File No. AI20-30-09494

IN THE COURT OF APPEAL

BETWEEN:

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 7975, 7106, 9074 AND 8223, WINNIPEG ASSOCIATION OF PUBLIC SERVICES 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) Respondents,

- and -

THE GOVERNMENT OF MANITOBA,

(Defendant) Appellant.

FACTUM OF THE APPELLANT

DEPARTMENT OF JUSTICE
Legal Services Branch, Constitutional Law Section
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FACTUM OF THE APELLANT

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PART I - INTRODUCTION

1. This appeal asks this Court to determine whether it is constitutional for the government to impose broad-based wage restraint legislation on the public sector in order to meet its budgetary priorities.

2. The trial Judge concluded that *The Public Services Sustainability Act,* S.M. 2017 c. 24 ("*PSSA*") is unconstitutional, and more particularly that the restraint on wages set out in the *PSSA* results in substantial interference in collective bargaining and thus amounts to an infringement of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

3. It is the Appellant's position that based on the binding decision of the Supreme Court of Canada in *Meredith v. Canada,* [2015] 1 SCR 24, the *PSSA* does not infringe freedom of association. The trial Judge erred in collapsing the two-part test enunciated by the Court into a single test; by requiring government to bargain before adopting wage restraint legislation; and by holding the government to a standard of not infringing on the bargaining approach enjoyed by certified statutory unions as opposed to considering the impact of the legislation on the right to meaningful bargaining guaranteed to all workers.

4. This appeal also asks the Court to determine whether the government had the authority to issue a new bargaining mandate to the University of Manitoba during the 2016 contract negotiations between the University and the University of Manitoba Faculty Association ("UMFA"). The trial Judge concluded that this conduct amounted to an infringement of freedom of association.

5. The Appellant's position is that the government, as part of its obligation to manage the public purse, had the right to set a mandate and to communicate that mandate to the public sector employer. The mandate had no impact on the process of bargaining which included the right to strike.

PART II - STATEMENT OF FACTS

The *Public Services Sustainability Act*

6. The *PSSA* was introduced for first reading as Bill 28 on March 20, 2017. During second reading on April 6, 2017, the government indicated that the purpose of the *PSSA* was to "ensure that the government's public sector compensation does not exceed the ability of Manitobans to sustain services to citizens" and that the government intended to address the fact that "the growth in public expenditures had continued to outpace the growth in revenues."[1] The Bill was passed on June 1, 2017 and received royal assent the next day. It has never been proclaimed.

7. The *PSSA* is time-limited wage restraint legislation that applies broadly across the public service to both unionized and non-unionized employees. It covers over 120,000 people or almost 20% of Manitoba's workforce. There are over 300 different unionized bargaining units within the ambit of the legislation, as well as approximately 10,000 non-unionized employees.[2]

8. The principal terms of the *PSSA* are that it sets benefit and wage caps of 0%, 0%, .75% and 1% over a four-year sustainability period. The sustainability period generally commences when the contract in place at the time of the legislation expires. This means that the *PSSA* does not override any existing terms of an agreement and will apply to bargaining units as their new agreements are negotiated.

9. The *PSSA* does not impact bargaining on non-monetary workplace issues including working conditions, health and safety issues, seniority and bumping provisions, discipline procedures, grievance procedures, reclassification issues, performance appraisals, recruitment and retention, contracting out and job security.

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[1] Legislative Assembly of Manitoba Vol. LXX No. 35B, 2nd session, 41st Legislature, April 6, 2017. **[TAB 23]**

[2] Book of Agreed Facts, para. 161-168.

10. Twenty-one collective agreements were completed within the terms of the *PSSA* and conditionally ratified by the members on the understanding that the agreements could be renegotiated in the event the *PSSA* was found to be unconstitutional.[3]

11. The constitutionality of the *PSSA* was challenged by the Manitoba Federation of Labour, an umbrella labour organization, and 28 unions representing public sector employees. On June 11, 2020 Madam Justice McKelvey released her reasons and found that the *PSSA* was unconstitutional on the basis that it violated the plaintiffs' freedom of association under s. 2(d) of the *Charter* and was not saved by s. 1. It is from this decision in respect of the violation of s. 2(d) that the Appellant now appeals; the s.1 finding is not being appealed.

University of Manitoba 2016 Contract Negotiations

12. The University of Manitoba and UMFA, which represents 1200 University professional employees, were engaged in contract negotiations in the summer and fall of 2016.[4]

13. The current government was sworn into office on May 3, 2016. The government informed the University of Manitoba management on October 6, 2016 that it was issuing a mandate for bargaining that was for a one-year agreement with a 0% wage freeze.

14. The University disagreed with the government's decision and the University President tried to get the government to reconsider but was unsuccessful. However, the University made the decision to respect the government's mandate

[3] Trial Reasons para. 427.

[4] See generally Trial Reasons at paras. 36-43.

direction. The University negotiators informed UMFA of the change in mandate on October 27, 2016 at the commencement of a mediation session.

15. UMFA reacted negatively to the change in mandate and considered the government's actions to have endangered the negotiation process. The change in mandate was also significantly different than the University's last wage offer. That offer, made on September 13, 2016, included wage increases of 1%, 2%, 2%, and 2% over four years, plus additional wages by way of select market adjustments that would have raised the average UMFA salary by 17.5% over four years. This offer was rejected by UMFA.

16. The parties did not reach an agreement during the mediation session and on November 1, 2016 UMFA members commenced a legal strike. During the course of the strike, the parties continued to bargain and engaged in a conciliation process.

17. On November 20, 2016 the parties agreed to a one-year collective agreement with a 0% wage increase. Some gains that UMFA made on behalf of its members included workload protections, a collegial process for the determination of tenure and promotion criteria, and some improvement to performance metrics.

18. Subsequently, UMFA filed an unfair labour practice against the University before the Manitoba Labour Board. The Labour Board ruled that the University did not commit an unfair labour practice when it chose to bargain in accordance with the new mandate. The Board held that the University had committed an unfair labour practice by failing to inform the union of the change in mandate at the first opportunity.[5]

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[5] *University of Manitoba Faculty Association v. University of Manitoba*, Manitoba Labour Board Case 215/16 ("MLB 215/16"). **[TAB 1]**

19. UMFA sought a declaration that the government had violated its members' rights to freedom of association during the 2016 contract negotiations. The trial Judge granted this declaration. It is from this decision that the Appellant now appeals.

PART III – POINTS IN ISSUE AND STANDARD OF REVIEW

20. There are two issues in this appeal:

i. First, is the *PSSA* constitutional and more particularly did the trial Judge err in concluding that the restraint on wages set out in the *PSSA* resulted in substantial interference in collective bargaining and thus amounted to an infringement of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

ii. Did the trial Judge err in finding that the government's conduct during the 2016 contract negotiations between the University of Manitoba and UMFA amounted to an infringement of freedom of association?

21. The standard of review with respect to constitutional issues is correctness. Where questions of constitutionality and infringement of *Charter* rights are raised on appeal, the rule of law requires a standard of correctness.[6]

[6] *Dunsmuir v. New Brunswick*, [2008] SCC 9 at para. 58 **[TAB 2]**; *Stadler v. Director St. Boniface/St. Vital*, 2020 MBCA 46 at para. 52. **[TAB 3]**

PART IV - ARGUMENT

The Constitutionality of the *PSSA*

1) Freedom of Association under the *Canadian Charter of Rights and Freedoms*

22. Freedom of association, as guaranteed by s. 2(d) of the *Charter* protects the right of individuals to associate to achieve collective goals. In *Mounted Police Association of Ontario v. Canada* ("*MPAO*"), Chief Justice McLachlin and Justice LeBel described one of the purposes of s. 2(d) as protecting "the right to join with others to meet on more equal terms the power and strength of other groups or entities."[7] Consequently s. 2(d) protects vulnerable groups and enhances equality.

23. The jurisprudence regarding freedom of association in the workplace context was significantly reformulated by the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* ("*Health Services*").[8] The majority concluded that freedom of association guarantees employees a constitutional right to engage in a meaningful process of collective bargaining on workplace issues, separate and apart from any operative statutory scheme.

24. However, as stated in *Health Services,* the constitutional right to collectively bargain is a "limited right" (para.91). It does not include "all aspects of 'collective bargaining', as that term is understood in statutory labour relations" or "guarantee access to any particular statutory regime (para. 19)." The Supreme Court repeated these comments in *Ontario (Attorney General) v. Fraser* ("*Fraser*"), holding that "no particular type of bargaining is protected."[9] In *Fraser,* Chief Justice

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[7] *Mounted Police Association of Ontario v. Canada (Attorney General),* [2015] 1 SCR 3 at para. 66. **[TAB 4]**
[8] *Health Services,* [2017] 2 SCR 391 at para. 89. **[TAB 5]**
[9] *Ontario (Attorney General) v. Fraser,* 2011 SCC 20 at para. 46. **[TAB 6]**

McLachlin and Justice LeBel explained that the s. 2(d) right to collective bargaining is more "minimal" or more "modest" than the statutory right and guarantees "a process that allows employees to make representations and have them considered in good faith by employers, who must engage in a process of meaningful discussion."[10] The regime upheld in *Fraser* allowed for representations to the employer orally or in writing, together with a requirement that the employer consider those representations in good faith.

25. The s. 2(d) right is also "limited" because it is a procedural right, meaning it is a right to a fair process. In *Saskatchewan Federation of Labour v. Saskatchewan* ("*SFL*")[11], Abella, J. added a factor to the *Fraser* description of the s. 2(d) right and described a meaningful process as including the rights of employees to join together to pursue workplace goals, the right to make collective representations to the employer and to have those representations considered in good faith, plus having a means of recourse should the employer not bargain in good faith.

26. As a procedural right, the right to collectively bargain does not extend constitutional protection to outcomes. The process of collective bargaining has always been distinguished from its results, which under a statutory scheme will generally be put into a collective agreement. As stated by the Supreme Court of Canada in *Fraser,* the "*Charter* may protect collective bargaining and not the fruits of that process."[12] For this reason, the majority in *Health Services* commented that s. 2(d) "does not guarantee a certain substantive or economic outcome" for employees engaged in a collective bargaining process.[13]

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[10] *Fraser* at paras 90, 93, 54. See also *MPAO* at para. 99.

[11] *Saskatchewan Federation of Labour v. Saskatchewan,* [2015] 1 SCR 245 at paras. 1, 24 and 29. **[TAB 7]**

[12] *Fraser* at para. 84.

[13] *Health Services* at para. 91.

27. Section 2(d) does not protect against all interference with the procedural right to bargain collectively. State action will infringe s. 2(d) only where it *"substantially interferes"* with the ability of a collective to exert meaningful influence over their working conditions. As the majority explained in *Health Services*:[14]

> Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects against "substantial interference" . . . it follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. . .
>
> 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 common goals of negotiating workplace conditions and terms of employment with their employer that we call 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. [Emphasis in original]

28. Substantial interference is not easily proven. To infringe s. 2(d) of the *Charter*, the action at issue must, either by intent or effect, "seriously undercut or undermine" the activity of workers coming together to pursue common goals.[15] Merely impacting, impairing, or affecting the collective bargaining process will not be sufficient. The question has been described by various appellate courts as one of "degree" or "intensity".[16]

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[14] *Health Services* at para. 90, 92. See also *Meredith v. Canada*, [2015] 1 SCR 125 at para. 24. **[TAB 8]**

[15] *Health Services*, at para. 92.

[16] *Canada (Procureur general) c. Syndicat canadien*, 2016 QCCA 163 at para. 31 ("*Syndicat canadien*") **[TAB 9]**; leave to appeal denied. SCC, August 25, 2016, Case No. 36914. **[TAB 10]** *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General,)*, 2016 BCCA 156 at para. 79 ("*Dockyard Trades*") **[TAB 11]**; leave to appeal denied. SCC, December 1, 2016, Case No. 35569. **[TAB 12]**

29. In each case, the question of whether state action substantially interferes with the s. 2(d) right to collectively bargain is contextual and fact specific. In *Health Services* the Supreme Court enunciated a two-prong test to be applied when determining whether state interference rises to the level of "substantial" (para. 93):

> The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of 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.

30. According to the Court's decision in *Health Services* (paras. 95-97), the focus of the first inquiry is whether the importance of the matter affected is so great as to undermine the ability of the employees to pursue goals collectively. As stated above, the right to collectively bargain does not guarantee the outcomes of the collective bargaining process or the rights contained in a particular agreement. However, the first inquiry recognizes that some matters may be more important than others when examining the employees' ability to meaningfully exert influence over working conditions. The less important a matter, the less likely that it will discourage employees from pursuing common goals through the constitutionally protected process of collective bargaining. Thus, issues such as the design of uniforms or the availability of parking will unlikely constitute substantial interference with s. 2(d) rights. On the other hand, limitations on wages would, in most situations, fall within the category of issues that would be important to constitutional collective bargaining and the capacity of employees to come together and pursue common goals.

31. However, the inquiry does not end with the determination of importance. *Health Services* (paras. 94 -97) directs a second inquiry into whether the measures taken by the state ultimately respect the fundamental precept of collective bargaining; that is, the duty to negotiate in good faith. Even in situations where the

measures adopted by the state deal with matters of significant importance, there will be no violation of s. 2(d) if the measures taken "preserve a process of consultation and good faith negotiation. (para. 95)" Indeed, as discussed below, *Meredith* very clearly confirms this point since the Supreme Court of Canada upheld wage restraint legislation.

32. The facts of *Health Services* provide an example of legislation that constituted a substantial interference. The legislation both repudiated multiple terms of past collective agreements dealing with layoffs, contracting out and bumping and denied the right to bargain these issues into the future. In *Fraser,* McLachlin, CJC and LeBel J., explained their own ruling in *Health Services* as follows (para. 76):

> The majority in *Health Services* held that the unilateral nullification of significant contractual terms by the government that had entered into them or had overseen their conclusion, coupled with effective denial of future collective bargaining, undermines the s. 2(d) right to associate.

33. Thus, it was the combination of the importance of the issues, the nullification of past agreements and the denial of future bargaining that underpinned the decision in *Health Services.*

2) *Meredith v. Canada:* Wage Restraint Legislation Does Not Substantially Interfere with the Constitutional Rights Protected by s. 2(d)

i. The facts surrounding the passage of the federal *Expenditure Restraint Act*

34. In *Meredith,* the Supreme Court of Canada upheld the constitutionality of the federal *Expenditure Restraint Act,* S.C. 209 c.2 ("the *ERA*") as it applied to members of the RCMP. The *ERA* imposed retroactive limits on wage increases in the public sector dating back to 2006-2007 and extending until 2010-2011. It also invalidated any terms in existing collective agreements which provided

otherwise.[17]

35. *Meredith* was subsequently relied upon by the Courts of Appeal in Quebec, British Columbia and Ontario, which all found that the *ERA,* as it applied respectively to CBC employees, dockyard workers, and the Public Service Alliance of Canada (PSAC) and the Professional Institute of the Public Service of Canada (PIPSC), did not substantially interfere with the right to collectively bargain protected by s. 2(d). Notably, the Supreme Court of Canada denied the unions' leave to appeal applications in all three cases.[18]

36. Canada's public service is made up of three separate components. The core public service includes the departments and agencies listed in Schedules I and IV the *Financial Administration Act,* R.S.C. 1985, c. F-11 ("*FAA*"). The Treasury Board is the employer for these departments and agencies and conducts collective bargaining through the Treasury Board Secretariat. The second component, referred to as the "Separate Agencies", are the agencies listed in Schedule V of the *FAA.* These agencies conduct their own labour relations negotiations within a mandate set by Treasury Board. The third component includes designated agencies and Crown Corporations that conduct their own collective bargaining.[19]

37. In the early fall of 2008, Treasury Board and other federal government employers were engaged in collective bargaining with various bargaining agents. In other situations, agreements had already been completed and still others were at different stages of arbitration. For example, CBC had reached agreements with two of its bargaining agents in October 2007. The dockyard workers had requested

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[17] *Meredith*, at paras. 12,13.

[18] *Syndicat canadien, supra* note 16; *Dockyard Trades, supra* note 16; *Gordon v. Canada, (Attorney General),* 2016 ONCA 625 **[TAB 13]**; leave to appeal denied. SCC, February 16, 2017, Case No. 37254. **[TAB 14]**

[19] *Gordon*, para. 8-10.

arbitration in March 2008. There were also other bargaining units that had agreements that were not yet open for bargaining in the fall of 2008 but that came open for bargaining during the restraint period set out in the *ERA*.[20]

38. In October 2008, in response to growing fiscal concerns, the federal government decided to impose limits on wage increases. On October 31, 2008 a senior Treasury Board Secretariat official met with the president of PSAC to advise that Treasury Board had set a restricted mandate regarding wage increases and that there was a desire to complete collective bargaining by the end of November. On November 13, 2008 the Secretary of Treasury Board met with the heads of the Separate Agencies to encourage them to reach agreements within the new mandate by the end of November. On November 17, 2008 a similar meeting was held with the heads of the Crown corporations, including the Commissioner of the RCMP.[21]

39. On November 19, 2008 the Governor General delivered the government's Speech from the Throne. The speech indicated that the government intended to "table legislation to ensure sustainable growth in the federal Public Service."[22]

40. Around the same time as the Speech from the Throne, Treasury Board directed its negotiators to return to the bargaining table and to seek to negotiate settlements within the defined mandate by the date of the upcoming Fiscal Statement (November 27, 2008). The mandate, which ultimately matched the terms of the *ERA,* was made public through a media announcement dated November 18, 2008. The negotiators were not authorized to discuss the terms of

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[20] *Gordon*, paras. 28, 116, 143-145; *Syndicat canadien* at para. 5[8,9]; *Dockyard Trades* at para. 9.
[21] *Gordon*, para. 21; *Meredith*, para. 60.
[22] Canada, House of Commons Debates Vol. 143, No. 002, 1st session, 40th Parliament, November 19, 2008 at p.15. **[TAB 24]**

the forthcoming legislation but did inform the bargaining agents of their new mandate and that the legislation could include caps on increases to wage rates. The rates in the legislation were not disclosed.[23]

41. Throughout November and the first week of December, government negotiators met with various bargaining agents with the goal of completing collective agreements. The financial mandate for the negotiations mirrored the terms of the *ERA* but the negotiators were also encouraged to be creative and flexible regarding other issues. By early December 2008 multiple agreements were completed.[24] One bargaining agent indicated that it had accepted the employer's wage offer because "we had a gun pointing at our heads", clearly referencing the pending legislative caps, which were at this time unknown.[25]

42. On November 27, 2008 the Minister of Finance issued an Economic and Fiscal Statement in which he advised that legislation was being introduced that "would put in place annual public service wage restraints of 2.3% for 2007-08, and 1.5% for each of the following three years."[26] This was the first time the caps in the *ERA* were disclosed.

43. The *ERA* was enacted by s. 393 of the *Budget Implementation Act, 2009* S.C. 2009 c.2, which was tabled in the House of Commons on February 6, 2009 and received Royal Assent on March 12, 2009. It capped wage increases for public servants over a five-year period, retroactive to April 1, 2006. It applied to over 400,000 persons on the federal payroll, whether unionized or not, as well as 48,000 employees working for Crown corporations.[27]

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[23] *Gordon* at para. 22; *Dockyard Trades* at para. 9[7]; *Syndicat canadien,* at para. 5[16].
[24] *Meredith,* para. 58, 59; *Gordon,* para. 24, 25.
[25] *Canada (Treasury Board) and Professional Institute of the Public Service of Canada,* 2009 PSLRB 102 at para. 43; aff'd 2010 FCA 109 ("*PIPSC*"). **[TAB 15]**
[26] Canada, House of Commons Debates Vol. 143, No. 008. 1st session, 40th Parliament, Nov. 27, 2008 **[TAB 25]**. Economic and Fiscal Statement of the Minister of Finance at p.376. **[TAB 26]** *Meredith* at para. 9.
[27] *Meredith* at para. 12. *Syndicat canadien,* at para. 5[21].

ii. The Supreme Court of Canada decision in *Meredith* and the three Court of Appeal decisions

44. The decision of the Supreme Court of Canada in *Meredith* is an application of the *Health Services* test in the context of wage restraint legislation. Chief Justice McLachlin and Justice LeBel, writing for the majority, recognized (at para. 4) that in accordance with their reasons in *Health Services,* the question they had to determine was whether the *ERA* substantially interfered with the associational activity of the RCMP.

45. The impact of the *ERA* on the RCMP was significant. As a result of the legislation. The members suffered a rollback of their scheduled wage increases. Members were also denied previously negotiated increases to additional compensation. Their pay was set for five years. An exemption provision in the *ERA* permitted Treasury Board to provide some additional remuneration to members in support of transformation initiatives to the RCMP.

46. The majority in *Meredith* found that the *ERA* did not substantially interfere with the constitutional right to collectively bargain under s. 2(d) of the *Charter*. In doing so, McLachlin, CJC. and LeBel, J. focused on the second branch of the *Health Services* test and considered how the *ERA* impacted bargaining. The majority compared the legislation at issue in *Health Services* with the *ERA* and noted that the former had made "radical changes to significant terms" in collective agreements previously negotiated. In contrast, the *ERA* capped wages at numbers that other employees had already agreed to. The Judges concluded that "[t]he process followed to impose the wage restraints thus did not disregard the substance of the former procedure. (para. 28)" In other words, what was critical to the majority was that the *ERA* did not take terms that had been ratified in past agreements and override them.

47. Further, the majority pointed out that there remained room to obtain financial

benefits through representations to Treasury Board. Thus, the conclusion was that the *ERA* "cannot be said to have substantially impaired the collective pursuit of workplace goals . . . (para. 30)."

48. *Meredith* was subsequently followed by the Courts of Appeal of Quebec, British Columbia and Ontario. All three Courts undertook fact-specific and contextual analyses in upholding the constitutionality of the legislation.

49. In *Syndicat canadien,* the Quebec Court of Appeal looked at the legislation in the context of its impact on CBC employees. In that context, the *ERA* resulted in the loss of a portion of a previously bargained wages and an obligation to repay certain amounts received in excess of the permitted limits.

50. The Court of Appeal for Quebec accepted that the *ERA* both affected the previously signed collective agreement and the ability to freely negotiate a new agreement. Nevertheless the Court rejected the unions' argument that any changes to an existing agreement would amount to a s. 2(d) infringement. The Court recognized that accepting such an argument would be to grant collective agreements a "sort of immutable constitutional status" which was inconsistent with Supreme Court jurisprudence. Instead, the Court concluded that the question that needed to be answered was to what "degree or intensity" the statutory measures interfered with the right to bargain collectively (para 31).

51. In answering this question, the Court applied the two-prong *Health Services* test. Under the first prong the Court concluded (para. 43) that "there is no question" that the *ERA* interfered with collective bargaining given the importance of wages to most employees and that the level of interference was "not trivial" (para. 44). Nevertheless, under the second inquiry, the Court found that there was still sufficient scope for collective bargaining, including on non-monetary issues such as hours of work, vacation, leaves, staffing, assignments and transfers (para. 55).

52. In *Dockyard Trades,* the British Columbia Court of Appeal considered the constitutionality of the *ERA* in the circumstances where it had invalidated a wage increase obtained through arbitration. In applying the *Health Services* test, the Court approached the issue through a "holistic" and "contextual" lens and concluded that there was no substantial interference with the bargaining process. Garson, J.A. for the Court stated at para. 93:

> 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.

53. The third appellate decision upholding the constitutionality of the *ERA* is the Ontario Court of Appeal decision in *Gordon.* The Court of Appeal concluded at para. 176:

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

54. The finding that the unions were able to make progress on non-monetary matters despite the *ERA* reveals the true impact of the *ERA.* The *ERA* did not preclude the opportunity for meaningful change to important workplace conditions through good faith bargaining. For example, PSAC was able to negotiate better return to work provisions following parental leave (para. 163). Thus, while the *ERA* took monetary issues off of the bargaining table it still allowed a wide scope for unions to exert meaningful influence on workplace conditions in accordance

with the constitutional guarantee of s. 2(d).

55. In sum, the Supreme Court of Canada decision in *Meredith,* together with the three Court of Appeal decisions, found that time-limited wage restraint legislation did not fundamentally alter the collective bargaining process. While the *ERA* impacted federal public servants in a variety of ways, including by overriding agreed to terms and arbitration awards, it still left room for bargaining on significant issues and did not render the association process futile or undermine the activity of workers coming together to pursue the common goals of improving workplace conditions. This is precisely what the Appellants say is the effect of the *PSSA.*

3) The Trial Judge Erred in Concluding that the *PSSA* Violates s. 2(d)

56. The trial Judge's determination that the *PSSA* violates s. 2(d) of the *Charter* is based on a number of supporting pillars that are discussed at paragraphs 304-349 of the reasons and are summarized at paragraph 348. The Appellant respectfully submits that the trial Judge erred in her analysis as follows:

i. By improperly distinguishing *Meredith* on the basis that it was decided in a non-union context given that the RCMP did not have a Wagner model of collective bargaining.

ii. By misinterpreting *Meredith* and finding that the *PSSA* is unconstitutional because the wage cap levels in the *PSSA* were not comparable to wage levels established through pre-legislative collective bargaining.

iii. By finding that the *PSSA* is unconstitutional because it was unnecessary since the same outcomes could have been reached through hard bargaining.

iv. By improperly distinguishing *Meredith* based on the lower wage caps in the *PSSA* as compared to the *ERA* and in finding the *PSSA* unconstitutional on the basis that it did not provide scope for bargaining on monetary issues.

v. By finding that the negative impact of the *PSSA* on a union's bargaining power or leverage results in a finding of unconstitutionality.

57. It is the Appellant's position that since the primary supporting pillars of the analysis – individually and taken together – provide no support for the conclusion, the conclusion cannot stand.

i) The trial Judge erred by improperly distinguishing *Meredith* on the basis that it was decided in a non-union context given that the RCMP did not have a Wagner model of collective bargaining.

58. The Supreme Court of Canada decision in *Meredith* is fundamental to the Appellant's case. It is a binding precedent that upheld wage restraint legislation that is similar, albeit not identical, to the *PSSA*. In order for the trial Judge to have found that the *PSSA* is unconstitutional it was necessary for her to provide legally defensible reasons to distinguish *Meredith* and to explain why the *ERA* and the *PSSA* are so fundamentally different, that one is constitutional, but the other is not. It is the Appellant's position that the trial Judge was bound by *Meredith* and her reasons for distinguishing it were in error.

59. The trial Judge first attempts to distinguish *Meredith* at paragraph 312 of the reasons by indicating that "there was no consideration of how the *ERA* impacted collective bargaining. . . [as the] RCMP was not legally permitted to engage in collective bargaining".

60. It is submitted that this statement is in error and shows a fundamental misunderstanding of what s. 2(d) protects. Section 2(d), like all *Charter* sections, applies equally to all persons and does not provide greater rights to unionized employees, who enjoy the Wagner model. RCMP members, farm workers, unionized employees and non-unionized employees have identical s. 2(d) rights; they all equally have the right to come together to advocate for fair workplace treatment. As the majority stated in *Fraser,* a case about s. 2(d) in the non-

unionized context, s. 2(d) "broadly . . . includes the right to collective bargaining in the minimal sense of good faith exchanges . . ."[28]

61. Section 2(d) does not create a constitutional right to the Wagner model of bargaining. It is a basic principle of constitutional analysis that the *Charter* sets the minimum thresholds that Parliament and the legislatures must meet to protect Canadians' fundamental rights and freedoms. It always remains open to government to legislate beyond the constitutional minimum.[29] Unions in Canada enjoy very robust collective bargaining procedures through statute but the statutory rights do not mirror the constitutional rights.

62. Thus, for the purposes of ruling on the constitutionality of the *ERA,* the majority in *Meredith* recognized at paragraph 24 that they did not need to consider the constitutionality of the Pay Council process. The only issue was whether the *ERA* was constitutional in accordance with the *Health Services* test. The majority concluded that the wage restraints in the *ERA* "cannot be said to have substantially impaired the collective pursuit of workplace goals . . ." (para 30).

63. The trial Judge's attempt to distinguish *Meredith* based on the RCMP's non-union status is equivalent to saying that RCMP members have lesser substantive constitutional rights than unionized employees. This is obviously wrong. Thus, it is submitted that trial Judge erred in attempting to distinguish *Meredith* on this basis.

ii) The trial Judge erred by misinterpreting *Meredith* and finding that the *PSSA* is unconstitutional because the wage cap levels in the *PSSA* were not comparable to wage levels established through pre-legislative collective bargaining.

64. The trial Judge also sought to distinguish *Meredith* and the Court of Appeal

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[28] *Fraser*, para. 90.

[29] See for example, *R. v. Jorgensen*, [1995] 4 SCR 55 at para. 76. **[TAB 16]**

decisions that upheld the *ERA* by indicating that the wage parameters in the *ERA* were reflective of pre-legislative bargaining and those in the *PSSA* were not. The Judge summarized her conclusions as follows:[30]

- the *ERA* cases found no violation of s. 2(d) as collective bargaining prior to its enactment was recognized and incorporated into the legislative wage 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. . .
- the [Manitoba] Government had not endeavoured to collectively bargain wage restraint within the public sector prior to the *PSSA's* enactment.

65. The Appellant submits that the trial Judge erred in her understanding of the facts that surrounded the bargaining that preceded the *ERA* and more importantly, its legal significance.

66. The bargaining that took place prior to the *ERA* took place under the shadow of pending legislation. What the trial Judge described "as good faith bargaining" at paragraph 321, one bargaining agent described as having "a gun pointing at our head."[31] Many of the unions settled their agreements knowing that legislation was coming but, contrary to the trial Judge's assertion, they did not know the details of the wage caps that would be set out in that legislation. Nevertheless, the Supreme Court and the Courts of Appeal took comfort in the fact that the outcomes achieved pre-legislation matched the outcomes that occurred post-legislation. In other words, the legislation did not have a profound impact on bargaining. As the majority stated in *Meredith* (para. 29):

> Actual outcomes are not determinative of 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.

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[30] Trial Reasons at para. 348. See also paras. 313,314, 321.

[31] *PIPSC* at para. 43.

67. The fact that bargaining took place prior to the introduction of the *ERA* was just a factor that supported the courts' views. None of the courts set pre-legislative bargaining as a *sine qua non* for constitutional legislation. Yet, it is submitted, that this is the error the trial Judge made. She turned what was a factor, which gave support for the finding that the legislation had had minimal impact, into a legal prerequisite for constitutional wage restraint legislation. She criticized the government for not undertaking pre-legislative bargaining with a broad number of unions.

68. Not only does *Meredith* not require collective bargaining in advance of wage restraint legislation, there is ample authority that governments owe no duty to consult or negotiate prior to passing legislation.[32] The trial Judge accepted this legal conclusion (Trial Reasons, paras. 296-303). Yet she then contradicted her own reasoning by using the lack of prior collective bargaining as a fact that supported the conclusion that the legislation is unconstitutional.

69. It is submitted that the trial Judge erred in her understanding of why the *ERA* was found to be constitutional. It was not because there was collective bargaining prior to its enactment that was incorporated into the legislative caps. It was because the effect of the legislation on bargaining was minimal. Some federal unions chose to complete agreements in advance of the legislation and with full knowledge that unknown wage caps were coming. Other unions had the wage caps set by legislation. In both situations there remained the ability to bargain many terms that were important to the employees. The fact that the contracts were similar, both pre- and post-legislation gave the Supreme Court of Canada and the appellate courts support for their conclusion that the *ERA* was constitutional. The legislation did not substantially change the outcomes that both groups obtained.

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[32] *Health Services*, at para. 157; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765 ("*Mikisew Cree #2*"). **[TAB 17]**

70. However, none of the courts went so far as to hold that pre-legislative bargaining was required in order for wage restraint legislation to be constitutional. Putting an obligation on government to negotiate in advance of legislation is not only contrary to *Health Services* and *Mikisew Cree #2,* it makes no practical sense. First, governments would only be able to introduce wage legislation if they happened to be negotiating with their major unions at the time they wished to bring legislation forward. Second, unions could significantly impact the constitutionality or unconstitutionality of legislation by agreeing or not agreeing to contract terms during pre-legislative bargaining.

71. Of course it is always open to government to engage in consultation, negotiation or collective bargaining prior to legislation, just like the federal government did in advance of the *ERA.* If this results in evidence that there were similar contracts negotiated before and after the legislation, this will be a fact that will support constitutionality. But the absence of evidence is not evidence. If government chooses not to engage in discussions prior to legislating, that is its prerogative. There are no legal consequences that flow from that decision. Legislation is neither constitutional nor unconstitutional based on that decision.

72. It is submitted that the error the trial Judge made was first misunderstanding *Meredith* and the other *ERA* cases and then using the fact that government did not engage in bargaining pre-legislation as a reason for finding the legislation was unconstitutional. Rather than relying on the lack of bargaining as a factor that supported unconstitutionality, the trial Judge should have made no mention of this fact. It is entirely legally irrelevant.

iii) The trial Judge erred by finding that the *PSSA* was unconstitutional because it was unnecessary since the same outcomes could have been reached through hard bargaining.

73. Another factor that led the Judge to conclude that the *PSSA* was

unconstitutional was that wage freezes had been successfully bargained in the past and that "hard co-operative bargaining could have been utilized by Government to support its desire for fiscal constraint" (Trial Reasons, para. 335).

74. This reasoning is entirely speculative. The fact that wage freezes were bargained previously in different circumstances says nothing about whether they could be successfully bargained again. More importantly, this reasoning runs afoul of the Supreme Court's repeated admonition that courts are to rule on the constitutionality of legislation, not on the policy or wisdom of legislative decisions.[33] The fact that wage restraints had been bargained in the past and might have been bargained in the future was entirely irrelevant to the s. 2(d) constitutional analysis. The necessity for legislation may be something to be considered under s. 1 of the *Charter* but, respectfully, it was a clear error in law for the Judge to have considered this as part of the substantive constitutional analysis.

iv) The trial Judge erred by improperly distinguishing *Meredith* based on the lower wage caps in the *PSSA* as compared to the *ERA* and in finding the *PSSA* unconstitutional on the basis that it did not provide scope for bargaining on monetary issues.

75. One of the ways that the *PSSA* differs from the *ERA* is that the *PSSA* imposes a two-year wage freeze. The trial Judge repeatedly characterized the *PSSA* as "draconian".[34] She held that the "removal of the ability to conduct genuine collective bargaining on monetary issues" supported a finding of unconstitutionality.[35] She further held, that the effective removal of the ability to bargain monetary issues under the *PSSA* meant that "robust collective bargaining

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[33] *Reference re Firearms Act (Canada),* [2000] 1 SCR 783 at para. 2 **[TAB 18]**; *Vriend v. Alberta,* [1998] 1 SCR 493 at para. 136. **[TAB 19]**

[34] Trial Reasons, paras. 320, 342, 348.

[35] Trial Reasons, para. 348.

on non-monetary issues cannot transpire" in the milieu created by the *PSSA*.[36]

76. The trial Judge stated at paragraph 320 of her reasons that an "important distinction" between the *ERA* and the *PSSA* is that the "the *PSSA* enacts two years of zero per cent wages increases" while "the *ERA* provided some level of wage increase in each year of its implementation." Since both the *ERA* and *PSSA* impose wage caps, it is submitted that the legal question that the trial Judge had to determine was whether the different wage levels in the *ERA* and *PSSA* give rise to a legally justifiable means to distinguish *Meredith*. It is the Appellant's position that they do not.

77. First, the trial Judge's repeated statement that the *PSSA* is draconian is improper. This is a value judgment, not a legal conclusion. Judges rule on the constitutionality of legislation, not on its policy. As the Supreme Court stated in *Babcock v. Canada (Attorney General)*, "it is well within the power of the legislature to enact laws, even laws which some would consider draconian . . ."[37] Disliking the policy set out in the *PSSA* is not a legally appropriate way to distinguish *Meredith*.

78. By focusing on the wage freeze, it is submitted that the trial Judge misunderstood the decision in *Meredith*. Since *Meredith* was considering the second branch of the *Health Services* test, the Court was concerned with the impact of the legislation on bargaining, not the numbers set out in the caps. The determination was that the process of bargaining was sufficiently robust even though wages could not be negotiated. The Appellant submits that if bargaining can occur under the *ERA* then equally it can occur under the *PSSA*.

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[36] Trial Reasons, para. 342.

[37] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 57. **[TAB 20]**

79. The trial Judge also took the position that the inability to discuss wages was a factor supporting a finding that the *PSSA* is unconstitutional. Thus, the trial Judge took the position that there must be an opportunity to have input on the important topic of wages in order for the legislation to be constitutional.

80. It is submitted that this reasoning is incorrect because it collapses the two-prong *Health Services* test into a single prong. The *Health Services* test starts by requiring the issue that is impacted by state action to be important. If the removal of an important issue from the scope of bargaining was sufficient to amount to a constitutional violation, then the test would be a single step. By developing a two-step test the Supreme Court directed the necessity to look beyond the importance of the issue and consider what removing that important issue does to the process of bargaining, not its substance. The Supreme Court in *Meredith* concluded that removing wages from discussion did not change the overall process of bargaining.

81. While it is true that the RCMP had the ability to discuss some compensation issues through Treasury Board, that particular option did not apply to any other federal bargaining entity. If there has to be scope to bargain all important issues for legislation to be constitutional, then the three Court of Appeal decisions dealing with the *ERA* would have been decided differently. Instead all three courts upheld the legislation because the scope to bargain other issues was sufficiently robust so as to allow good faith bargaining to operate.

82. Further, it is submitted that the trial Judge erred in concluding that the lack of scope to bargain monetary issues was a factor supporting a finding that the *PSSA* is unconstitutional. What the Judge should have considered is what scope was left for bargaining. The *PSSA* has no impact on the ability to bargain multiple workplace issues including health and safety issues, seniority and bumping procedures, disciplinary procedures, grievance procedures, reclassification issues, performance appraisals, recruitment and retention, contracting out and job security,

including no-layoff clauses. By focusing on the wage freeze in the *PSSA* and the inability to bargain monetary issues, it is submitted that the trial Judge misapplied the *Health Services* test.

v) **The trial Judge erred by finding that the negative impact of the *PSSA* on a union's bargaining power or leverage results in a finding of unconstitutionality.**

83. Central to the Plaintiffs' thesis at trial was that the *PSSA* fundamentally alters a union's ability to bargain because once wages are pre-determined the union loses its leverage to trade-off wages for other concessions. The trial Judge accepted this position and found that once wages were pre-determined only minor gains could be achieved through bargaining.[38]

84. The importance of leverage to the process was put forward by several union representatives as well as Dr. Hebdon. The Judge accepted Dr. Hebdon's evidence as follows (Trial Reasons, para. 329):

> . . . 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.
>
> 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.

85. It is submitted that, while the Judge had the authority to accept the evidence of Dr. Hebdon, she erred in the legal consequences that flowed from that evidence. More specifically, it is submitted that the use the Judge made of Dr. Hebdon's evidence does not comply with the Supreme Court's jurisprudence in *Health*

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[38] Trial Reasons, paras. 332, 348.

Services, Fraser and *Meredith.*

86. Dr. Hebdon described a particular methodology of negotiation, the one favoured by unions for their collective bargaining. One reason the Judge gave for accepting Dr. Hebdon's evidence was because he had years of practical experience negotiating in the unionized context using this approach (Trial Reasons, para. 326).

87. However, by accepting the need for leverage and trade-offs, the Judge constitutionalized one methodology of bargaining. In essence the trial Judge held that legislation is unconstitutional if it negatively impacts a union's bargaining power and ability to trade-off. However, it is submitted that this is contrary to the decisions in both *Health Services* and *Fraser* where the Supreme Court made clear that s. 2(d) does not favour the Wagner model of bargaining. As the majority stated in *Fraser* (at para. 41), quoting *Health Services:*

> Section 2(d) protects only 'the right . . . to a general process of collective bargaining, not to a particular model of labour relations, nor **to a specific bargaining method.**' [Emphasis added]

88. It is submitted that the Judge considered the wrong question. She focused on whether the *PSSA* changed how unions generally approach bargaining and how they achieve acceptable outcomes. In doing so, she failed to consider the second step of the *Health Services* test which requires consideration of whether a meaningful process for bargaining remains. She held the government to the standard of not infringing on the ideal "Cadillac" model of collective bargaining when the correct test is whether the legislation preserved a meaningful process.

89. Further, the trial Judge focused on what outcomes were obtained under the *PSSA* as a factor supporting a finding that the *PSSA* is unconstitutional. She found that only "minor gains" had been achieved by the unions that had bargained in accordance with the *PSSA* mandate (Trial Reasons, para. 348). It is submitted that reliance on outcomes runs contrary to the statements in *Health Services* and *Fraser*

that s. 2(d) protects a process but "does not guarantee a certain substantive or economic outcome."[39]

90. Once again *Meredith* and the Court of Appeal decisions are the linchpins of the Appellant's argument. The Courts concluded that the *ERA* provided sufficient breadth for a meaningful process to occur. Thus, the inability to bargain wages and the inability to trade-off wages did not factor into the legal analysis. There remained sufficient scope to discuss and complete agreements regarding many important workplace issues. There was no wholesale repudiation of previously agreed to terms and the limitation on bargaining was time-limited to five years.

91. It is submitted, that if legislation cannot impact a union's leverage without violating s. 2(d), then *Meredith* and the Court of Appeal cases must be wrongly decided. The *ERA* changed what unions could trade-off and bargain, yet the legislation was constitutional because it left room for meaningful dialogue.

92. It is submitted that the same is true of the *PSSA*. While the *PSSA* does change how unions must approach bargaining and the outcomes they can expect it does not remove the ability of sophisticated unions to represent their members and to have meaningful discussions about workplace topics. The twenty-one agreements that were completed in accordance with the terms of the *PSSA* prove this to be true. The outcomes were not what the unions wanted but outcomes are not constitutionally protected. There was still an opportunity to meet, to discuss issues and to have the issues considered in good faith by the employer. This is precisely what the *Charter* protects.

4) Summary

93. In summary, it is the Appellant's submission that the trial Judge's finding that the *PSSA* is unconstitutional is fundamentally flawed. The *PSSA* and *ERA* are

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[39] *Health Services* at para. 91; *Fraser* at para. 84.

substantially similar and there is no legally sound basis to distinguish the binding authority of *Meredith*. Thus, the Appellant submits that the finding that the *PSSA* violates s. 2(d) of the *Charter* should be reversed.

The 2016 University of Manitoba Contract Negotiations

94. The trial Judge sets out the facts regarding the 2016 UMFA contract negotiations at paragraphs 36 - 43 of the reasons. The legal analysis of this issue is at paragraph 429. The trial Judge held that the government's conduct substantially interfered with collective bargaining contrary to s. 2(d) of the *Charter*.

95. The Judge's first reason for reaching this conclusion is that the UMFA contract differed from other university contracts that had been negotiated prior to the *PSSA*. With respect, this reasoning conflates the 2016 and 2017 bargaining years. The *PSSA* had nothing to do with the 2016 bargaining process. The *PSSA* was not introduced until many months after the contract negotiations were completed.

96. Second, the Judge found that the University had the financial resources to offer more than the government's mandate of 0%. However, there is no explanation how this is relevant to a legal analysis of government conduct. Perhaps the trial Judge was considering whether the government conduct in setting a mandate was desirable or necessary. However, the government's motivation for its conduct is not relevant to its constitutionality. The only issue that the Judge should have addressed was whether the issuance of the new mandate during bargaining substantially interfered with the process so as to amount to a violation of s. 2(d), not the motivation for that conduct.

97. Third, the Judge found that the change in mandate that led the University to change its position "represented a substantive disruption of the collective bargaining process, harmed the relationship between [the university] and UMFA, and . . . significantly altered the relationship between the union and its membership. . ." The Appellant takes no issue with the finding that the change in mandate caused bad feelings and angered some UMFA members. However, it is submitted that this is not sufficient to constitute a violation of s. 2(d).

98. Mandates are common practice in public sector bargaining. *Meredith* describes the federal process for mandates that is set out in the *FAA*. Given that about half of the University's budget comes from the Province, the Manitoba government has traditionally set mandates for University bargaining.[40]

99. At the point in time that the government changed the bargaining mandate, there was no offer on the table. The previous offer had been rejected by UMFA. The Labour Board found that the University was within its legal rights to adopt the new bargaining position in accordance with the government mandate.[41] If it was not an unfair labour practice for the University to adopt the new mandate, then it is submitted that there is nothing improper with the government communicating its policy objectives, through a mandate, to a public sector employer.

100. In considering the legal impact of the change in mandate, it is helpful to consider the impact of the *ERA* on settled agreements. In the case of the RCMP, the legislation resulted in a scheduled and previously announced wage increase to the RCMP being rolled back. As explained in *Syndicat canadien* (para 5[26]) a wage increase in the CBC collective agreement was also rolled back. In neither situation did this result in a finding that the legislation was unconstitutional.

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[40] Evidence of Mark Hudson, November 19, 2019 at page T80, lines 13-16, 27-29.
[41] MLB 215/16, at pages 71, 72.

101. If rolling back and overturning completed agreements does not amount to substantial interference, then it is submitted that issuing a new mandate does not amount to substantial interference. Issuing the mandate did not change the process. UMFA still had the right to bargain, the right to mediation, the right to strike and the right to conciliation – all of which it took advantage of in finally coming to a settled agreement.

102. In summary, it is the Appellant's submission that the government has the legal authority to set mandates for public sector employers and it does not amount to a constitutional violation for it to do so. Thus, the Appellant submits that the trial Judge erred in granting the declaration that the government had violated the rights of UMFA members under s. 2(d) of the *Charter* respecting the 2016 contract negotiations.

PART V - RELIEF CLAIMED

103. For the reasons set out above, the Appellant respectfully submits that this Honourable Court should grant the appeal and should find that:

- the *PSSA* does not infringe freedom of association as guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms;* and
- the government's conduct during the 2016 UMFA contract negotiations did not violate s. 2(d) of the *Charter.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Heather Leonoff, Q.C., Counsel for
The Attorney General of Manitoba

DATED this 4th day of January, 2021.

Estimated Time for Oral Argument: 2 hours

PART VI

LIST OF AUTHORITIES

Tab No.

CASE LAW

LEGISLATION

OTHER DOCUMENTATION