab 5). That option had first been proposed in August 2016 in a submission to Richards. It is apparent that the legislative wage restraint model being evaluated was that which had been formulated in Nova Scotia. The unproclaimed Nova Scotia legislation reflected a wage model of two years at zero per cent followed by 1.0 per cent in the third year, and 1.5 per cent plus 0.5 per cent in the fourth year (Exhibit 3, Tab 18). On December 14, 2016, the PSCC approved, in principle, a public sector restraint legislation model (Exhibit 3, Tab 20). Additionally, at that time, there was discussion of a consultation process to be initiated with union leaders regarding public sector compensation and legislation (Exhibit 3, Tab 17). The proposed Manitoba public sector compensation legislation was expected to include a two year wage pause with modest increases thereafter. Further, an avenue for additional compensation was set out if efficiencies were identified, negotiated and approved by the Treasury Board in years three and four. There would also be retroactivity/claw back provisions if employers agreed to monetary terms beyond what was permitted in the ***PSSA***. The arbitration process would be circumvented as wages being awarded beyond what the legislation stipulated would not be permitted.

[285] The December 2016 PSCC meeting had been preceded by the November 21, 2016 Throne Speech, at which time Government stated that wage restraint legislation would be introduced following consultation and dialogue with leaders of organized labour. The meetings to be arranged with labour leaders were to advise of the Province's financial situation and seek "meaningful dialogue" on possible solutions (Exhibit 3, Tab 19). Further, the PSCC discussion indicated:

> It can be anticipated that organized labour will want to address the Province's intention with respect to legislation. It is recommended that the Minister of Finance:
>
> - Acknowledge that, as outlined in the speech from the throne, legislation will be introduced, following consultation and dialogue, to ensure that wage costs in the public sector do not exceed Manitoba's ability to sustain the services they receive in return.
>
> - Advise the group that details of any possible legislative options have not been finalized by government. Government is seeking input from and dialogue with union leaders prior to any final decisions by government regarding the legislation.
>
> - Propose a further meeting with organized labour and government officials to exchange ideas about possible legislative options. A conceptual outline of possible legislation from the Province's perspective could be discussed at the meeting. For example, this outline could consist of the concept of pause(s), possible wage increases, and efficiencies. Input and suggestions from organized labour will also be sought throughout the consultation process.

[286] On January 5, 2017, Irving prepared an Advisory Note for Richards stating that proposed draft legislation, based on Nova Scotia's sustainability model had been prepared. The note advised that, "[p]auses to total compensation for at least two years. Pauses for all years not likely to survive a court challenge concerning the circumvention of collective bargaining" (Exhibit 3, Tab 21). It was indicated that recognition of some form of

"meaningful" collective bargaining was needed to defend a constitutional challenge to the legislation. It was thought that that would be accomplished "...with the two components of modest increases in years 3 and 4 and the possibility of allocating a limited portion of approved, achievable efficiencies towards nominal increases".

[287] Irving first contacted Rebeck on December 5, 2016, and a meeting was arranged with labour for January 5, 2017 (Government and certain labour representatives had formed the FWG). It was apparent that by the time of that meeting, as evidenced in the PSCC documentation, that the ***PSSA*** was in the developmental stage, and that consultation with labour would only relate to legislative content. As stated in the Advisory Note, draft legislation had already been prepared. However, at the January 5, 2017 FWG meeting, the Minister of Finance advised that legislation was one option, with all others on the table. The union representatives were also told that no legislative drafting had begun and that Government was meeting with them on a "blank slate" basis. It was hoped that an exchange of meaningful dialogue would transpire. However, members of the PSCC continued to meet and work on the legislation, which was ultimately presented to that group on March 8, 2017 (Exhibit 3, Tab 33).

[288] The PSCC meetings documentation noted that the labour representatives were committed to work with Government to achieve a balanced budget within an eight year target period, but disagreed that legislation was necessary. A memorandum dated February 22, 2017, showed that the MFL position reflected the belief that a legislative option was premature. Further, components of any possible legislation should be discussed during the course of collective bargaining (Exhibit 3, Tab 27). The Government position was that the proposed legislation did not interfere with collective bargaining rights or the right to strike. Indeed, meaningful discussions could transpire around workplace conditions and non-monetary issues.

[289] The union representatives approached these meetings with the belief that consultation would transpire and that the Government was open to non-legislative options. The unions requested information with respect to Government's financial position in order to facilitate meaningful discussions towards a balanced budget scenario. There was a recognition that Manitoba faced fiscal challenges. Many communications between Rebeck and Irving occurred with respect to the Government's fiscal position, including a requested response to the unions' February 10, 2017 presentation, appeals for information, and many other matters. As early as January 10, 2017, Rebeck asked (Binder 1, Tab 26):

> "... clarification on the status of any government legislation related to collective bargaining and/or constraining public sector wages or growth in wages. At Thursday's meeting, Minister Cameron Friesen advised us that while the government was committed to introducing legislation this spring (as per last fall's Throne Speech commitment), no legislative drafting had yet begun, and the government was approaching us with a 'blank slate' in regards to legislative content.
>
> However, according to media reports from later in the day, Minister Friesen subsequently stated that draft legislation was already prepared or was being prepared and would be shared with labour shortly. Needless to say, we believe that a fulsome discussion of fiscal options is in order prior to settling on a single legislative course of action.

[290] A great many questions were posed by Rebeck over the time period of January to March 2017, many of which never met with a response. During the course of the February 24, 2017 FWG meeting, Irving stated (Binder 1, Tab 45, p. 6):

> Collective Bargaining does not always work. Not always done in good faith. Might be a requirement to take a pause if it's not working, even in the long term. The government prospective is looking for progress and efficiencies. We cannot bank on good faith.

[291] The four meetings of the FWG that transpired during the months of January to March 2017 reflected discussions and frustrations on what the unions felt was a lack of information related to the fiscal situation of the Province and the status of possible legislative action. A draft of the proposed legislation was requested without a response. The frustrations and concerns of organized labour were well set out in Rebeck's letter of March 7, 2017, to Irving (Binder 1, Tab 50):

- labour being completely in the dark about what specific fiscal goals the Government was seeking to achieve with the legislation and why goals could not be achieved through collective bargaining;
- no information about the specific legislative goals;
- incredibly short time frame;
- labour had worked in good faith and had made proposals with respect to returning to balance over an eight year period, without response;
- the Minister had assured that all options were on the table;
- labour never declined to provide feedback on the Government's legislation, but were never told with certainty that it was proceeding, nor was a draft ever provided; and,
- inconsistent information was being received from Government.

The answer from Irving (Binder 1, Tab 51) was not wholly responsive to those issues outlined in Rebeck's letter. It must be recognized that certain information requested was non-disclosable and protected by Cabinet privilege. Rebeck continued through April 19, 2017, to request information subsequent to the introduction of the legislation and Budget 2017 (Binder 1, Tab 57). Again, many questions were left unanswered.

[292] There were a number of Plaintiff unions who did not participate in the FWG and, accordingly, were not consulted by Government in any manner about the possible enactment of legislation. Government did not want large numbers of union representatives on the FWG.

[293] The Government was clearly of the view that collective bargaining would not achieve the type of certainty desired and envisioned by the legislative option. It is the union position that good faith consultation never transpired as regards this matter. Further, Government was not forthright in its interactions with the unions with respect to issues such as whether draft legislation existed, feedback on the unions' presentation, the need for legislation, the provision of information, as well as other matters. An absence of good faith was submitted to exist.

[294] The case law provides some support for the requirement to engage in pre-legislative consultation. Justice Donald, in ***BCTF***, found:

> [288] In this context, a *Charter* breach cannot always be seen within the four corners of legislation, but must sometimes be found to occur *prior* to the passage of the legislation, when the government failed to consult a union in good faith or give it an opportunity to bargain collectively. If the breach *is* the lack of consultation, then surely this Court must consider such a lack of consultation when determining whether a breach occurred.
>
> [emphasis in original]

Further, in the ***OPSEU*** decision, Justice Lederer also found that meaningful consultation between Ontario and the involved unions did not transpire.

[295] Unquestionably, Government stipulated that it wished to consult with the unions before legislation was enacted. I am not satisfied that Government was at any time prepared to consider any options other than wage restraint legislation. Nor was a varied content of that legislation likely possible. As early as August 9, 2016, Government was in receipt of a recommendation that a public service sustainability model similar to the unproclaimed Nova Scotia legislation should be adopted in Manitoba. The evidence revealed that the PSCC recognized that it must undertake "consultation", but that consultation was not necessarily on the need for a legislative option as opposed to collective bargaining. Instead, consultation was

expected on the content of the legislation itself. I have concluded that, throughout the limited and perfunctory consultation process between Government and the unions, there never was an intention to seriously consider any other options which were not reflective of a legislative initiative. The consultation was not meaningful in nature as to the need for legislation or with respect to its content. The communications primarily between Irving and Rebeck demonstrated the tension between the two groups, with the unions requesting information and feedback with little or no response. All of that being said, does a duty to consult exist in terms of a possible infringement on s. 2(d) rights?

[296] The case law, as was indicated in ***BCTF***, makes mention of the good faith pre-legislative consultation process in terms of the determination of a s. 2(d) breach. Conversely, the decision in ***Health Services*** held that, "[l]egislators are not bound to consult with affected parties before passing legislation" (paras. 157 and 179). This was reiterated, as previously indicated, in ***Mikisew***. Further, Justice Rowe outlined the many steps necessary in the legislative process and the complexity of that process (para. 160). The imposition of a consultative process:

> [164] ... could effectively grind the day-to-day internal operation of a government to a halt. What is now complex and difficult could be drawn out and dysfunctional. Inevitably, disputes would arise about the way that this obligation would be fulfilled. This is why the separation of powers operates the way it does. The courts are ill-equipped to deal with the procedural complexities of the legislative process.

I am in agreement with the Defendant that a duty to consult prior to the enactment of legislation does not exist. I do not interpret Justice Donald's reasons in ***BCTF*** to obligate the Government to engage in a consultative process before the introduction of legislation. Nor was such a position necessarily embraced by the Supreme Court of Canada when his reasons were adopted.

[297] The recent ***Mikisew*** decision well-articulated that policy and law making choices lie within the legislative function. To hold otherwise could result in an inappropriate inhibition of the legislative process. Further, to incorporate consultation into the process could have many unforeseen and, perhaps, limiting consequences. Justice Karakatsanis in ***Mikisew*** stated:

> [2] ... Two constitutional principles — the separation of powers and parliamentary sovereignty — dictate that it is rarely appropriate for courts to scrutinize the law-making process. The process of law-making does not only take place in Parliament. Rather, it begins with the development of legislation. When ministers develop legislation, they act in a parliamentary capacity. As such, courts should exercise restraint when dealing with this process. Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy. It would also transpose a consultation framework and judicial remedies developed in the context of executive action into the distinct realm of the legislature. Thus, the duty to consult doctrine is ill-suited to the law-making process; the law-making process does not constitute "Crown conduct" that triggers the duty to consult.
>
> ...
>
> [32] For the reasons that follow, I conclude that the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.
>
> ...

> [36] Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. While the adoption of the *Canadian Charter of Rights and Freedoms* transformed the Canadian system of government "to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 72), democracy remains one of the unwritten principles of the Constitution (*Secession Reference*, at paras. 61-69). Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

[298] The ***Health Services*** decision held that a pre-legislative duty to consult does not exist. It must be acknowledged that government`s consultation with a group about to be impacted by its actions is not an unusual practice. That being said, a legal duty to consult cannot be said to have been created or established. To determine otherwise could well curtain any pre-legislative consultation from ever transpiring as a government would be reluctant to undertake such action if the spectre of judicial review of that process became the law.
[299] Any duty to consult that is said to be established pursuant to International law does not create such a duty pursuant to Canadian law.
[300] Accordingly, I am not prepared to find a s. 2(d) rights violation because of a failure to undertake pre-legislative meaningful consultations between the unions and Government. I am satisfied, based on ***Health Services*** and ***Mikisew***, that no duty to consult on a pre-legislative basis exists in Canada. The relief sought under para. 1(e) of the Re-Amended Statement of Claim is dismissed. To hold otherwise could well promote dysfunction in the operation of the legislative process. The duty to consult is an area which will be further considered under a s. 1 argument and analysis. A failure to consult is relevant in assessing whether legislation which violates s. 2(d) can be justified under s. 1 of the ***Charter***.

Pre-Legislative Collective Bargaining

[301] The Plaintiffs maintain that there was a duty to undertake timely and good faith collective bargaining prior to the enactment of the ***PSSA*** (Re-Amended Statement of Claim, s. 1 (d)).
[302] The decisions in ***BCTF*** and others, such as ***Dockyards Trades*** and ***Gordon***, do not require government to engage in collective bargaining as a prerequisite to the introduction of legislation. Many of the same principles are applicable under this heading as were discussed under the Pre-Legislative Duty to Consult. Clearly, decisions such as ***Health Services*** and ***Mikisew*** do not create such a duty. The requirement on government to collectively bargain with unions prior to legislation would create uncertainty in the legislative process and dysfunction. This is not an area in which the courts have any jurisdiction or involvement. There is no question that collective bargaining can precede legislation. However, there is no legal duty to undertake such a course of conduct.
[303] I am satisfied that there is no legal duty imposed on Government to engage in pre-legislative collective bargaining. Accordingly, the relief claimed pursuant to para. 1(d) of the Amended Statement of Claim is denied.

Section 2(d) of the Charter – Constitutionality of the PSSA

[304] Section 2(d) of the ***Charter*** involves the freedom to establish, belong to and maintain an association. The Supreme Court of Canada's labour decisions, which include ***MPAO***, ***Meredith***, ***SFL***, and ***Health Services***, have set out many of the principles that are applicable in this area. As Justice Abella indicated in ***SFL***, "... the arc bends increasingly towards workplace justice" (para. 1).
[305] The increasing arc towards "workplace justice" took fruition from the dissenting reasons of then Chief Justice Dickson in the ***Alberta Reference*** decision where he found that a guarantee of freedom of association included the right to collectively bargain and a right to

strike. That dissent substantially informed the Supreme Court of Canada's decision in ***Health Services***.

[306] As has been indicated throughout this decision, it is necessary to consider the constitutionality of the ***PSSA*** through a contextual and fact-based analysis in order to determine if there has been substantial interference with freedom of association. It is important to evaluate whether the ***PSSA,*** in intent and/or effect, substantially interferes with the collective bargaining process. The "intensity" of the measures adopted in the ***PSSA*** must be evaluated. In ***Health Services***, the test for substantial interference states:

> 93 Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> **The Importance of the Matter Affected**
>
> 95 ...The more important the matter, the more likely that there is substantial interference with the s. 2(*d*) right. Conversely, the less important the matter to the capacity of union members to pursue collective goals, the less likely that there is substantial interference with the s. 2(*d*) right to collective bargaining.

Issues such as wages, contracting out, ability to strike, pensions, layoff conditions, bumping rights and seniority, along with monetary benefits, have all been regarded in the case law as being of fundamental importance to the collective bargaining process. As was said in ***MPAO*** by McLachlin C.J. quoting Cory J. from the ***Alberta Reference*** case, "Whenever people labour to earn their daily bread, the right to associate will be of tremendous significance. Wages and working conditions will always be of vital importance to an employee" (para. 40).

[307] The ***PSSA*** has effectively removed union rights to collectively bargain any monetary terms or benefits. The Government has indicated, both through the ***PSSA*** directly and indirectly via mandates to various employers based upon the legislation, that there is little or no appetite to bargain monetary issues. Both the Plaintiffs and the Defendant acknowledge that wages and monetary benefits are of fundamental importance to the collective bargaining process. After a careful consideration of all the evidence, I am satisfied that the first step of the substantial interference test has been met. The trial evidence, including Dr. Hebdon's expert opinion, was indicative of the importance of monetary issues to union membership. It was generally of fundamental importance and afforded leverage in the collective bargaining process to achieve associational goals.

[308] The fact that monetary outcomes have been mandated under the ***PSSA*** does not automatically equate to a s. 2(d) violation, even though such areas are usually significant collective bargaining matters. However, I am satisfied that the process was, in the circumstances, disrupted to such a degree so as to satisfy the first step of the ***Health Services*** test. It is true that collective bargaining can transpire, but the meaningfulness of that process and ability of union members to come together and pursue collective goals has been subjected to substantial interference.

[309] The agreements reached demonstrated that the "process" has resulted in minimal gains for union membership (i.e., BUFA, MGEU, UMFA, RRC, GOLICO). Further, with respect to RRC and ACC, retractions transpired, being the loss of layoff protection. I acknowledge that union leaders have issued bulletins hailing "big gains" upon contract agreements. However, these were undertaken to endeavour to alleviate frustrations being experienced by the membership and embarrassment as was testified to by Lawrence – a public relations motivation to alleviate the cynicism and frustration of membership was endeavoured. Effectively, the ***PSSA*** has

served to remove a union's ability to participate in meaningful collective bargaining on issues of crucial importance to employees. Again, it is recognized that actual outcomes are not determinative of a s. 2(d) analysis. However, such evidence of outcomes can be illustrative of and support conclusions with respect to the impact on associational activity.

The Impact on the Process of Meaningful Collective Bargaining

[310] The ***Health Services*** decision outlined considerations to be evaluated in the determination of whether government action has undermined a meaningful process of collective bargaining. The Supreme Court considered certain elements of good faith bargaining: a duty to engage in meaningful dialogue with a willingness to exchange and explain positions; an obligation to meet and engage in good faith discussions; the need for both parties to approach the bargaining table with good intentions; hard bargaining can transpire, however, it cannot be approached with the intention of avoiding a collective agreement or destroying a bargaining relationship; past processes of collective bargaining cannot be disregarded; a temporary limit to collective bargaining restraint does not render the interference insubstantial. In essence, did the measures adopted disrupt the balance between employees and employer to such a degree as to substantially interfere with the collective bargaining process? Further, it must be remembered that it is the process that requires protection and not the "fruits"/outcome of collective bargaining: ***SFL***.

[311] In ***MPAO*** (para. 72), the Supreme Court provided illustrations of how the balance of power between an employer and employee can be disrupted. These included restricting the subjects to be discussed and imposing arbitrary outcomes. Engaging in a restrictive restraint process serves to render meaningless an employee's pursuit of workplace goals and the ability to leverage towards achieving a solution by way of collective bargaining. The process has been significantly impacted.

[312] The Government has relied upon the ***Meredith*** decision to argue that the ***PSSA*** restraints do not result in substantial interference with the collective bargaining process. This position was based on the Supreme Court's acceptance of temporary public sector wage restraint legislation in circumstances of financial difficulty. The acceptability of the ***ERA*** restraint legislation can also be seen in a number of Court of Appeal decisions, such as ***Dockyard Trades, Gordon,*** and ***Syndicat canadien***. However, it must be remembered that, specifically in ***Meredith***, there was no consideration of how the ***ERA*** impacted collective bargaining, as the issue before the Court was whether the ***ERA*** interfered with what had been found in ***MPAO*** to be an unconstitutional consultative wage determination process. The RCMP was not legally permitted to engage in collective bargaining at the time of that decision.

[313] The Court of Appeal decisions that relied upon ***Meredith*** all determined that the ***ERA*** was not, on the facts of those cases, a breach of s. 2(d) rights. The ***ERA*** received Royal Assent on March 12, 2009. It capped wage increases for public servants for a five year period, retroactive to April 1, 2006. The ***ERA*** set a 2.3 percentage increase for the years 2007–2008 and 1.5 per cent in the three subsequent years. A zero per cent wage freeze was never enacted. The ***ERA*** was a response to the global financial crisis that had reached its peak in the fall of 2008. The purpose of the legislation was to assist in the stabilization of the Canadian economy in a time of crisis. There had been ongoing collective bargaining prior to the ***ERA's*** enactment. The union negotiators were told that legislation was looming and would be applicable to them in the event agreements were not achieved. There were specific dates set out in the ***ERA*** that governed its applicability to agreements reached. The Government and unions were able to engage in meaningful negotiations in advance of the legislation. The Government chose to negotiate in good faith before enacting and proclaiming the ***ERA***.

[314] The unions were aware of the impending ***ERA*** legislation, with some able to conclude agreements, and others not. Consequently, those cases that challenged the ***ERA*** were faced with the fact that the legislated wage parameters were reflective of the good faith collective bargaining that preceded its enactment. Further, wages were not capped at a zero per cent level at any time making it distinguishable from the ***PSSA***.

[315] The ***ERA*** was held to be constitutional in a number of decisions rendered both by the Supreme Court of Canada and Appeal Courts in this country. The Government submits that there are important similarities between the ***ERA*** and the ***PSSA***, as well as distinctions which render it subject to the same positive constitutional conclusion.

[316] The following comparisons were emphasized by Government:

1. both pieces of legislation set time-limited wage restraints;
2. it was not possible to bargain additional monetary benefits, except with respect to the RCMP under the ***ERA***;
3. both pieces of legislation were applicable across the broad public service to both unionized and non-unionized employees;
4. wage levels were commensurate with bargaining – the ***ERA*** was preceded by the advice that wage restraint legislation would be implemented. In accordance with that disclosure, a number of agreements were reached through collective bargaining. The Government submits that 21 agreements have been completed since the 2017 ***PSSA*** passage. Those reflect the same level of compensation, and, hence, are illustrative of the collective bargaining process achieving the same outcomes as the restraint legislation. (There are important distinctions with respect to this position in that many of the agreements under the ***PSSA*** were accomplished on a "take it or leave it" scenario and acceptance of the terms were under duress and ratified through a vote conditional on constitutionality.);
5. non-monetary issues may be the subject of collective bargaining between the parties;
6. certain employees remained eligible for wage increases through merit and years of service steps;
7. the right to strike was maintained.

[317] The Government also highlighted certain differences between the two pieces of legislation with the first being that the ***PSSA*** does not overturn any agreements ratified before the legislation was introduced in March 2017. That being said, its terms will be applicable to the next collective agreement to be negotiated. The ***ERA*** overturned agreements, as was referenced in cases such as ***Dockyards Trades*** and ***Syndicat canadien***. The other significant difference was that in years three and four of the ***PSSA*** sustainability periods, an opportunity exists to negotiate savings and increase employee compensation. The Government points to the negotiations with Doctors Manitoba and its willingness to negotiate sustainability savings with the MGEU under GEMA, such as closing government offices for three days between Christmas and New Year's and over-time issues as illustrative of its desire to collectively bargain sustainability savings. The years three and four sustainability provisions were argued to provide a robust opportunity for collective bargaining to increase employee compensation. A further distinction is that the ***PSSA*** contains what was argued to be a broader exemption clause from its provisions than existed under the ***ERA*** (s. 7(4)). These areas will be explored later in these reasons.

[318] The unions take issue with Government's position, particularly related to reliance on the ***Meredith*** decision. It was contended that ***Meredith*** must be confined to the ***ERA's*** effects in the context of the consultative, non-binding recommendation RCMP Pay Council process that existed in that case. That process was found in ***MPAO*** to be constitutionally inadequate. Further, in ***Meredith***, the ***ERA*** capped wage increases for RCMP members at a rate consistent with agreements concluded with other bargaining units inside and outside of the core public administration. Accordingly, those agreements reflected outcomes emanating from the collective bargaining process. Further, the ***ERA*** did not preclude consultation on other compensation-related issues, nor did it prevent the consultation process from moving forward. Additional allowances could be negotiated, along with significant benefits.

[319] The fact that 21 agreements have been reached since the ***PSSA*** received Royal Assent was argued by the unions to not reflect an actual bargaining process, or results that might have been achieved through collective bargaining. Further, certain recent collective agreements outside the ***PSSA's*** jurisdiction have produced wage increases in excess of its

limits (ArlingtonHaus, Revera, and Extendicare) as has the awards of arbitration boards (PARIM). Other areas of unions' concern included:

1. there is no end date in the ***PSSA*** for a first collective agreement settled after March 2017. Any such agreement in the public sector will be subject to the four year sustainability period;
2. employees have been denied the right to a meaningful process of collective bargaining;
3. the ***PSSA*** extends to all compensation-related issues. The ***ERA's*** definition of additional remuneration was significantly broader than that contained in the ***PSSA***, which prohibits compensation of "an allowance, bonus, premium or benefit of any kind to be paid or provided to the employee" (s. 2);
4. the ***PSSA*** will have a chilling effect on future union bargaining;
5. the ***PSSA*** freezes wages at zero per cent for a two year period.

[320] There are significant differences and similarities between the ***ERA*** and the ***PSSA***, as was outlined by the parties. The fact the legislation is time limited is of relevance in terms of the determination of whether substantial interference with collective bargaining has transpired. Indeed, because of the sustainability period, it is arguable that this legislation can be far reaching for certain groups negotiating new agreements into the future – perhaps to 2025. Another important distinction is that the ***PSSA*** enacts two years of zero per cent wage increases. The ***ERA*** provided some level of wage increase in each year of its implementation. As was said by the Quebec Court of Appeal in ***Syndicat canadien***, "... the ***ERA*** did not impose salary freezes or reductions, measures that would have been much more draconian" (para. 48). The Government has effectively and completely removed wages and other monetary compensation from the collective bargaining process. While the ***ERA*** capped wage increases, the ***PSSA*** prohibits any monetary increase for a two year period. This restriction has a structural impact on the collective bargaining process. The remuneration increases for years three and four are modest. The possibility of negotiated increased compensation for those years remains speculative. The ***PSSA*** is a broad-based enactment with a focus on impacting Manitoba's public sector employees.

[321] The constitutionality of wage restraint legislation as considered in ***Meredith*** and other cases was, in part, premised on the fact that the wage levels set out in the ***ERA*** were consistent with actual good faith collective bargaining processes. There was no such bargaining undertaken prior to the passage of the ***PSSA***. Further, the collective agreements concluded on the same terms as the ***PSSA*** were ratified after its enactment and with knowledge of its provisions, including the retroactivity/claw back provisions. Additionally, those agreements were ratified with conditional ballots, and under duress. They were not the subject of a collective bargaining process as transpired before the implementation of the ***ERA*** as outlined in ***Meredith, Dockyards Trades***, and other cases. As previously indicated, the unions in those cases were afforded advance warning of the content and implementation scenario of the ***ERA***. Meaningful collective bargaining was found to have been undertaken before the legislation became law. Such was not the case as regards the ***PSSA***. The 21 collective agreements referenced by Government were not reached through meaningful bargaining before the ***PSSA*** was enacted. These agreements were not as in the ***ERA*** cases – the result of an outcome consistent with the actual bargaining process. Where actual collective bargaining occurred, the wage increases were above the ***PSSA***-mandated compensation (i.e., ArlingtonHaus, Extendicare, Revera).

[322] I am not satisfied that the ***PSSA*** facilitates collective bargaining on important non-monetary issues. As Dr. Hebdon testified, most strikes (77 per cent) relate to wage issues. Further, when union memberships establish their priorities for bargaining, wages and monetary terms are generally a top priority. That does not diminish the fact that there can be workplace concerns and job security issues; however, leverage is no longer afforded by the ability to collectively bargain monetary terms. This promotes the unlikelihood of securing non-monetary concessions. While the right to strike is maintained under the ***PSSA***, Dr. Hebdon has indicated, and I accept, that such a right is "futile". The appetite to strike over

non-monetary issues was not evident during the course of the trial from those witnesses who provided evidence on the behalf of the unions.

[323] Without question, certain employees will be eligible for merit and/or step increases over the ***PSSA*** sustainability period. However, no evidence was provided as to the number of employees who might be eligible for those increases. Further, such benefits are limited over the course of time.

[324] While it is clear that the ***PSSA*** does not rollback wage settlements reached before its enactment, it could apply retroactively in the event parties have negotiated or arbitrated terms in excess of the ***PSSA*** under the looming threat of proclamation. The only agreements allowed to stand would be those that do not vary the terms of the ***PSSA*** or those undertaken through specified Government agreement, such as Doctors Manitoba or those that have served to align compensation with similar bargaining units. The number of public sector employees who have secured a collective agreement since 2017 is very small.

[325] The Government has maintained that the provision of an ability to negotiate increased compensation in years three and four creates a significant difference from the ***ERA*** legislation. This area was considered through expert evidence and leads to the conclusion that the negotiated sustainability savings aspect of the ***PSSA*** may be of no value. There has been no negotiated sustainability savings since 2017. Any such sustainability savings would come at a cost to employees. It is likely that the inclusion of these provisions was to defend against a constitutional challenge by affording an avenue of possible collective bargaining on monetary issues, whether realistically achievable or not.

[326] The expert evidence of Drs. Hebdon and Chaykowski was earlier outlined in this decision. While they agreed on certain aspects of their testimony, there were areas of significant divergence. I am satisfied and accept the evidence of Dr. Hebdon as being more reasonable and persuasive in the circumstances. Dr. Chaykowski exhibited definite biases that were well brought out by Plaintiffs' counsel during cross-examination through references to his testimony in other courts and academic writings. Further, Dr. Hebdon has had practical experience in terms of the collective bargaining process in contrast to Dr. Chaykowski. Dr. Chaykowski did not accept that the ***PSSA*** would limit collective bargaining or lessen a union's bargaining power. Correctly, he was of the view that certain non-monetary issues could well be of greater importance during a bargaining process. However, as Dr. Hebdon's testimony showed, monetary benefits are generally of more significance to union memberships. The trial evidence verified such a conclusion. Dr. Chaykowski was also of the opinion that increased compensation could be negotiated in years three and four. It is noteworthy that he did not review any of the affidavit evidence which served to articulate how "negotiations" had been undertaken between Government and public sector unions and their impact on the union memberships.

[327] Dr. Chaykowski documented in his writings significant umbrage to the effects of wage restraint legislation on collective bargaining, on the relationships between employers/employees, and unions with their memberships. He warned of the dangers of wage restraint legislation and the possible erosion of the collective bargaining process (i.e., para. 155). However, such damage was said to be restricted to Ontario or federal legislation. It is apparent that Ontario has resorted to and relied upon restraint measures more frequently than Manitoba. That being said, it is disingenuous to suggest that the ramifications of restraint legislation would not similarly impact public sector workers in this Province. Those impacts would include relationships between employees/employers, union representatives and membership, morale, lower trust, frustration of the collective bargaining process, and a general undermining of labour relations.

[328] I am satisfied that the evidence of Dr. Hebdon must be preferred and was of particular importance in evaluating the constitutionality of the ***PSSA***. He utilized a fact-based and contextual analysis in reaching his conclusions in this matter. Further, he had taken the opportunity of reviewing all the affidavit evidence and other referenced documentation.

[329] All parties agree that monetary terms and benefits are a high priority for union membership. Those areas are usually considered after collective bargaining has transpired on non-monetary terms. It is expected that a momentum towards resolution and a trust will have built between the parties dealing with non-monetary matters. Further, there may be important non-monetary issues on the table, such as job security. In those circumstances where monetary wages and benefits have been imposed, a resolution is less likely to be achieved on significant non-monetary issues as leverage is lost and the bargaining power of the union is diminished. I accept Dr. Hebdon's conclusion in this regard (September 19, 2017 Report at p. 11):

> ... Given that wages and other monetary terms have been excluded from collective bargaining for four years, my conclusion is that meaningful collective bargaining is not viable. My assertion is directly contrary to one of the purposes of the PSSA, namely, section 1. (c). I would also make the point that the PSSA unfairly places restrictions only on the union's side. The four-year so-called sustainability period 'pay rate' increases of 0, 0, .75, and 1% clearly favour management. This aspect of the PSSA unfairly shifts the balance of bargaining power in favour of management interests.
>
> As indicated above, monetary issues are pivotal to the exercise of bargaining power of both labour and management. The parties know that when monetary issues are settled, it is almost impossible to generate pressure on any other issues because they are central to the negotiations. Thus, by predetermining pay rate increases in favour of management the union is left with almost no ability to exercise bargaining power on non-monetary issues. This loss of bargaining power is not the only problem.

[330] There are additional areas where damage is caused by wage restraint legislation as reflected by the fact that union members can no longer have their priorities addressed. This serves to create both frustration and cynicism within the membership group. That frustration is directed towards their union representatives and to management generally. It is apparent in reviewing the affidavit evidence of the union representatives that such frustrations and cynicisms exist in the Manitoba public service. This was well evidenced by the referenced negotiations with UMFA, MGEU and other mentioned units. Moreover, Dr. Hebdon opined that the literature and experience has illustrated that more grievances are filed along with the existence of industrial conflict in circumstances where restraint legislation has been utilized. There also was considered to be a chilling effect on the next round of collective bargaining, albeit the evidence was not as strong in that area.

[331] Negotiations with RRC and ACC were demonstrative of the situation where union membership had in its recent past negotiated zero per cent agreements, but were able to bargain job security. In the latest round of bargaining with those units, the ***PSSA*** terms were accepted. However, there was an absence of union leverage to secure gains on non-monetary issues. The job security provisions were eradicated. Without question, this damaged the collective bargaining process, caused frustration within the union membership, and constituted a substantial interference.

[332] Manitoba public sector unions collectively bargained zero per cent increases for two years in 2010 and 2011 in return for benefits such as job security. In the circumstances that now exist, the unions are left with very little power to negotiate non-monetary areas because the leverage afforded by monetary benefits has been eradicated from the bargaining table. Clearly, certain of the unions such as BUFA have been able to negotiate some improvements, with the example being four new faculty members and other benefits. However, those gains were small in comparison to what, arguably, could have been negotiated through collective bargaining with all issues on the table. Further, the availability of strike action is, essentially, meaningless and "futile". As Dr. Hebdon opined, the union membership would see little value

in striking over non-monetary issues when there is no countervailing pressure to enhance the collective bargaining process.

[333] I accept Dr. Hebdon's conclusion that, "With monetary issues already predetermined, meaningful bargaining is unworkable and almost impossible" (September 17, 2019 Report, p. 14). This constitutes substantial interference with s. 2(d) rights. Further, it is disingenuous on the part of Government to argue that it is operating by policy and mandate on monetary issues and not by virtue of this legislation. The ***PSSA*** is the legislative enactment of those mandates and policies, albeit not proclaimed. Government has the ability to set mandates and instruct public sector employers with respect to compliance. It has done so under the auspices of ***PSSA*** wage restraints. There is no question that tough mandates can be adopted, however, the process in this Province has engendered substantial interference with collective bargaining. The threat of the retroactive claw back provision exists and looms over any employer or employee that dares to bargain outside the parameters of the legislation as proclamation could transpire at any time, facilitating the impact of those provisions. There are exceptions, primarily in the healthcare field, where agreements above ***PSSA*** limits have been concluded in order to secure parity with like bargaining units (i.e., DSM Westman Labs). Those bargaining units will still have to undergo sustainability savings with their next collective agreement.

[334] The Government, through Stevenson, indicated on examination for discovery that it chose to legislate wage restraint through the ***PSSA*** despite having negotiated public sector wage pauses in the past. This choice was made to achieve certainty. If collective bargaining had instead transpired, it is likely that there would have been agreements to no layoff provisions, no contracting out provisions, job security or like measures in exchange for the wage freeze. This hypothetical result would recognize trade offs in the collective bargaining process. At this juncture, Government has sought wage restraint without having to make any concessions. It is a strident, inflexible and rigid approach to labour negotiations.

[335] I am satisfied that hard or co-operative bargaining could have been utilized by Government to support its desire for fiscal restraint. In the event such bargaining was utilized, it would have been necessary to provide increased information to the unions, as was requested by Rebeck, so that the parties could engage in a mutually conducive and meaningful bargaining process. This, again, recognizes the necessity of Cabinet confidentiality as regards certain information.

[336] The inclusion of increased compensation through negotiated sustainability savings in years three and four under the ***PSSA*** was determined by Dr. Hebdon as being unworkable. Those savings provisions have not been utilized to date. I accept his findings that these provisions are unlikely to provide a methodology to enhance employee compensation. Section 14 of the legislation outlines the process whereby the Treasury Board must agree, in its sole discretion, to approve the use of a portion of the identified savings to fund an increase in compensation payable to employees. It is acknowledged that the possibility exists that a union could identify certain sustainability savings or bargain to achieve them on condition of approval by Treasury Board and, perhaps, even for the percentage amount thought appropriate. However, that has not occurred. The negotiated sustainability savings must reference an ongoing reduction of expenditures as a result of measures agreed in a collective agreement that reduces or avoids costs. In order to find savings within the collective agreement, it is presumably necessary for the union to agree to a concession without knowing what portion would be attributable to sustainability savings. Therefore, in the event the Treasury Board agreed to provide 50 per cent of the savings to union members, those members would, effectively, be losing the other 50 per cent to Government. An example of the Government's willingness to consider sustainability savings is to reduce overtime rates from paying double time to time and a half; reducing retirement allowances and severance pay; agreeing to lower wage and salary rates for some classifications and agreeing to reduce retroactive salary payments. As Sheila Gordon testified, the MGEU considered such proposals as being concessions without an incentive for acceptance.

International Law

[337] The unions have relied upon International law to allege a violation of s. 2(d) ***Charter*** rights because of a failure to comply with International standards or conventions (para. 113 of the Re-Amended Statement of Claim). In support of that contention, a lengthy and substantive report by Professor Mecklem of the University of Toronto was filed. That report documents what is considered to be violations by Government based upon the right to bargain collectively under International law. According to the International Labour Organization ("ILO"), the right to collective bargaining includes:

- the voluntary negotiation of public sector collective agreements;
- the requirement that governments consult with public sector unions on issues affecting their interests;
- a prohibition on limiting the ability of unions to collectively bargain wages; and,
- a prohibition on governments from imposing certain restrictions on the public sector in the name of economic stabilization.

The ILO has no legal authority and operates as a "best practices" tribunal. Professor Mecklem reviewed what he described as this Government's violations of International law, including the legislation itself, interactions with and involvement in negotiations between UM and UMFA, the pre-legislative consultative processes, the impact of the ***PSSA***, and the limitations imposed on the available scope of collective bargaining. The unions maintain (Re-Amended Statement of Claim, paras. 111-113) that Government has failed to comply with and meet standards of International law, has failed to comply with International human rights doctrines, and has failed to afford the same level of protection to employees as found necessary by International law. By virtue of a violation of International law, the Plaintiffs contend that a violation of s. 2 (d) has occurred.

[338] International law has played a role in ***Charter*** interpretation in Canada and has been relied upon many times, including in labour relations. This is apparent in decisions such as ***Health Services*** and ***Meredith***, along with many other cases, including the ***Alberta Reference***. However, the results reached in those cases does not necessarily reflect an adherence to International law. Further, a violation of International law does not equate to an available remedy in a Canadian court.

[339] In reviewing the case law, the report of Professor Mecklem, and considering the submissions of the parties, I am satisfied that the role of International law is important as an interpretive tool. However, it does not constitute a ***Charter*** protection, nor does it necessarily "bolster" a perceived ***Charter*** violation. This was determined in the decision of ***Kazemi Estate*** [38] at para. 150, where Justice LeBel stated:

> The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of International law and casting aside the principles of parliamentary sovereignty and democracy.

[340] I agree with the Government's submission that Canadian law must be considered separately and differently from International law. It is noteworthy that, in those circumstances where International law has had different expectations, a breach was not found to be determinative of the issue. The Supreme Court has frequently utilized International law, as seen in cases such as ***Meredith, SFL, Mikisew***, and ***Health Services***. Indeed, the ***ERA*** was criticized by the ILO as not adhering to International law standards. However, such criticisms do not necessarily result in such standards constituting a violation under Canadian domestic law. This was also apparent in ***Mikisew*** – where the Supreme Court's decision did not embrace International law standards.

Conclusion – Constitutionality under s. 2(d)

[341] I am satisfied that the ***PSSA*** violates s. 2(d) of the ***Charter***, based upon a contextual and fact-specific analysis of the circumstances that arise in this case. The legislation prevents meaningful collective bargaining of monetary issues – an area central to freedom of association and the capacity of the association to achieve a very significant common goal. Further, the overall impact of the legislation on the process of collective bargaining rises to the level of substantial interference. This legislation is distinguishable from the ***ERA*** for those reasons previously outlined and because of the very different financial circumstances in which the legislation transpired.

[342] The ***PSSA*** is a draconian measure which limits and reduces a union's bargaining power. The legislation circumvents and compresses the leverage or bargaining power available and inhibits the unions' ability to trade off monetary benefits for non-monetary enhancements, such as protection from contracting out job security, and layoffs. The ***PSSA*** has left no room for a meaningful collective bargaining process on issues of crucial importance to union memberships. There is no ability to promote representations and have them considered on a good faith basis. The right to meaningfully associate in pursuit of a fundamental and important workplace goal has been denied. It is not the "fruits" that raises the substantial interference, but it is the loss of a meaningful process. There have been only minor improvements secured through collective bargaining within the 21 agreements achieved since the passage of the ***PSSA***. The fact that there are minor improvements is reflective of a minor degree of bargaining power. This is particularly important where consistently union memberships express wages and monetary benefits as being top priorities. The removal of an ability to bargain for those issues negates and diminishes the union's power to engage in the collective bargaining process. Robust collective bargaining on non-monetary issues cannot transpire in such a milieu. Further, substantial interference does not equate with total interference. As previously indicated, the results of collective bargaining are not determinative in a s. 2(d) analysis; however, the outcomes illustrate the impact on associational activity that has transpired.

[343] The utilization of this wage restraint legislation is particularly concerning as history has demonstrated that zero per cent increases were collectively bargained in 2010 with substantially the entire public service, albeit there were trade-offs and not the certainty this Government desires. It is those trade-offs that the Government wishes to now avoid through the utilization of the ***PSSA*** and its mandates and policies based upon that legislation.

[344] The evidence refers to 21 negotiated agreements – all ***PSSA*** compliant. However, those collective agreements were conditionally ratified (an unusual process) to secure the monetary benefit of 1.75 per cent. They were negotiated under duress and under the auspices and threat of the claw back provisions of the ***PSSA***. This does not constitute fair and meaningful collective bargaining. Nor does it cure constitutional substantial interference. There were certain agreements, such as DSM Westman Labs, that secured monetary benefits above the mandated ***PSSA*** amounts. However, those were agreed to provide equity in the healthcare field with similar bargaining units while restructuring was occurring. Those units remain subject to the sustainability savings provisions in the future. Further, certain of those 21 agreements were achieved by virtue of a "take it or leave it" scenario without the benefit of collective bargaining.

[345] Additionally, agreements were backdated to avoid the immediate consequences of the ***PSSA*****.** The number of employees included in the 21 negotiated agreements is 8,865 – or 7.9 per cent of the Plaintiffs membership. It must be emphasized that because non-monetary issues can be collectively bargained, a meaningfulness to the process does not become a reality. There must be an ability for union representatives to be able to pursue its members' priorities – primarily involving monetary gains. Once monetary issues are removed from the bargaining table, collective bargaining has, in these circumstances, experienced substantial interference. This is particularly so when wages have been frozen for a two year period. This was demonstrated in the ***Correctional Officers*** decision, where staffing and pensions were removed from collective bargaining. Even though all other issues could be negotiated, a s. 2(d)

breach was found, albeit the legislation was saved by virtue of s. 1. Other decisions, such as ***Health Services***, ***BCTF,*** and, particularly, ***OPSEU***, were instructive in the determination of this case. The ***ERA*** cases were distinguishable based upon the fact good faith collective bargaining had transpired, capped wage increases were allowed in each year, and the existent financial crisis.

[346] The ***PSSA*** has served to reduce the unions' bargaining power with all the ramifications attendant to that as outlined in the evidence, and particularly by Dr. Hebdon. The legislation and the mandates that have emanated from it has significantly disrupted the balance of bargaining power between employers and unions. The Government's position on wages and other monetary benefits since 2017 has substantially been inflexible and intransigent. Its actions has narrowed the range of collective bargaining options to such an extent that capitulation has been experienced by certain units. In those circumstances where Government has not complied with ***PSSA*** limits or created exemptions as it saw fit, such as with Doctors Manitoba, it has applied the restraint legislation in an unequal manner.

[347] The ***PSSA*** was designed by Government to restrain public sector wages without the need to undertake collective bargaining and, perhaps, have to trade-off sought-after union benefits. The legislation and mandates that emanate from it substantially interferes with the unions' ability to take part in the process in a meaningful way. The outcome of collective bargaining is not the issue, it is the fundamentally flawed process.

[348] Undoubtedly, the Province faced fiscal concerns with the resultant need to control expenditures. This must be considered when assessing whether the measures taken – the ***PSSA*** – served to disregard the fundamental s. 2(d) obligation to preserve the processes of good faith bargaining. I have evaluated those concerns and remain satisfied that the ***PSSA*** has comprised and substantially interfered with that process, and the integrity of the process, for all reasons previously articulated, which include:

- a significant reduction in the unions' bargaining power, with a concurrent inability to ensure discussions and pursuit of meaningful workplace goals (see UMFA, RCC, ACC and UCN as examples);
- removal of the ability to conduct genuine collective bargaining on monetary issues;
- acknowledgement that wage freezes have been collectively bargained successfully in the last 10 years;
- a disruption of the collective bargaining process by removal of monetary issues from the bargaining table;
- strikes have become futile;
- the scenario of capitulation has transpired, rather than negotiation;
- the ***ERA*** cases found no violation of s. 2(d) as collective bargaining prior to its enactment was recognized and incorporated into the legislated caps. Further, the unions were advised of the nature and content of the legislation which facilitated an ability to meaningfully collectively bargain in advance of its implementation with full knowledge as to what would soon transpire. It was enacted in response to a global financial crisis. The ***ERA*** did not include a "draconian" wage freeze (***Syndicat canadien***, para. 48);
- the Government had not endeavoured to collectively bargain wage restraint within the public sector prior to the ***PSSA's*** enactment. Agreements bargained by entities not captured by the ***PSSA***, such as Revera and ArlingtonHaus, were well above the caps set under the ***PSSA***. While actual outcomes are not determinative of a s. 2(d) analysis, the evidence of outcomes for bargaining units, such as Revera and ArlingtonHaus supports the conclusion of substantial interference and the major impact that has been occasioned upon associational activity;
- Government has bargained with certain groups beyond ***PSSA*** parameters with time-limited offers; two were "papered" and backdated to appear that they were signed before the ***PSSA***, which was not the case; stipulations that the ***PSSA*** would

apply to the next agreement; others were not permitted to engage in such negotiations;
- damage to unions/Government or employer relationships;
- damage to unions and their memberships relationships – DSM Westman Labs, MGEU, UMFA, EMS, Superintendents, MTS, etc.;
- the questionable viability/utilization of negotiated sustainability savings in years three and four of the ***PSSA***;
- conditional ratification of agreements signed under duress;
- unions' evidence that only minor gains were achieved in those conditionally ratified agreements;
- the claw back provisions;
- creation of uncertainty, delay and confusion.

[349] I find that the ***PSSA*** violates s. 2(d) of the ***Charter*** and, in particular, ss. 9–15 of the legislation. These sections constitute the heart and substance of the legislation.

SECTION 1

Is *PSSA* justifiable under s. 1 of the *Charter*?

[350] Section 1 of the ***Charter*** reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[351] The Supreme Court of Canada in ***Oakes***[39] set out the test for what legislative limits are justifiable in a free and democratic society. Then Chief Justice Dickson found that s. 1 performed two functions:

> 63. ...first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria... against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms--rights and freedoms which are part of the supreme law of Canada.

[352] Further, as set out at para. 66 of ***Oakes*** decision:

> The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit...

[353] The components to the ***Oakes*** test are (pp. 138-141):

1. the objective of the law must be pressing and substantial;
2. the restriction imposed by the law must be proportionate to the pressing and substantial objective – for there to be proportionality there must be:
   (a) a rational connection between the pressing and substantial objective and the means chosen to achieve that objective;
   (b) the law must be minimally impairing; and,
   (c) the benefits of the law, or salutary effects, must outweigh its negative consequences, or deleterious effects.

All components will be evaluated in order to ensure a complete s. 1 analysis.

[354] These decisions must again be considered in a factual and contextual environment. The implications of s. 1 were discussed in a number of the cases referenced in this matter, including ***Health Services*** where the unconstitutionality of s. 2(d) was not saved by s. 1. In that case, Chief Justice McLachlin noted:

> 108 Even where a s. 2 (d) violation is established, that is not the end of the matter; limitations of s. 2 (d) may be justified under s. 1 of the *Charter* , as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

Pressing and Substantial Objective

[355] It is necessary to establish the pressing and substantial objective of a legislative initiative: ***Frank***.[40] The ***PSSA's*** purposes are outlined in s. 1:

> (a) to create a framework respecting future increases to compensation for public sector employees... consistent with the principles of responsible fiscal management and protects the sustainability of public services;
>
> (b) to authorize a portion of sustainability savings identified through collective bargaining to fund increases in compensation or other employee benefits; and
>
> (c) to support meaningful collective bargaining within the context of fiscal sustainability.

[356] The primary Government legislative objective for the ***PSSA*** was to curtail upward pressure on public sector compensation costs and to provide predictability for such costs in order to manage the deficit and contribute to provincial fiscal stability (Amended Statement of Defence, para. 34). The Government submits that the ***PSSA*** objectives were very similar to those established in the ***ERA*** cases, which were found to be constitutional.

[357] In ***Gordon***, the Ontario Court of Appeal held that government should be afforded a wide latitude in matters of economic policy, budgeting and labour relations: "... the court should generally accept Parliament's objectives at face value, unless there is an attack on the good faith of the assertion of those objectives or on their patent irrationality" (para. 242). The Government objectives in ***Gordon***, ***Meredith***, and ***Syndicat canadien*** were found to be pressing and substantial.

[358] In this case, the Plaintiffs contend that Government has not acted with good faith intentions. These stated Government objectives of deficit reduction and fiscal stability were argued to be insufficient to establish and support a free standing pressing and substantial objective for the purposes of s. 1 of the ***Charter***. This is particularly so when the pressing financial issue was not a global financial crisis, as existed at the time of the ***ERA***. This crisis was discussed in ***Gordon***, where the court stated:

> [184] ...The evidence established that: this was the most serious global recession since the Great Depression; global conditions and the economic recession had a negative impact on the Canadian economy and on the fiscal position of the Government of Canada...

The Plaintiffs submit that the pressing and substantial objective cannot be substantiated in this case. The January 5, 2017 Advisory Note to Richards authored by Irving stated, "... pauses do not address the deficit problem, they simply do not make the situation any worse" (Exhibit 3, Tab 21). Additionally, the Executive Summary of the ***PSSA*** prepared for the Minister of Finance indicated:

> Placing restrictions on compensation increases will produce certainty for the Manitoba government and allow for the sustainability of costs to deliver front line

> services to citizens. A 1% increase in compensation across the public sector adds an estimated $100 million in public sector compensation costs, which is why defining compensation limits is necessary.

(Exhibit 3, Tab 31)
There was argued to be no evidence provided by Government as to how the ***PSSA*** would serve to protect public services or act to balance the budget. The ***PSSA*** is about controlling costs and budgetary considerations.
[359] The courts, in several cases, have indicated that budgetary restraints and the absence of a fiscal emergency will be insufficient to justify an infringement of a ***Charter*** right: ***Health Services***, para. 147. The Supreme Court of Canada in ***Newfoundland (Treasury Board)***,[41] held, "It is convenient at this point to look more closely at what this Court has said in the so-called "dollars versus rights" controversy" (para. 65). Additionally, at para. 72:

> "...courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.
>
> [emphasis in original]

Further confirmation of this principle was provided in ***OPSEU***, where Justice Lederer held:

> [238] It is only in exceptional circumstances that a breach of rights under the *Charter* will be justified based on economic concerns. In this case, there is no suggestion that any social program was in any proximate peril.... The impetus for restraint in wages and benefits was prudence and not any immediate fiscal emergency.

[360] The Manitoba fiscal situation must be considered in the context of this case in order to determine the existence of a pressing and substantial objective. It would be an unusual state of affairs where economic and fiscal circumstances were not an issue with any province or with government in this country. In Manitoba, 55 per cent of the budget is comprised of public sector costs which grows by 200 million dollars each year, without increased compensation. It is necessary to consider whether the pressing and substantial objective of this legislation could be substantiated in the context of exceptional circumstances presented by fiscal challenges and budgetary constraints. The expert evidence on this issue was presented on behalf of the unions by Dr. Beaulieu and on behalf of the Government by Dr. Di Matteo. It is noteworthy that neither expert opined that Manitoba was in a financial crisis situation. Instead, prudence was recommended by both in terms of a fiscal policy.
[361] Dr. Di Matteo opined (January 17, 2019 Report, at p. 6):

> A comparison of Manitoba's net public debt to other Canadian provinces reveals that while absolute net debts levels are small especially compared to much larger provinces like Ontario or Quebec, when growth rates are examined, or adjustments made for economic size, the Manitoba situation becomes more serious.

He testified that Manitoba had a robust economy, compared to some others, and, essentially, was in the middle of the Canadian pack. Net debt had increased in all jurisdictions, which was said to be generally affected by political choices. Such choices may not always be economically sound, but are popular. Dr. Di Matteo testified that all governments should make plans and exercise fiscal prudence with the many options that are available. Further, he opined that choices which reduce revenue serve to slow deficit reduction.
[362] Dr. Beaulieu testified in a similar vein (July 20, 2019 Report, p. 16):

> The conclusion from looking at government deficits over time and across provinces and other jurisdictions in Canada and in the OECD is that Manitoba has managed its

> fiscal position responsibly and in line with other jurisdictions. There is no evidence of a fiscal crisis in Manitoba.

[363] It is noteworthy that Groen, who has been Assistant Deputy Minister, Fiscal Management and Capital Planning, since 1990, could not recall a time when there were not budgetary constraints in Manitoba and debt.

[364] The Manitoba state of financial affairs was very diverse from what existed at the time of the ***ERA*** cases, being a global economic recession. Dr. Di Matteo testified that Manitoba did not encounter a similar economic recession as was present in Ontario in 2008; rather, it has experienced a relatively robust economy with positive GDP growth every year since 2009. Dr. Beaulieu also opined that the 2016 fiscal circumstances in Manitoba were far different from those of 2008.

[365] The objective of the ***PSSA*** was to control public sector employee compensation. The two years of zero per cent increases followed by 1.75 per cent over years three and four (acknowledging the possibility of negotiated sustainability savings) would provide cost certainty. There would continue to be some public sector expenditure growth caused by merit and step increases. It is important to compare and evaluate the restraint legislation with what Government has undertaken to limit revenue gathered during the promotion of deficit reduction. These are, without question, policy choices that a government is entitled make. However, those policy choices have served to substantially reduce the amount of revenue available to service the Manitoba deficit. The question that must be asked is whether it is appropriate to have public sector employees shoulder the provincial burden of deficit reduction when choices are being made that reduce available revenues.

[366] The 2016 budget lowered tax revenue by 24.2 million dollars in 2017 by virtue of freezing taxes and the indexing of basic personal exemptions and tax brackets. The changes to income tax brackets have continued in subsequent budgets and have increased basic personal exemptions and indexed personal income tax brackets. These tax cuts have been referenced as the largest in Manitoba history. Effectively, 35,000 tax payers have been removed from the tax rolls. This was expected to save tax payers 77 million dollars in 2019 and 78 million dollars in 2020. These tax savings constitute revenue reductions for Government.

[367] A further loss of revenue was created by the 1.0 per cent PST reduction, effective July 1, 2019. Manitoba is alone across the country in enacting a consumption tax reduction. Groen testified that the Government will collect an estimated 305 million dollars less PST revenue in 2019/2020 and 325 million dollars less in 2021 as a result of this change. He acknowledged that the deficit would have been eliminated entirely by 2020/2021, had the PST not been lowered.

[368] Dr. Di Matteo concluded that such revenue reduction decisions were political in nature and not those based upon an economic rationale. Dr. Beaulieu testified that the PST reduction, "... goes in the wrong direction of a government trying to reduce the deficit" (pp. 44 and 45). He opined that such a reduction was an extreme measure. Dr. Beaulieu also stated (p. 44):

> The 2017 Budget states that it will pursue fiscal management in a sensible and prudent manner. It says that the government will "pursue responsible recovery." It goes on to define this as following a plan that "avoids drastic measures choosing instead to steadily pursue and achieve improvements year-over-year." The language of the budget has the right idea and reflects sound economics, but this is in stark contrast to *The Public Services Sustainability Act* that is a drastic action that places an undue and extreme burden on public sector employees.
>
> A prudent and measured economic response to the fiscal situation at the time would take actions to reduce the deficit over time. This is the language of the budget, and as we saw above, this is what bond rating agencies see as a sound economic response to the long run of budget deficits in Manitoba. The economy was strong and robust

> when the legislation was introduced as is well understood and it is economically prudent for the budgetary adjustments to be undertaken gradually and effectively.
>
> The budget confirms the government's commitment to return to balance by end of their second term. Again, this reflects a sensible and prudent approach to restoring the budget to balance. *The Public Services Sustainability Act* was not required to achieve these goals.
>
> In order to restore the budget to balance the government needed to focus on a combination of reducing spending and increasing revenues. Yet the 2017 Budget introduced a number of measures that either reduce revenue or increased spending and at the same time *The Public Services Sustainability Act* put a large and unfair burden of reducing expenditure on public employees.

[369] It is apparent that the Government in 2019 has continued with a similar approach by virtue of eliminating payment of PST on certain revenue generating services that it applied to, such as home insurance, salon services and Wills preparation. Accordingly, this will further reduce PST revenue. The Government's fiscal plans for the year ending March 31, 2019, included increasing the deficit from 163 million dollars to 360 million dollars. Further, as indicated, the November 19, 2019 Throne Speech discussed further tax rollbacks. However, there was expected to be increased spending in highway construction, a re-initiation of capital projects, a 40 million dollar Idea Fund for healthcare workers and a 25 million dollar Idea Fund for teachers. That Throne Speech did not express any concern about the size of the provincial deficit or plans to reduce debt. Dr. Di Matteo found it interesting that the 2019 Budget Speech did not reference deficit reduction or debt. There has, to date, been no documented inclusion of cannabis revenues that would assist in the reduction of the provincial deficit.

[370] The Rainy Day Fund is another area that must be considered with respect to these issues. That Fund is generally utilized to pay down debt, or be available in emergency situations. The 2017 budget allocated 10 million dollars for the Rainy Day Fund with future allocations of 50 million dollars to take place in each of the years of 2018/2019 and 2019/2020. However, in 2018/2019, the Government instead transferred 407 million dollars, lauding it as the largest investment ever made into the Fund. Such transfers served to impact the Province's deficit. Dr. Beaulieu opined (p. 45):

> The Budget included contributions to the Fiscal Stabilization Fund of $10M in 2017/18 and $50M in both 2018/19 and 2019/20. This contribution to the Stabilization Fund goes in the wrong direction and is an increase in the expenditure side of the budget that is incongruous with the idea of bringing into law *The Public Services Sustainability Act* that legislatively freezes wages for two years, with 0.75% increase in the third year and 1% in the fourth year.
>
> It is surprising and difficult to understand how a government taking draconian actions like *The Public Services Sustainability Act* would contribute to a fund designed to help with budgetary shortfalls when they are trying to reduce the deficit and limit debt accumulation.
>
> It is ironic that the fund was created to try and help balance out government borrowing requirements over time. The intent is to grow the fund during times of surplus and contract it in times of deficit to lessen the requirements for external borrowing. Instead this action in the budget borrows $110M to contribute to a savings fund. This action adds directly to the deficit and runs counter to the objectives of the government and their aim to balance the budget.

> Instead of contributing to this fund, the government should be moderately drawing down the fund by $15M to $20M per year for the next five years. This would lessen the borrowing requirements on the province and remain consistent with the intent of the fund. Once the province returns to balance, the government can begin to contribute positively to the stabilization fund.
>
> We presented evidence above that the deficit was relative small, and this is seen with the low deficit-GDP ratio. However, the budget could have been lowered further but for the contributions to this fund. Based on the 2017 Budget, the deficit-GDP ratio would decline from 1.4% of GDP in 2016/17 to 1.37% in 2017/18, 1.11% in 2018/19 and 0.86% in 2019/20. As discussed above these are manageable numbers and in line with the other provinces and the federal government.
>
> However, if the budget did not contribute to the Fiscal Stabilization Fund, the deficit to GDP ratio would be even lower than forecast in the Budget. It would have fallen to $499M or 0.7% of GDP by 2019/20. For a government intent on balancing the budget, it is unclear why it would borrow an additional $110M over three years, adding to the deficit, in order to hold cash within the Fiscal Stabilization Fund.

[371] There have been significant discrepancies between the Government's forecasted deficits and the actual deficits each year since 2015/2016:

- 2015/2016
  - budgeted deficit: 1.012 billion dollars
  - actual deficit: 84 million dollars
- 2016/2017
  - budgeted deficit: 911 million dollars
  - actual deficit: 764 million dollars
- 2017/2018
  - budgeted deficit: 840 million dollars
  - actual 695 million dollars
- 2018/2019
  - budgeted deficit: 521 million dollars
  - actual: 163 million dollars
- 2019/2020
  - budgeted deficit: 360 million dollars

Dr. Beaulieu opined that, "[t]he practice of the current government in overstating the size of the deficit is a disturbing trend" (p. 47). That concern was amplified by additional actions taken that lower Government revenues, including diverting funds into the Rainy Day Fund and reducing the PST.

[372] The AGM's public accounts and other financial statements audits in 2018 and 2019 provided a qualified audit opinion. The AGM's office had significant concerns about Government's compliance with Generally Accepted Accounting Principles (GAAP). A qualified opinion is expected to be rare and should be taken seriously.

> Our qualifications on Manitoba's summary financial statements relate to the government not complying with generally accepted accounting principles (GAAP) and highlight that there are material misstatements in the summary financial statements. However, these errors are isolated to certain areas, which we have

> described in our "basis for qualified opinion" paragraphs are explained further below.
>
> (Binder 3, Tab 118, p. 5)

As previously indicated, those two qualifications were the removal of the WCB from the GRE and an unauthorized Government transfer recorded as regards MASC.

[373] In a news release dated September 28, 2018, the AGM highlighted the concerns (Binder 3, Tab 119):

> Ricard's audit opinion states that the summary financial statements present Manitoba's financial performance fairly, except for 2 qualifications – or concerns - about significant errors in the statements. This is the first qualified audit opinion on the province's public accounts since 2007.
>
> "The result of these 2 errors is that the summary deficit is overstated by $347 million. That's half the reported deficit," says Ricard.
>
> The first error noted by Ricard is the removal of the Workers Compensation Board (WCB) as an entity in the consolidated summary financial statements. The statements include all funds, organizations and business enterprises controlled by the government, also known as the government reporting entity. Ricard notes there have been no relevant changes to the *Workers Compensation Act* that would indicate a loss of control. His Office's analysis of the government's relationship with the WCB (as defined in the *WCB Act*), against the criteria of control set in accounting standards, confirmed that the government continued to control the WCB.
>
> "The exclusion of entities from the government reporting entity that are still controlled by government does not provide a complete picture of the financial position and results of government," said Ricard.
>
> The removal of the WCB from the government reporting entity means the WCB's net revenue was not recorded in the summary financial statements, overstating the reported deficit by $82 million.
>
> The second error involves the transfer of $265 million from the Manitoba Agricultural Services Corporation to a trust account. Ricard notes the transfer was recognized as an expense for the 2017-18 fiscal year, yet was not authorized until after the fiscal year had ended. "The transaction should not have been recorded in 2018," said Ricard.

[374] There were conversations between the AGM and Tess on these issues. However, no resolution was reached and a qualified opinion was, again, rendered in 2019 (AGM, Binder 4, Tabs 124 to 128). As indicated, the March 31, 2019 AGM opinion represented the second year in a row a qualifying opinion was rendered as no changes had resulted with respect to the inclusion of the WCB revenue and the MASC reporting (Binder 3, Tab 120). The September 26, 2019 news release with respect to the qualified audit opinion (Binder 3, Tab 121) indicated:

> Ricard notes that had Public Sector Accounting Standards been properly applied, the province would have recorded a surplus of $9 million, rather than a deficit of $163 million, and that the net debt would be $1.1 billion lower.

[375] There is no anticipated change in the Government's position as to the inclusion of WCB and MASC in its Financial Statements. Tess testified that these decisions were made by

Government. He also acknowledged that the Government is likely to receive another qualified opinion following the 2019/2020 fiscal year.

[376] Dr. Beaulieu opined, with respect to this issue (pp. 47 and 48 of his Report), that:

> The Auditor General of Manitoba, Norm Ricard, who is responsible for offering an independent audit of the financial statements, stated that there are "significant concerns" about the government's compliance with generally accepted accounting principles. According to Ricard, there were two important departures from national accounting standards: the removal of the Workers Compensation Board from the government's accounting books and a surprise transfer of $265M into a trust. The Auditor General stated that these "... represents a significant departure from Canadian public sector accounting standards."

The latter referenced the MASC. The AGM has indicated that removing WCB from the public accounts served to inflate the deficit by 52 million dollars. Further, the removal of MASC increased the budgetary deficit by another 225 million dollars. In the event those entities had been included in Government's financial picture, a budgetary surplus would have been noted in both 2018/2019 and 2019/2020. As Dr. Beaulieu indicated (October 18, 2019 Addendum, p. 3):

> Keep in mind that a main focus of this government is to reduce the debt. Excluding these entities from the government books removes the reserve assets of both entities and increases net debt by $1 billion (that is, removing the WCB in its summary financial statements understated government assets by $632m, and removing the MASC trusts in the financial statements understated assets by $490 million.)
>
> In brief, the habitual overstatement of the budget and the government's departure from accepted accounting practices raises concerns.

Dr. Di Matteo testified that the Government should support the advice of the AGM with respect to accounting practices.

[377] These areas all represent, in a substantive way, policy choices made by Government along with what might be considered as manipulation in areas such as the WCB and MASC exclusion from public accounts. Arguably, the deficit is made to appear more substantial than actually exists, along with the fact that revenues have been significantly reduced. Further, increased expenditures reflected in the budget of 2019/2020 have demonstrated spending rather than contraction. The only substantive area in which this Government has, through its policies, indicated a substantial pull back is public sector compensation.

[378] I am satisfied that the Government's stated objectives in pursuing this legislation and mandate do not support a pressing and substantial objective that would justify it pursuant to s. 1 of the ***Charter***. The Government's reliance was on fiscal circumstances which did not constitute a crisis or emergency situation. The Government's political choices were to reduce income taxes and lower the PST, all of which reduced revenue and slowed deficit reduction. The Rainy Day Fund was significantly funded, which diverted funds that could have been utilized for deficit-reduction purposes.

[379] The issues raised by the AGM's qualified opinions must also be considered, along with recent budgetary proclamations of funding capital projects, new initiatives and increasing deficit spending. The Government's objectives in introducing the ***PSSA*** were not pressing nor substantial.

[380] As the referenced case law stipulated, budgetary considerations alone cannot normally be relied upon to support the existence of a free standing pressing and substantial objective for s.1 ***Charter*** purposes. That being said, it is rare for a court to reject that the objective of the law is sufficiently important to justify the limitation of a ***Charter*** right. The expert testimony and other evidence at trial did not establish that Manitoba's financial circumstances were exceptionally impacted or in a dire situation. Further, the defence did not argue that a

financial crisis existed. The evidence tended to demonstrate that this province is in the middle of the Canadian provincial experience. Dr. Di Matteo likened the Manitoba situation to that of an oil tanker turning slowly: small corrective steps were required. He also opined this Province's financial situation was very different to that which existed at the time of the 2008 global crisis.

[381] An October 3, 2017 KPMG report entitled *A Fiscal Performance Review* did not include any recommendations for public sector wage or benefits restraints. It did recommend an eight per cent reduction in the workforce.

[382] The pressing and substantial objective of the Government must be considered in the context of other policies it has adopted since 2016. These include reducing tax revenue, reduction of the PST, and massive injections of resources into the Rainy Day Fund. It is not for a court to mandate policy for government. However, such policy "choices" raise the question of the Government's promotion of deficit reduction positioned against its revenue reduction measures. It is necessary to weigh and evaluate the pressing and substantive object of Government in the context of its actions taken both as regards the passage of the ***PSSA*** and other policies, such as violations of public accounting standards and significant funding of the Rainy Day Fund. The revenue reduction measures, including the PST reduction, also must also be considered. The ramifications of the ***PSSA*** will continue for years to come

[383] I am satisfied, based on all the evidence, that a pressing and substantial objective has not been established in this case. The infringement of s. 2(d) rights cannot be justified by the fiscal condition of the Province during the relevant timeframe — no evidence was presented to support the existence of a financial crisis nor exigent circumstances. Even if accepted that the objective is pressing and substantial, the ***PSSA*** does not meet the proportionality part of the ***Oakes*** test. Given this conclusion, I do not need to continue the s. 1 analysis, but will do so for the sake of completeness.

Rational Connection

[384] In ***Oakes***, the Supreme Court of Canada defined the second step of the s. 1 analysis as follows:

> 70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

In ***Health Services***, the second stage was described as follows:

> 148 The second stage of the *Oakes* analysis requires the government to establish that there is a rational connection between the pressing and substantial objective and the means chosen by the government to achieve the objective. In other words, the government must establish, on the balance of probabilities, that the means adopted in the Act are rationally connected to achieving its pressing and substantial objectives. This element of the *Oakes* test has been described in this Court as "not particularly onerous"...

A reasonable inference must be drawn that the means adopted by government will assist in securing the objective. It is usual to find that a rational connection to the objective exists. As was stated in ***RJR-MacDonald Inc.***:[42]

> 129 ...While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning....

[385] The Courts of Appeal in both ***Gordon*** and ***Syndicat canadien*** determined that it was "self-evident" that the legislative initiative of the ***ERA*** 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..." (***Gordon***, at para. 255). The Government maintains that such is the case with respect to the ***PSSA*** where public service compensation costs approximate 55 per cent of Government's budget. The controlling of such costs would be expected to have a positive impact on deficit reduction and contribute to the Province's fiscal stability. Consequently, the measures undertaken in the legislation were submitted to be rationally connected to the Government's objectives of controlling public sector compensation costs. While other policy choices were available, the Government elected to follow the ***PSSA*** course to support its objective.

[386] Conversely, the unions maintain that a rational link cannot be established in these circumstances. The unions rely on the comments of Justice Lederer in ***OPSEU***:

> [249] ...there is a limit to the circumstances where inferences based on reason and logic can be accepted as demonstrating the requisite rational connection. The measures which limit the right (in this case, to freedom of association) should not be arbitrary and should be based on care of design. In this case, they were not. The process was arbitrary because it was unilateral. Even though, as the Minister noted at the outset, it was "very different" from past sector-wide negotiations... the process was put in place by the government without consultation or discussion. Ontario's representatives professed to be open to review of the process, but introduced it during a conference call the day before substantive discussions were to begin as "... an overview of the next steps" without the opportunity for questions.... When ETFO asked questions about the process, Ontario's team either could not or would not answer. The questions asked were basic to the process: how would the negotiations proceed, could additional issues be raised and would other cost saving measures be considered.... OSSTF, having been told Ontario would consider alternative terms to meet its fiscal goals, asked for the financial target that any alternative proposals it made would have to satisfy. OSSTF was told the information would be provided. It was not. Evidently, this sort of information was not available. In other words, Ontario devised a new and different process on its own. It failed to or was unable to answer questions as to how that process was to be conducted and professed to be open to changes in circumstances where it could not provide information that would be central to any alternative the unions sought to develop and bring forward.

[387] This process, under discussion by Justice Lederer, was argued by the unions to be comparable to what has transpired in the Province of Manitoba. The unions repeatedly asked for information to assist in the development of alternatives to legislation and to understand the need for such action. That information was declined and the legislation was enacted in an expedient manner. The Government exemplified a closed mind to other options or alternatives.

[388] I am satisfied that the evidence has demonstrated that a legislative option was essentially the Government's only considered alternative, and it was not to be the subject of

consultation beyond, perhaps, certain aspects of its content. The Minister's indication that there would be consultation was not clear as to whether all options would be on the table, albeit, such was not the case. Indeed, cost certainty could not be guaranteed through collective bargaining. This is despite the fact that one of the ***PSSA's*** legislative objectives was to support meaningful collective bargaining within the context of fiscal sustainability.

[389] It is important to recognize that the Government had no cost projections for the savings that would be achieved through this legislative option. Groen testified that the Department of Finance was never asked to undertake an analysis of the cost consequences that would result from the ***PSSA*** – either initially or over time. Further, Stevenson indicated, under cross-examination of his affidavits, that no calculations had been made by the Government by the time the 2017/2018 budget had been tabled on April 11, 2017, as to how much money would be saved through the introduction of the ***PSSA*** (Stevenson cross-examination, August 14–16, 2019).

[390] On April 11, 2017, the Finance Minister dealt with the issue of potential savings and said, "[n]o estimate of financial, employment impacts of public-sector wage controls" existed (Rebeck affidavit, para. 99). There had been no calculation at that time as to savings that might transpire with a wage freeze. Further, at a press conference held by the Education and Training Minister on February 8, 2018, it was stated that the amount of savings through a wage freeze of teachers' salaries was unknown.

[391] The wage increases of 0.75 per cent and 1.0 per cent in years three and four under the ***PSSA*** were not based on a financial analysis, as confirmed through Groen's testimony. Those figures were established by Stevenson and Irving, without the benefit of any financial analysis.

[392] The Government's actions with respect to the ***PSSA*** and the imposition of wage restraints were, at best, arbitrary. The evidence shows the restraints were not based upon financial investigation as to the consequences, including what savings or cost reductions might be realized. Instead, substantive congruity with the Nova Scotia legislation was adopted. No evidence was presented before the court to establish the savings that might be estimated by virtue of the introduction of the ***PSSA***: As Justice Lederer said in the ***OPSEU*** decision, "[t]he measures which limit the right (in this case, to freedom of association) should not be arbitrary and should be based on care and design" (at para. 249).

[393] However, I accept, on a balance of probabilities, that a rational connection has been established. It is clear that wage restraint legislation would assist in the control of public sector compensation costs. That being said, the ***PSSA*** was not based upon a sound financial analysis – one was never done. The legislation was instead arbitrary and unfair in its substantial interference with the collective bargaining process. A question that must be posed is whether interference with the collective bargaining process was necessary in order to achieve cost certainty in public sector compensation. Wage freezes have successfully been negotiated in the past. It is difficult to suggest how Government could, without a financial analysis, support a rational connection to the pressing objective, except in the very broadest sense. That is what has transpired and the threshold for a rational connection is low. As was said in ***OPSEU*** , quoting from the dissent in ***Meredith*** (para. 256):

...

> The fact that there are fiscal concerns does not give the government an unrestricted license on how it deals with the economic interests of its employees.
>
> [Footnote omitted]

[394] A rational connection has been established here, as this Government, on a broad basis, has demonstrated a causal link with the pressing and substantial objective. While I find the steps taken by the Government to be arbitrary, and taken without care and design, a rational

connection between a pressing and substantial objective, and the means adopted by Government to achieve that objective, has been established.

Minimal Impairment

[395] This step of the proportionality test requires that, even if rationally connected to the objective, the ***PSSA*** should impair "as little as possible" the right or freedom under consideration. Essentially, what steps were reasonably necessary to achieve the Government's objective? A minimal impairment analysis requires an assessment as to whether alternative and less rights impairing means were considered. As was indicated in ***Health Services***:

> 150 The government need not pursue the least drastic means of achieving its objective. Rather, a law will meet the requirements of the third stage of the *Oakes* test so long as the legislation "falls within a range of reasonable alternatives" which could be used to pursue the pressing and substantial objective...

[396] "At this stage, the burden is on the Government to show the absence or less drastic means of achieving the objective 'in a real and substantial manner'" (***Gordon***, at para. 258). It is incumbent upon the Government to establish, through evidence, that the impairment was minimal in all of the circumstances. There is no question that judicial deference is an important consideration at this stage of the analysis. As was indicated in ***Gordon***, at paras. 259–260:

> [259] Judicial deference to Parliament at the minimal impairment stage has taken the form of a flexible approach that is sensitive to the context of the law in issue. McLachlin J.'s formulation of the test in *RJR-MacDonald*, at para. 160, was adopted by the court in *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569, at para. 58:
>
> > The impairment must be "minimal", that is, the law must be carefully tailored so that the 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 over broad merely because they can conceive of an alternative which might better tailor objective to infringement...
>
> [260] Similarly, as Gonthier J. explained, "it is not sufficient that a judge, freed from all such constraints, could imagine a less restrictive alternative": *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 112. Wilson J. held that only where there are alternative measures "clearly superior to the measures in current use" would a law fail at this stage: *Lavigne v. Ontario Public Service Employees Union,* 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211, at p. 296, para. 170. McLachlin C.J. and Deschamps J. explained that "[t]he Court will not interfere simply because it can think of a better, less intrusive way to manage the problem": *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 94. They added: "What is required is that the [government concerned] establish that it has tailored the limit to the exigencies of the problem in a reasonable way."

[397] Essentially, were there less drastic or damaging means of achieving the objective? Minimal impairment requires that the legislation should impair as little as possible the right of association. The legislation should pursue the pressing and substantial objective through the least drastic means which would constitute the minimum necessary to accomplish the goal. In making such a determination, there must be some tolerance afforded as to the least drastic means. There must be a consideration as to whether the ***PSSA*** abridges freedom of association as little as might be reasonably possible.

[398] The Government submits that the pressing and substantial objective of the legislation was to manage public sector compensation costs. In both ***Gordon*** and ***Syndicate canadien***, the

ERA was found to be minimally impairing and a similar result was submitted by the defence to be appropriate as regards the ***PSSA***. The Government contended that there are really only one of two ways to control costs in the public sector: a reduction of the workforce or limits through legislation. Government knew that the ***ERA*** had been found to be constitutional and that similar legislation had been enacted in Nova Scotia, albeit the constitutionality is before the Court. Accordingly, wage restraint legislation was argued to be a reasonable alternative. The Government sought consultation from the unions with respect to a legislative option, which, it is argued, union leadership declined to provide. The legislation was described as being tailored to allow for merit and years of service step increases, the ability to freely bargain non-monetary issues, strike action was permitted, and the opportunity of increased negotiated compensation in years three and four existed, as well as possible exemptions from the operation of the statute, if approved. The ***PSSA*** was also submitted to be time-limited legislation.

[399] The unions maintain that Government actions were not undertaken in good faith, meaningful consultation was denied, and information was not provided as requested. There were reasonable alternatives which were not explored and, as a consequence, a high degree of judicial deference should not be afforded.

[400] The area of consultation must be considered with respect to minimal impairment. As was said in ***Health Services***:

> 157 Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.

[401] I accept much of what the unions have submitted with respect to this area in concluding that the evidence has established that the Government did not meaningfully consider any alternatives other than legislation. No evidence was presented by Government as to its consideration of alternative solutions. The acceptance of the Nova Scotia model represented the Government's course of action. Within a handful of months of their election, the sceptre of legislation was raised and, essentially, adopted. The November 21, 2016 Throne Speech indicated that, "[l]egislation will be introduced, following consultation and dialogue, to ensure that the province's public sector costs do not exceed Manitoba's ability to sustain the services they receive in return". The unions had not been consulted, and the tenor of the Throne Speech indicated that only consultation and dialogue would transpire with respect to the legislative option. There was to be no room for collective bargaining in this process, even though that process had previously secured a two year public sector wage freeze. It is clear that before "consultation" with unions commenced, the Government had undertaken the following steps:

1. August 9, 2016 — the Nova Scotia legislation was under review with consideration to undertake a similar model;
2. September 21, 2016 — PSCC adopted the recommendation of utilizing the Nova Scotia legislative model and directed the exploration of legislative options to be discussed at the next meeting;
3. October–November 2016 — a legal opinion on the legislation was sought and received;
4. November 2, 2016 — PSCC was verbally advised as to the nature and contents of the Nova Scotia legislation;
5. November 21, 2016 — the Throne Speech announced that restraint legislation would be introduced;
6. December 5, 2016 — date on first draft of the legislation;

7. December 14, 2016 — Cabinet approved in principle a public sector compensation legislative model which was to extend over four years, with a two year wage freeze. There could be additional compensation if sustainability savings were identified and negotiated in years three and four, with Treasury Board approval. Further, arbitrators' rights were limited;
8. December 21, 2016 — the first draft of the legislation illustrated two years of zero per cent increases;
9. January 5, 2017 — recommendations were made on what workplaces and individuals should be included or excluded from the legislation. The four year compensation mandate was determined to be zero per cent, zero per cent, 0.75 per cent, and one per cent.

[402] The Government maintained that it was open to other alternatives. However, all the above-noted steps had been undertaken before any consultation with union representatives had occurred. There was no "blank slate" of alternatives or options to be considered, despite what the union representatives were told in early January 2017. At the first meeting of the FWG on January 5, 2017, no indication was provided that legislation had already been drafted. Further, no requested information was forthcoming.

[403] On February 10, 2017, FWG met and the union representatives provided a PowerPoint presentation demonstrating alternative measures to reduce the deficit and return to balance. Additionally, as previously indicated, MNU President Mowat advised of an over-time cost savings measure for nursing staff and provided documentation at the February 24, 2017 meeting. Irving called the initiative "amazing". However, little analysis was done with respect to such proposals (under 24 hours). Indeed, when union representatives requested feedback, none was provided. Cabinet never saw the presentation, nor the analysis of its content. It is also noteworthy that at the February 24, 2017 FWG meeting, Rebeck had requested that collective bargaining be undertaken to assist in achieving a balance. The response from Irving was that "collective bargaining does not always work" and is "not always done in good faith".

[404] The ***PSSA*** final draft was completed on March 8, 2017, and presented to the PSCC as the method to secure certainty for public sector costs. The fact that a final draft had been prepared and presented was unknown to union representatives. The FWG met for a final time on March 9, 2017. Rebeck, again, asked specific questions but was not afforded with responses. The PSCC had reviewed the ***PSSA*** the prior day in virtually its completed form. The need for such a meeting of the FWG is, at best, speculative, as surely the die was cast. The *bona fides* of this process must be queried.

[405] The ***PSSA*** was introduced in the Legislature on March 20, 2017. The FWG union representatives continued to pose questions without the courtesy of Government answers. It is apparent that the Government undertook many significant steps in the development and creation of the ***PSSA*** before meeting with union representatives on January 5, 2017, when they were advised that all options were on the table – "a blank slate".

[406] The "consultation" area was more fully outlined at paras. 284–293 of this decision.

[407] I am not satisfied that the Government intended to engage in meaningful consultation towards any avenue other than the legislation model. Information, when requested, was not provided, which negated the unions' ability to participate in meaningful consultation, even of the proposed legislation, which was not revealed in draft form. I acknowledge that all information may not have been appropriately provided to maintain Cabinet privilege. However, in hard or co-operative bargaining situations, it is imperative to divulge information and goals.

[408] Government, at no time, considered a "blank slate" of options with respect to public sector cost control, and, particularly, would not embrace collective bargaining. As indicated, collective bargaining had been utilized in the past for the purposes of negotiating wage freezes, and certainly was utilized in advance of the implementation of the ***ERA***. The ***PSSA*** does not satisfy reasonable minimal impairment and inhibits the right to collectively bargain

well beyond a minimal level. The Government failed to afford a reason why less intrusive measures were not contemplated or whether alternatives were even considered. Indeed, this legislation was a copy of the Nova Scotia model and adopted without financial analysis of its consequences.

[409] There is no question that the court must not interfere simply because there were alternatives, some being less intrusive. The issue for resolution here is whether Government came within the range of means that limit s. 2(d) rights as minimally as reasonably possible. There must be leeway afforded to Government in such circumstances and judicial deference. However, there was no evidence provided by Government as to a consideration of any reasonable alternatives, particularly as would relate to collective bargaining. Indeed, all evidence denotes early acceptance and pursuit of a Nova Scotia-like wage restraint model. Government and union representatives formed the FWG; however, their consultations were, at best, superficial. There was no evident intent to deviate from the chosen legislative path. The four FWG meetings from January through March 2017 constituted an exercise in futility as Government continued to put the ***PSSA*** into final form before its introduction into the Legislature. Union representatives were not informed as to what was truly transpiring, information was not provided, nor were they afforded an opportunity to review the draft legislation for feedback purposes. Additionally, the Government was non-responsive to the unions' initiatives to achieve balance.

[410] The ***PSSA*** was not the least impairing method that was available to reduce the deficit or to satisfy the pressing objective. The burden is on the Government to demonstrate that the impairment was minimal – it has failed to do so. The pre-legislative consultations between the unions and Government did not demonstrate a meaningful discussion of any options – even legislative options. The evidence is clear that from August 2016 forward, the only alternative was a made-in Nova Scotia legislative restraint model. The pre-legislative "consultations" have been reviewed and illustrated that the unions endeavoured to secure information without success. This resulted in an inability to meaningfully consult. The unions provided an alternative that employed the collective bargaining process. The Government's mind was closed to such alternatives and only sought cost certainty for public sector compensation – collective bargaining was never an option. Further, it is arguable that the lack of provision of information was purposeful to block the search for alternative measures. The query must be made as to why collective bargaining or other recourses did not constitute viable alternatives. Collective bargaining had been successfully utilized in times of dire financial crisis. This was not such a time of crisis, but that process was not considered. Other options might have included a plan to reduce the budgets of Government-funded employers. Such a reduction would have required the employer to carefully consider monetary proposals at the bargaining table – hard bargaining could have transpired. There were alternatives, albeit none were explored. Dr. Beaulieu referenced the legislation as being an extreme alternative.

[411] The evidence, from entities such as Revera and ArlingtonHaus, illustrated, once delayed advice was provided by Government, that they were outside the ***PSSA's*** jurisdiction; that wage increases above these restraints were successfully bargained. Accordingly, it cannot be suggested that the ***PSSA*** reflects the going rate for collectively bargained agreements. This was also demonstrated by what UM was offering UMFA prior to Government's involvement.

[412] The fact that the ***PSSA*** permits collective bargaining on non-monetary matters does not serve to create the scenario of minimal impairment. This area has been addressed with the conclusion that without monetary issues on the bargaining table, the unions have been dealt a significant bargaining power reduction. There has been substantial interference with the bargaining process.

[413] Provisions, such as possible increased negotiated compensation in years three and four, have yet to have been utilized and likely will not be. Those savings would result in a concession of the employees' interests. The s. 7(4) exemption provisions have also not been utilized. These areas all illustrate demonstrable control by Government. Further, these

provisions were plausibly enacted in an attempt to protect against a constitutional challenge. Irving prepared an Advisory Note for Richards on January 3, 2017:

> ... Pauses for all years not likely to survive a court challenge concerning the circumvention of collective bargaining.... Modest increases to compensation. Imperative that the legislation allow for some collective bargaining to occur in order to meet potential legal challenges...
>
> ...
>
> ... must be some form(s) of "meaningful" collective bargaining... with the two components of modest increases in years 3 and 4 and the possibility of allocating a limited portion of approved, achievable efficiencies towards minimal increases.
>
> (Exhibit 3, Tab 21)

There was no evident consideration by Government to meet its goals through less intrusive measures. As was stated by Donald J.A. in ***BCTF***, "... It cannot be said that it took any approach to minimally impair in this context, let alone a reasonable one...." (para. 389).

[414] It is noteworthy that the Government has implemented policies which have reduced revenue gathering, such as the altered indexing of tax brackets, the reduction of the PST and very significant transfers into the Rainy Day Fund. These measures have been taken while endeavouring to impose wage restraint on the public service. It is clear that such a restraint measure is not minimally impairing, nor the least drastic measure. The fact that it is time limited for four years is not reflective of its actual operation. In the event of economic prosperity, there is no indication the ***PSSA*** would be lifted or revoked. Additionally, sustainability periods come into place at different times, for different groups, and its effect will not expire until 2025.

[415] The ***PSSA*** is directed at monetary issues and wages. The evidence of Dr. Hebdon was clear that the removal of an ability to negotiate on monetary terms substantially extinguishes the availability to secure trade-offs, such as securing layoff protection. The leverage available to the unions will be and has been dramatically reduced. This has been evidenced by contracts which once contained a non-layoff clause, such as ACC and RRC. Those bargaining units were unable to, again, negotiate such protection, despite agreeing to wage restraint. It must be remembered that in ***Health Services***, interference with areas such as layoff rights constituted a substantial interference with s. 2(d) rights. It is apparent that the fact that bargaining is still possible on non-monetary issues does not mean that the legislation can be classified as minimally impairing. The existence of negotiated sustainability savings, which, according to Dr. Hebdon will be of little value, also does not constitute or reflect minimal impairment by operation of the ***PSSA***. The Treasury Board has the ultimate discretion to approve any negotiated savings and determine the apportionment to the unions.

[416] The Government has failed to substantiate any proportionality between the deleterious effects of its measures on the s. 2(d) rights of public sector employees and its objectives in implementing these measures. Indeed, the evidence demonstrates that the legislation was contemplated and received Royal Assent without any financial analysis and without engaging in meaningful dialogue with the unions. The draft legislation was well underway before the promised consultation began. The Government had closed its mind to any other alternatives, and, particularly, those that involved collective bargaining. Further, measures were being taken to significantly cut Government revenues.

[417] I am satisfied that the Government has failed to meet its onus under the minimal impairment branch of the ***Oakes*** test. There has been no evidence put forth as to why collective bargaining was not possible as previously occurred in and around 2010. Further, there has been no explanation as to why other less intrusive and, perhaps, equally effective measures, were not chosen or explored, even those of a legislative nature. The Government chose not to call any member of the PSCC or Government decision maker to explain why such

measures could not have been adopted or were even considered in these circumstances. Indeed, as in ***Health Services***, the evidence has demonstrated that there was, "... no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter" (at para. 156). The evidence in this case demonstrates that very soon after its election, this Government became fixated on the legislative model. Indeed, Government had a draft in place before consultation even commenced with the unions. While Government representatives indicated an openness to other options and a clean slate was being considered, the evidence showed otherwise. Indeed, Irving stipulated collective bargaining does not always work, nor is it always done in good faith. It was disingenuous to suggest that anything but this legislative model was being considered with no other options evaluated.

[418] The Government has not satisfied the onus of demonstrating what alternatives were considered prior to forging the legislative course. There were no attempts to collectively bargain, no meaningful consultation or discussion of other options, and no evidence as to why the ***PSSA*** afforded the only recourse. The ***PSSA*** cannot be regarded as minimally impairing in these circumstances, and travels far beyond what was reasonably necessary to procure the objectives of the legislation

Final Balancing

[419] As was indicated in ***Oakes*** (at para. 70):

> ...there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".
>
> [emphasis in original]

The court when on to say (at para. 71):

> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter* ; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter* , and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[420] The Government has maintained that the ***PSSA*** limits collective bargaining on monetary issues for one contract period of four years. Such a limit does not substantially impact ***Charter*** values as discussed in ***Hutterian Brethren of Wilson Colony***. [43] Those values include liberty, human dignity, equality, autonomy and the enhancement of democracy. The Government argued that employees are still able to belong to a union, exercise their right to associate and address and influence important non-monetary workplace issues. They can still utilize the right to strike and layoffs were not set out in the legislation. It was further submitted by the defence that public sector employees will benefit from the tax relief and other positive impacts on the provincial economy that will result from deficit reduction. There should also be enhanced spending in areas such as healthcare, education and infrastructure

renewal. These areas were argued to be sufficient to allow the court to determine that the ***PSSA*** is a reasonable limit that can be demonstrably justified in a free and democratic society.

[421] The unions disagree with that position and submit that the ***PSSA*** violates freedom of association which cannot be demonstrably justified under s. 1 of the ***Charter***. I am in agreement with that conclusion.

[422] The legislation has, in accordance with the affidavit evidence and testimony provided by many of the union witnesses, affected the relationships between the unions and its memberships, as well as the unions with the employers. Further, the memberships' negotiating priorities could not be addressed. As Dr. Hebdon has said, this Government's actions will have a long-term effect and, perhaps, create a chilling of relationships for future rounds of collective bargaining. The evidence has shown that the ***PSSA*** has substantially interfered with a meaningful process of collective bargaining for over 110,000 Manitobans. The Government is facilitating popular tax revenue reduction measures on the backs of public sector workers. Proportionality does not exist.

[423] The case law has demonstrated that there is an increasing recognition of workers' rights and the importance of those rights. This recognition began substantially with then Chief Justice Dickson in the ***Alberta Reference***, where he stated in dissent:

> 91. Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect....

The testimony and evidence provided in this case demonstrated that those fundamental interests have been dramatically impacted by the ***PSSA***. The Government has suggested that public service employees will benefit by a stronger provincial economy and reductions in areas such as personal taxation. There was little to no evidence presented on those points. Further, in accordance with the attestation provided by Government representatives, no analysis was performed on the savings that could be attributed as a consequence of the ***PSSA*** restraints, unlike what transpired in ***Gordon***, where substantial evidence was put forward.

[424] The comments of Justice Lederer in ***OPSEU*** are poignant in this case:

> [270] This takes me to the third question asked in the second part of the *Oakes* test: overall proportionality. This analysis requires the court to weigh the benefits sought through the carrying out of the impugned measures against their deleterious effects. In its desire to reach an end it had defined, Ontario over ran the rights of the employees. The end sought by Ontario could have been achieved through more targeted legislative or administrative action and fairer, meaningful collective bargaining. The impact was not just on the economic circumstances of education workers but on their associational rights and the dignity, autonomy and equality that comes with the exercise of that fundamental freedom. These are the sort of values that attracted the dissent of Chief Justice Dickson at the time of the first trilogy, dissents which are now celebrated as the opening insight to the full breadth of the freedom.

Conclusion – Section 1

[425] I am satisfied that the ***PSSA*** has significantly impacted the associational rights and protections of public sector employees. Such an infringement cannot be demonstrably justified in a free and democratic society. Accordingly, the ***PSSA*** is not saved by virtue of s. 1 of the ***Charter***.

CONCLUSION

[426] I have concluded that the ***PSSA*** operates as a draconian measure that has inhibited and dramatically reduced the unions' bargaining power and violates s. 2(d) associational rights. There is no meaningful bargaining leverage afforded in the current situation. Any improvements which have been collectively bargained since 2017 are minor and reflect the lessened degree of bargaining power because of the removal of monetary issues from the bargaining table.

[427] The "negotiations" that have transpired, based upon the ***PSSA***, demonstrate that:

- employers have not necessarily embraced the concept of wage restraint (ex., UM, BU, MGEU, FLBSD), but have felt compelled to bargain in full compliance, even where no budgetary constraints existed, and because of the retroactivity provisions;
- employers, at the outset of negotiations, have indicated the need for compliance with the ***PSSA***. This has created a vacuum in which the collective bargaining process must function without the ability to utilize the leverage afforded by monetary issues;
- certain employers have chosen not to collectively bargain and delayed negotiations or are uncertain as to the applicability of the ***PSSA*** to their workplaces, which has, again, created delay.

There have been 21 negotiated ***PSSA*** agreements. Most have been achieved under duress and the threat of the claw back provisions. These were conditionally ratified, subject to the ***PSSA's*** constitutional status. Further, these agreements have affected only 7.9 per cent of Plaintiffs union members.

[428] Unions were able to negotiate zero per cent increases over two years in and around 2010. Those were successfully bargained, albeit with trade-offs. This Government said it wanted certainty and found collective bargaining to be unacceptable to achieve that result. As Stevenson indicated, zero per cent increases were bargained in the past; however, other non-monetary benefits had to be conceded. There is no question that monetary wage benefits are generally a very high priority with union membership. The limits on bargaining of monetary provisions has resulted in a loss of bargaining power which does not afford membership with a robust and meaningful ability to collectively bargain on non-monetary issues.

[429] The bargaining that transpired in 2016 with UMFA, found to be an unfair labour practice, was remarkable in that what transpired was UM's proposal over four years of a 17.5 per cent general wage increase plus market adjustments, being reduced to 1.75 percent. This occurred because of a Government mandate, of which UMFA was not advised until arbitration had begun. The University of Winnipeg and BU had previously agreed to more substantive wage increases (a range between 1.5 per cent and 2.5 per cent for 2016–2018). Consequently, it cannot be said that the ***PSSA*** wage caps were consistent with the going rate reached in other agreements, as existed in ***Syndicat canadien*** and other ***ERA*** cases. Interestingly, as well, UM felt it was in a sufficiently advantageous financial position to offer increased monetary wages/benefits and pleaded with Government representatives to allow such bargaining to transpire. This represented a substantive disruption of the collective bargaining process, harmed the relationship between UM and UMFA, and, as the evidence demonstrated, significantly altered the relationship between the union and its membership – both with respect to the 2016 and the 2017 negotiations. What transpired was a violation of s. 2(d) of the ***Charter***. This is but one clear example of the violations of s. 2(d) that have occurred. The same infringements can be seen with respect to MTS, DSM Westman Labs, MGEU, and others.

[430] There have been examples where Government has "bargained" above the ***PSSA*** limits. However, such bargaining has generally transpired in the healthcare sector in order to secure equality with other units as a consequence of the realignments that have and will take place in healthcare. There have been other examples, such as the ***IATSE*** bargaining, EMS Superintendents, Direct Support Workers, and Trades employees at Winnipeg hospitals, who have all received higher than ***PSSA*** amounts. However, again, those agreements were accomplished to bring symmetry of wages with similar units or to resolve evident inequities. Those employees will still be subject to four years of sustainability when it comes time to

negotiate their next collective agreement. Further, many of those contracts were concluded on a take-it-or-leave-it scenario from the employer without collective bargaining transpiring. As indicated, other agreements have been conditionally ratified. The existence of 21 agreements does negate the existence of substantial interference. Those agreements were not concluded as a consequence of meaningful bargaining, and, as was said by Justice Lederer in ***OPSEU,*** represented, "more capitulation than negotiation" (at para. 142). There have also been significant delays occasioned with respect to collective bargaining, as evidenced by MTS, MGEU, ArlingtonHaus, and others.

[431] The ***PSSA***, despite the fact that it has not been proclaimed, is effectively in force in the Province of Manitoba. It is clear from the "mandates" and policies utilized by the Government that the wage levels of zero per cent, zero per cent, 0.75 per cent and 1.0 per cent have been the applicable standards when dealing with unions. Further, the proclamation of the ***PSSA*** represents a looming presence for union representatives – particularly with regard to the claw back and debt due provisions of the legislation. The ***PSSA*** has been enacted and its application has clearly been impactful in this Province. It has created substantial interference with collective bargaining.

[432] The ***PSSA*** has made it impossible for the Plaintiffs to achieve their collective goals and limits the right to freedom of association. The s. 2(d) right cannot be exercised in a meaningful fashion. The ***PSSA*** is not saved by virtue of s. 1 of the ***Charter***.

[433] I have concluded:

1. this court has the requisite jurisdiction to rule on the constitutionality of the ***PSSA***;
2. the Government has violated the unions' s. 2(d) of the ***Charter*** with respect to the rights of public sector employees and the collective bargaining process;
3. the violation of s. 2(d) ***Charter*** rights was not justified pursuant to s. 1;
4. the Government was not required to afford the unions with an opportunity to engage in bargaining prior to enacting the ***PSSA*** (s. 2(d));
5. the Government was not required to conduct meaningful pre-legislative consultation with the unions with respect to the ***PSSA*** (s. 2(d)).

[434] I am satisfied that the Plaintiffs are entitled to the relief sought pursuant to paras. 1(c) and (f) of the Amended Statement of Claim, as the Government violated s. 2(d) of the ***Charter*** respecting the rights of employees represented by UMFA, which violation cannot be justified under s. 1 of the ***Charter***. Further, ss. 9–15 of the ***PSSA*** violates the rights and freedoms guaranteed by s. 2(d) of the ***Charter*** and cannot be justified under s. 1 of the ***Charter***. Those provisions are invalid and of no force and effect. They represent the heart and substance of the ***PSSA***. The relief sought under s. 1(i) is redundant, and, hence, dismissed, as is the relief requested pursuant to paras. 1(d) and 1(e).

_____J.

APPENDIX

Name	Role	Reference
AIKMAN, Stuart	Business Agent and Secretary for IATSE	Aikman
ARNOTT, Darlene	MGEU Staff Representative	Arnott
BEAULIEU, Dr. Eugene	Professor, University of Calgary	Dr. Beaulieu
BEAUPRÉ, Elizabeth	Assistant Deputy Minister, Health Workforce Secretariat	Beaupré
BLEICH, Alan	National Representative, CUPE	Bleich
BRULÉ, Mathieu	Negotiator,	Brulé

Name	Role	Reference
	Public Service Alliance of Canada – PSAC	
CARLYLE, Elizabeth	National Servicing Representative, CUPE	Carlyle
CHAYKOWSKI, Dr. Richard	Director, MIR Program, Queen's University	Dr. Chaykowski
Di MATTEO, Dr. Livio	Professor, Lakehead University	Dr. Di Matteo
ELLIS, Brian	Director Negotiation Services, Labour Relations Division	Ellis
FLEMMING, Greg	Executive Director of UMFA	Flemming
GAWRONSKY, Michelle	MGEU President	Gawronsky
GODIN, Jon-Thomas	Chief Negotiator, Brandon University Faculty Association	Godin
GORDON, Sheila	Director of Negotiations for MGEU	Gordon
GOULD, Norman	President, Manitoba Teachers' Society	Gould
GROEN, Richard	Assistant Deputy Minister, Fiscal Management – Treasury Board Secretariat	Groen
HEBDON, Dr. Robert	Professor, McGill University	Dr. Hebdon
HUDSON, Mark	President, UMFA	Hudson
JULIANO, Greg	Chief Negotiator, UM	Juliano
KINDRAT, Terri	PHLRS	Kindrat
KRAYCHUK, Phil	Coordinator of Health and Safety for UFCW 832	Kraychuk
LAFONTE, Marc	Business Manager of the Operating Engineers of Manitoba, Local 987	Lafonte
LAWRENCE, Miranda	MGEU Staff Representative	Lawrence
MCDOWELL, Walter	Labour Relations Officer for Manitoba Association of Health Care Professionals – MAHCP	McDowell
MOTTOLA, Marilyn	National Servicing Representative, CUPE	Mottola
MOWAT, Sandi	President, MNU	Mowat
NELSON, Laura	MGEU Staff Representative	Nelson

Name	Role	Reference
PACI, Thomas	Manitoba Teachers' Society	Paci
PAYETTE, Marc	MGEU Staff Representative	Payette
REBECK, Kevin	President, Manitoba Federation of Labour	Rebeck
RICARD, Norm	AGM	Ricard
RICHARDS, Michael	Deputy Secretary to Cabinet and Deputy Minister of Governmental Affairs	Richards
SIRETT, Erin	Bargaining Representative for PSAC	Sirett
SKOMOROH, Walter	Education Representative for CUPE	Skomoroh
STEELE, Carla	MGEU, Member Services Manager	Steele
STESKI, Garry	Assistant Deputy Minister, Financial Treasury Division	Steski
STEVENSON, RICHARD	Assistant Deputy Minister, Labour Relations Division	Stevenson
STUART, KEN	Bargaining Representative for Unifor's Local 3007	Stuart
SUTHERLAND, Michael	MGEU Staff Representative	Sutherland
TESS, Aurel	Provincial Comptroller	Tess
TRUDELL, Martin	Director of Negotiations for UFCW 832	Trudell
WHITESIDE, Wesley	MGEU Staff Representative	Whiteside

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[1] ***MGEU v. The Minister of Finance for the Government of Manitoba, The Honourable Scott Fielding***, 2020 MBQB 68
[2] ***Labourers' International Union of North America,*** [2016] O.L.R.D. No. 2163 (QL)
[3] ***Ontario Nurses' Assn. v. Participating Nursing Homes***, [2016] O.P.E.D. No. 5 (QL)
[4] Morley Gunderson & Daphne Taras, *Canadian Labour and Employment Relations*, 6th ed, Pearson Canada, 2008, p. 255
[5] See Note 4
[6] Richard P. Chaykowski and Robert S. Hickey, *Building More Effective Labour-Management Relationships*, 1st ed (Queen's School of Policy Studies, 2013)
[7] Richard Chaykowski, "From Non-Union Consultation to Bargaining in the Canadian Federal Public Service" in *Voice and Involvement at Work: Experience with Non-Union Representation*, 1st ed by Paul J. Gollan, Bruce E. Kaufman, Daphne Taras & Adrian Wilkinson (2014 Taylor & Frances Group: New York), at p. 265
[8] ***Health Services and Support – Facilitators Subsector Bargaining Assn. v. British Columbia***, 2007 SCC 27, [2007] 2 SCR 391 ***("Health Services")***

[9] ***Mounted Police Association of Ontario v. Canada (Attorney General)***, 2015 SCC 1, [2015] 1 SCR 3 (“***MPAO”)***

[10] ***Meredith v. Canada (Attorney General)***, 2015 SCC 2, [2015] 1 SCR 125 ***(“Meredith”)***

[11] ***Gordon v. Canada (Attorney General)***, 2016 ONCA 625 (CanLII) (“***Gordon”***)
[12] ***John Gordon, et al. v. Attorney General of Canada***, 2017 CanLII 6750 (SCC)
[13] ***The Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)***, 2016 BCCA 156 (CanLII) (“***Dockyard Trades***”)
[14] ***Ontario (Attorney General) v. Fraser***, 2011 SCC 20, [2011] 2 S.C.R. 3 (“***Fraser***”)
[15] ***Saskatchewan Federation of Labour v. Saskatchewan***, 2015 SCC 4, [2015] 1 S.C.R. 245 (“***SFL***”)
[16] ***Canada (Procureur general) v. Syndicat canadien de al function publique,*** section locale 675, 2016 QCCA 163 (CanLII) (“***Syndicat canadien***”)
[17] ***Canada (Attorney General) v. Canadian Union of Public Employees, Local 675***, 2016 QCCA 163 (CanLII)
[18] ***Alberta Union of Provincial Employees v. Alberta***, 2014 ABQB 97 (CanLII)
[19] ***Alberta Union of Provincial Employees v. Alberta***, 2019 ABQB 577 (CanLII)
[20] ***Alberta Union of Provincial Employees v. Alberta***, 2019 ABCA 320 (CanLII)
[21] ***Mikisew Cree First Nation v. Canada (Governor General in Council)***, 2018 SCC 40, [2018] 2 S.C.R. 765 (“***Mikisew***”)
[22] ***British Columbia Teachers’ Federation v. British Columbia***, 2016 SCC 49, 2 SCR 407, rev’g (2015) BCCA 184
[23]***British Columbia Teachers’ Federation v. British Columbia***, 2015 BCCA 184 (CanLII) (“***BCTF***”)
[24] See Note 22
[25] See Note 15
[26] ***Reference re Public Service Employee Relations Act (Alta.)***, 1987 CanLII 88 (SCC), [1987] 1 SCR 313 (“***Alberta Reference***”)
[27] ***Ontario Public Service Employees Union v. Ontario***, 2016 ONSC 2197 (“***OPSEU***”)
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[29] ***The Manitoba Federation of Labour et al v. The Government of Manitoba***, 2018 MBQB 125
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[31] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada, 2014)
[32] Peter Hogg, *Constitutional Law of Canada* (5th Ed.) Vol. 2 at p. 59-21
[33] ***R. v. Mills***, 1999 CanLII 637 (SCC), [1999] 3 SCR 668
[34] ***Borowski v. Canada (Attorney General)***, 1989 CanLII 123 (SCC), [1989] 1 SCR 342
[35] ***British Columbia (Attorney General) v. Alberta (Attorney General)***, 2019 ABQB 121 (CanLII) (“***BCAG v. AAG***”)
[36] ***Ewert v. Canada***, 2018 SCC 30, [2018] 2 SCR 165
[37] ***Reference Re Canada Assistance Plan (B.C.)***, 1991 CanLII 74 (SCC), [1991] 2 SCR 525
[38] ***Kazemi Estate v. Islamic Republic of Iran***, 2014 SCC 62, [2014] 3 SCR 176
[39] ***R. v. Oakes***, 1986 CanLII 46 (SCC), [1986] 1 SCR 103
[40] ***Frank v. Canada (Attorney General)***, 2019 SCC 1, [2019] 1 SCR 3
[41] ***Newfoundland (Treasury Board) v. N.A.P.E.***, 2004 SCC 66, [2004] 3 S.C.R. 381 (“***Newfoundland (Treasury Board)”)***
[42] ***RJR-MacDonald Inc. v. Canada (Attorney General)***, 1995 CanLII 64 (SCC), [1995] 3 SCR 199
[43] ***Alberta v. Hutterian Brethren of Wilson Colony***, 2009 SCC 37, [2009] 2 SCR 567 (at paras. 72–76)