

Wage Restraint in Manitoba: Is Freedom “Just Another Word For Nothing Left To Lose”?

B R U C E C U R R A N *

ABSTRACT

Federal and provincial governments have, over the last 50 years, passed legislation from time to time freezing the wages of public sector workers, but their power to pass such legislation has become both murkier and more constrained over the past 15 years due to the Supreme Court of Canada’s evolving jurisprudence on the right to collective bargaining under the Charter. The recent experience of the Government of Manitoba with the *Public Services Sustainability Act* is illustrative. This article analyzes the latest wage restraint regime in this province, the Manitoba Court of Queen’s Bench decision that declared it unconstitutional, and the Manitoba Court of Appeal decision that reversed the ruling of the lower court. Three interesting aspects of Manitoba’s experience with a potential s. 2(d) Charter breach are examined in detail: the necessity to consider government action in addition to legislation; the requirement to incorporate the lack of consultation and negotiation into the analysis; and the need to examine the impact of the overall wage restraint scheme on bargaining power. These three issues are extremely relevant to policy-makers considering the

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implementation of wage restraint legislation, and to the litigation currently underway in other provinces, such as Ontario.

KEYWORDS: Manitoba; Canadian Charter of Rights and Freedoms; Freedom of Association; Right to Collective Bargaining; Wage Restraint Legislation

I. INTRODUCTION

At various stages over the last half century, many Canadian governments, both at federal and provincial levels, have enacted wage restraint legislation. Such legislation strives to introduce freezes or limits to public sector compensation as a means of reducing budgetary deficits. What is new in the past 15 years is the evolution of a series of constitutional constraints on wage restraint programmes in the jurisprudence of the Supreme Court of Canada, starting with *Health Services and Support - Facilities Subsector Bargaining Association v British Columbia*.¹ Prominent industrial relations scholar Richard Chaykowski summarized the impact of the case, which recognized a right to collectively bargaining under the freedom of association protections of the *Charter*, thusly: “*BC Health* made it clear that policy-makers would have to consider the extent to which judicial interpretation of *Charter* rights might constrain government policy.”² However, the response of a number of governments has not been to attempt to comply with the spirit of the Supreme Court jurisprudence, but rather to exploit potential loopholes, a strategy that can be termed “legal opportunism”.

Legal opportunism has been relied upon by the Progressive Conservative Party of Manitoba, since taking power in 2016. The Government of Manitoba implemented wage restraint legislation, called the *Public Services Sustainability Act*,³ that seemed at first blush to do a reasonable job of preserving the freedom of association of

¹ [2007] 2 SCR 391 [*BC Health Services*].

² Richard P Chaykowski, “Canadian Labour Policy in the Aftermath of *Fraser*” (2012) 16:2 CLEJ 291 at 303.

³ SM 2017, c 24 [PSSA].

public sector workers. It appeared to allow for collective bargaining on non-compensation issues; it seemed to preserve the right to strike; and it even gave the impression that Government employees might eventually share a portion of the savings to be realized from austerity measures. However, in the process of enacting the legislation, the Government engaged in a disingenuous consultation with the unions, overstated the problems with its finances, reserved the possibility of retroactive claw-backs of pay workers already received, refrained from proclaiming the PSSA in an attempt to shield it from *Charter* scrutiny, and attenuated the leverage that workers might have to negotiate improvements in the financial and non-financial terms of employment. The Government of Manitoba's approach to freedom of association has been analogous to the freedom sung about in the song "Me and Bobby McGee". At first instance, the "freedom" offered appears very attractive. But in the end, this freedom is "just another word for nothin' left to lose" for public sector workers, because of the impossibility of meaningful gains on employment terms, and "[n]othin'" is "all that Bobby [or in this case, then-premier Brian Pallister] left me [the worker]". This legislation was challenged by public sector unions, and in June 2020, Justice McKelvey of the Manitoba Court of Queen's Bench ruled that the legislation was a violation of workers' collective bargaining rights⁴ under section 2(d) of the *Canadian Charter of Rights and Freedoms*.⁵ On appeal, the Manitoba Court of Appeal overturned this ruling⁶ in what I believe to be a misinterpretation of the Supreme Court of Canada's jurisprudence on Freedom of Association. Unfortunately, the Supreme Court of Canada did not grant leave to appeal the Court

⁴ *Manitoba Federation of Labour et al v The Government of Manitoba*, 2020 MBQB 92 [MFL QB 2020].

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982 c 11 [Charter]*.

⁶ *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85 [MFL CA]. Note that one aspect of the Queen's Bench decision was upheld: The ruling that the Government of Manitoba interfered in the collective bargaining between the University of Manitoba and the University of Manitoba Faculty Association [UMFA] in 2016, before the legislation was passed, and in the process breached UMFA member's s. 2(d) *Charter* rights.

of Appeal's decision. It is important to understand that this is not necessarily a tacit approval by our highest court of the Manitoba Court of Appeal decision. In a famous speech, Justice Sopinka explained some of the principles relating to the Supreme Court's granting of leave to appeal as follows: "We are not a court of error and the fact that a court of appeal reached the wrong result is in itself insufficient. This is still the case if the court of appeal has misapplied or not followed a judgment of this Court."⁷

This paper will have four main parts. First, I will discuss the recent wage restraint actions of the Government of Manitoba while also putting them in some historical context. Next, I will recapitulate the decision of the Manitoba Court of Queen's Bench. Third, I will summarize the Manitoba Court of Appeal decision. Last, I will analyze three interesting aspects of the case: the Government's attempt to shield itself from *Charter* scrutiny by refraining from proclaiming the PSSA; the extent of any government duty to consult and/or negotiation with the unions before embarking on a course of wage restraint; and whether the wage restraint regime's impact on the bargaining power of public sector workers ought to be part of the s. 2(d) analysis. Hopefully, this analysis will help to shape the jurisprudence of other jurisdictions, such as Ontario and Nova Scotia, which have challenges to similar legislation before the courts. It is also my goal that this analysis will help guide government policy-makers who might be considering wage restraint legislation.

II. BACKGROUND

A. *Historical Context*

Public sector labour relations have some unique facets when compared with private sector labour relations. In *private* sector labour relations, the legislative branch sets the rules for the game in a relatively disinterested way, and the two main protagonists,

⁷ Justice John Sopinka, "The Supreme Court of Canada" in Henry S Brown, ed, *Supreme Court of Canada Practice 2011*, 11th ed (Toronto: Carswell, 2010) at 489.

employers and unions, must play by these rules. The government also acts as a impartial referee to enforce these rules, through labour relations boards and by providing an express mechanism of grievance resolution by private, neutral arbitration. In *public* sector labour relations, the government is in an inherent conflict-of-interest situation. The government retains the power to legislate the process under which the working conditions are determined.⁸ Additionally, in public sector labour relations, the government has other roles:

1. An employer who must raise revenue in order to satisfy its payroll obligations, primarily by taxing its citizens.⁹
2. An “economic policy-maker responsible for fiscal and economic stability”.¹⁰
3. The protector of public welfare.¹¹

Oftentimes, these other roles conflict with the government’s role as neutral rule-maker, and the government is tempted to slant the rules in favour of it as employer and economic policy-maker. In the public sector, the government may introduce certain pro-employer rules on a standing basis, and other favourable rules may be introduced on an *ad hoc* basis, in response to certain changes in political ideology or economic shocks. Sometimes, the government

⁸ Mark Thompson & Patrice Jalette, “Public-Sector Collective Bargaining” in Morley Gunderson & Daphne Gottlieb Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto: Pearson/Addison Wesley, 2009) 403 at 412.

⁹ Paul Phillips & Carolina Stecher, “Fiscal Restraint, Legislated Concessions, and Labour Relations in the Manitoba Civil Service, 1988-1997” in Gene R Swimmer, ed, *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills, Ont: Oxford University Press, 2001) 96 at 96; Thompson & Jalette, *supra* note 8 at 412.

¹⁰ Phillips & Stecher, *supra* note 9 at 96.

¹¹ Gene Swimmer & Mark Thompson, “Collective Bargaining in the Public Sector: An Introduction” in Gene R Swimmer & Mark Thompson, eds, *Public Sector Collective Bargaining in Canada: Beginning of the End or End of the Beginning* (Kingston, Ont: Industrial Relations Centre, Queen’s University, 1995) 1 at 4.

uses its *ad hoc* rule-making power to dictate, rather than negotiate, certain employment terms for the workers.¹²

Public services are very labour intensive, and as a result public sector compensation comprises a substantial portion of government budgets. This prompts governments to look to control compensation for their employees to manage deficits.¹³ Generally speaking, governments have three ways to try to control compensation in the public sector.¹⁴ One method involves using legislation to impose restraint on compensation (called “wage restraint legislation”), which has been commonly used by government due to its certainty and expediency.¹⁵ There are several approaches to wage restraint legislation. Governments can introduce restraints to current collective agreements (retroactive wage restraint legislation) or set limits (including rollbacks or freezes) to compensation in renewal collective agreements that will be negotiated in the future (prospective wage restraint legislation). Alternatively, governments can merely *threaten* to introduce legislation if their desired results are not achieved at the bargaining table.¹⁶ The second method is to obtain financial concessions through a combination of hard bargaining and reductions in transfer payments to employers in the broader public sector, such as hospitals, schools, or municipal governments.¹⁷ The third strategy involves an attempt to foster a cooperative relationship with the public sector unions where the unions voluntarily agree to increase productivity and/or restrain compensation in return for

¹² Thompson & Jalette, *supra* note 8 at 412.

¹³ Gene R Swimmer & Tim Bartkiw, “Provincial Policies Concerning Collective Bargaining” in Christopher J C Dunn, ed, *Provinces: Canadian Provincial Politics*, 2nd ed (Peterborough, Ont: Broadview Press, 2006) 507 at 507 and 513.

¹⁴ *Ibid* at 525.

¹⁵ Richard P Chaykowski, “Systemic Pressures on Ontario Public Sector Industrial Relations” in Richard P Chaykowski & Robert Sean Hickey, eds, *Building More Effective Labour-Management Relationships* (Montréal, PQ: School of Policy Studies, Queen’s University, McGill-Queen’s University Press, 2013) 13 at 50; Thompson & Jalette, *supra* note 8 at 412.

¹⁶ *Ibid.*

¹⁷ *Ibid.*; Swimmer & Thompson, *supra* note 11 at 17.

certain concessions, such as job security and increased input into government policies.¹⁸

While in the 1970s and 1980s wage restraint legislation was used to fight inflation,¹⁹ it has instead been used by the federal and many provincial governments starting in the 1990s to suppress the wages of public sector workers in an effort to address growing budgetary deficits.²⁰ Often, such legislation covered not just individuals employed directly by the government, but also those working for entities that receive substantial funding from the government, such as those in sectors like health care and education. For the balance of this paper, these two groups of employees will be referred to jointly as broader public sector (BPS) workers.²¹ Wage restraint legislation has been enacted at various times by the federal government, as well as the provincial governments of New Brunswick, Newfoundland, Manitoba, Nova Scotia, Quebec, and Ontario.²²

In the 1990s in Manitoba, the Progressive Conservative government under then-Premier Gary Filmon passed a series of wage restraint acts that effectively froze all wages and benefits of provincial employees for a period of six years.²³ As part of this

¹⁸ Swimmer & Bartkiw, *supra* note 13 at 525.

¹⁹ Gene R Swimmer, "Public-Sector Labour Relations in an Era of Restraint and Restructuring: An Overview" in Gene R Swimmer, ed, *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills, Ont: Oxford University Press, 2001) 1 at 2.

²⁰ Thompson & Jalette, *supra* note 8 at 412; Swimmer & Bartkiw, *supra* note 13 at 513; Swimmer, *supra* note 19 at 2.

²¹ Chaykowski, *supra* note 15 at 14; Swimmer & Bartkiw, *supra* note 13 at 512; Swimmer & Thompson, *supra* note 11 at 3; Richard P Chaykowski & Robert S Hickey, "Principles for Labour Relations Policy Reform in the Wake of the Drummond Report on Ontario's Public Services" (2013) 17:2 CLEJ 379 at 379.

²² For a good summary of this legislation, consult the following sources: Swimmer & Thompson, *supra* note 11 at 17; Swimmer & Bartkiw, *supra* note 13 at 526-528; John L Fryer, "Provincial Public Sector Labour Relations" in Gene Swimmer & Mark Thompson, eds, *Public Sector Collective Bargaining in Canada Beginning of the End or End of the Beginning* (Kingston, Ont: Industrial Relations Centre, Queen's University, 1995) 341 at 353-365.

²³ Phillips & Stecher, *supra* note 9 at 96-120.

regime, the provincial government, Crown corporations, and other public-sector employers were eventually empowered to require their employees to take up to 10 days leave annually without pay, a human resource practice that became known colloquially as “Filmon Fridays”.²⁴ There was continuing suppression of meaningful collective bargaining under the Filmon Government’s fiscal restraint program. Rather than attempt to negotiate with the major public-sector unions about cuts, the Government of Manitoba unilaterally imposed wage freezes or roll-backs through legislation and cut civil service jobs.²⁵ Interestingly, actual cuts in the total civil service compensation constituted a very minor component of the fiscal recovery.²⁶ The cutbacks were really part of an ideologically-driven government agenda to create a more business-friendly environment in Manitoba.²⁷

A decade after the end of the Filmon Government’s wage restraint program, the Supreme Court of Canada started issuing a series of decisions developing a right to collective bargaining under s. 2(d) of the *Charter*. These rulings place some constraints on a governments’ ability to implement wage restraint programs, but the jurisprudence does not prevent such programs outright. The three most significant cases for our purposes are *BC Health Services, Mounted Police Association of Ontario v Canada (Attorney General)*,²⁸ and *Meredith v Canada (Attorney General)*.²⁹ In *BC Health Services*, the British Columbia government failed to consult a number of health sector unions, and passed legislation which did the following: ignored job security provisions in the relevant collective agreements; outsourced numerous jobs; rewrote existing collective agreements; and mandated that any future collective agreements that provided specific kinds of job security would be null and void. The Supreme Court established that s. 2(d) of the *Charter* does

²⁴ *Ibid* at 105.

²⁵ *Ibid* at 104–105.

²⁶ *Ibid* at 111.

²⁷ *Ibid* at 119–120.

²⁸ [2015] 1 SCR 3 [MPAO].

²⁹ [2015] 1 SCR 125 [Meredith].

provide a right to collective bargaining. Chief Justice McLachlin and Justice Lebel, for the majority, ruled “s. 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining.”³⁰ The Court set out a two-part test for determining whether “a government measure affecting the protected process of collective bargaining amounts to substantial interference”.³¹ This test “in every case is contextual and fact-specific”.³² Under this two-part test, “[t]he 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.”³³ The Court ultimately found that certain provisions in the B.C. legislation failed both parts of the test, in that the legislation impacted very important matters like contracting out, layoffs, and bumping, and the process did not provide a reasonable substitute for collective bargaining because the government’s unilateral actions did not involve good faith negotiation or consultation. This case did not deal with a wage restraint program, but many of the principles are still applicable.

Similarly, *MPAO* was a case that did not involve a wage restraint program, but did enunciate relevant principles in assessing whether the right to collective bargaining of public sector workers had been violated. Chief Justice McLachlin and Justice Lebel, writing for a majority of the Court, explained that the ultimate question to be determined is whether the government measures have disrupted the balance between employees and employer.³⁴ According to them, the guarantee in the constitution serves to

³⁰ *BC Health Services*, *supra* note 1 at para 87.

³¹ *Ibid* at para 93.

³² *Ibid* at para 92.

³³ *Ibid* at para 93.

³⁴ *MPAO*, *supra* note 28 at para 72.

protect workers against the more powerful employers.³⁵ It must be noted, though, that the Supreme Court has consistently stressed in this and other cases that s. 2(d) of the *Charter* protects the process for workers—it does not guarantee any substantive result.

In *Meredith*, the Supreme Court of Canada had the opportunity to consider a piece of wage restraint legislation implemented in response to the financial crisis of 2008. The Treasury Board of Canada established compensation levels of the RCMP. In June 2008, the Treasury Board announced salary increases of 3.32%, 3.5%, and 2% for the years 2008, 2009, and 2010. In December 2008, the Treasury Board communicated to the RCMP Commissioner a revised wage decision providing for salary increases of 1.5% for each of the three years, in line with limits previously announced for the whole of the public sector. In March 2009, the *Expenditure Restraint Act*³⁶ was enacted, imposing a limit of 1.5% on wage increases in the public sector, including RCMP officers, for the 2008 to 2010 fiscal years. Members of the RCMP brought a constitutional challenge, arguing that the December 2008 decision of the Treasury Board and the *ERA* violated officer's right to collectively bargain under s. 2(d) of the *Charter*. Madam Justice McLachlin and Justice LeBel, for the majority of the Court, ruled that neither the *ERA* nor government action substantially interfered with the process so as to infringe RCMP members' freedom of association.³⁷ She found that the limits imposed by the *ERA* were shared by all public servants, were consistent with the going rate reached in agreements concluded elsewhere in the core public administration and did not preclude consultation on other compensation-related issues, either in the past or the future. Justice McLachlin explained that "[a]ctual 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

³⁵ *Ibid* at para 58.

³⁶ S.C. 2009, c. 2 [*ERA*].

³⁷ However, the decision of the court was not unanimous. Justice Abella delivered a vigorous dissent, ruling that the *ERA* did violate the right to collective bargaining of RCMP members.

impact on the appellants' associational activity."³⁸ Furthermore, according to Justice McLachlin, the ERA did not prevent the consultation process from moving forward: An exception for RCMP members included in the ERA allowed RCMP members to obtain significant benefits as a result of subsequent proposals brought forward.

As mentioned in the Introduction, this evolving jurisprudence has meant that governments must be increasingly diligent in considering the *Charter* protections for freedom of association when formulating labour policy and drafting labour statutes, including those involving wage restraint.³⁹ However, the response of some governments has not been to attempt to comply with the spirit of the jurisprudence, but rather to seek to opportunistically exploit its ambiguities. A prime example of a government employing legal opportunism is that of Nova Scotia. That province passed the original version of the PSSA in 2015.⁴⁰ This legislation limited compensation increases that could be negotiated in any renewal collective agreement for the public sector over the following five years to 0%, 0%, 1%, 1.5%, and .5%, respectively. In an apparent attempt to shield the legislation from *Charter* scrutiny while at the same time coercing compliance, the Nova Scotia government enacted the legislation in December 2015, but delayed its proclamation. Eventually, the government was driven to proclaim the legislation in August of 2017 when the largest public sector union in the province, the Nova Scotia Government and General Employees Union, forced its hand and filed for interest arbitration.⁴¹ As will be discussed in the next section, Manitoba

³⁸ Meredith, *supra* note 29 at para 29.

³⁹ Chaykowski, *supra* note 2 at 303.

⁴⁰ SNS 2015, c 34 [PSSA of NS].

⁴¹ The NSGEU filed for interest arbitration when the government refused any increase above that in the unproclaimed legislation. In response, the province proclaimed the PSSA of NS in force 22 August 2017, N.S. Reg. 127/2017, (2017) NS Gaz II, Vol. 41, No. 18. The constitutionality of the legislation has been challenged, and the Nova Scotia Government brought a constitutional reference before the Nova Scotia Court of Appeal. Ultimately, the Court of Appeal declined to rule on the constitutionality, finding that the case lacked

used this legislation as a template for its own wage restraint legislation. Ontario has also enacted legislation that is similar in many respects to the *PSSA of NS* and Manitoba's *PSSA*.⁴² In November of 2022, the Ontario Superior Court of Justice ruled that the Ontario legislation was unconstitutional, for reasons very similar to those of Justice McKelvey of the Manitoba Court of Queen's Bench.⁴³ The Ontario Government has appealed the decision, and the jurisprudence from Manitoba may be influential.⁴⁴

B. Public Services Sustainability Act of Government of Manitoba

Legal opportunism tactics have also been utilized by the Government of Manitoba. The Progressive Conservative Party of Manitoba assumed political power in Manitoba following a provincial election in April 2016. Since then, the Government of Manitoba has adopted an austerity agenda aimed at reducing provincial expenditures and budget deficits.⁴⁵ Very soon after taking power, the Government became interested in emulating the Nova Scotia legislation as a means of restraining public sector compensation.⁴⁶ On August 9th, 2016, an Advisory Note was provided to Cabinet, recommending consideration of the Nova Scotia model of wage restraint.⁴⁷ On September 16, 2016, Cabinet

a sufficient evidentiary foundation: *Reference re Bill 148, An Act Respecting the Sustainability of Public Services*, 2022 NSCA 39.

⁴² *Protecting a Sustainable Public Sector for Future Generations Act*, 2019, S.O. 2019 c. 12.

⁴³ *Ontario English Catholic Teachers Assoc. v His Majesty*, 2022, ONSC 6658.

⁴⁴ Canadian Press, "Ford government appeals Ontario court decision striking down Bill 124", CBC News, (December 29, 2022), online: <<https://www.cbc.ca/news/canada/toronto/ontario-appeals-bill-124-1.6699900>>.

⁴⁵ *COVID-19, Austerity and an Alternative Social and Economic Policy Path for Manitoba*, by Jesse Hajer & Lynne Fernandez (Canadian Centre for Policy Alternatives, 2021) at 6.

⁴⁶ *MFL QB 2020*, supra note 4 at para 13.

⁴⁷ *Ibid.*

approved the recommendation and a Public Sector Compensation Committee (“PSCC”) was formed, consisting of six Cabinet ministers and a number of non-voting staff.⁴⁸ In the fall of 2016, the Government of Manitoba directed the University of Manitoba to remove an offer for a salary increase mid-way through bargaining with the University of Manitoba Faculty Association, which ultimately led to a finding of bad faith bargaining against the University.⁴⁹ The government forbid the University of Manitoba from citing the direction as the reason for this removal. This was so despite the fact that “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.”⁵⁰ 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, and modest compensation increases in years three and four. The wage restraint regime was substantially based upon the Nova Scotia model.⁵¹

From January 5, 2017 to March 9th, 2017 the Government conducted four consultation meetings with five to six union representatives.⁵² The Government misled the union representatives about the extent to which the consultation would have any meaningful impact on its austerity plans. The Government assured union leaders that all options were on the table, with “legislation being one option”, and that the “Government was prepared to adopt a ‘blank slate’ approach with respect to legislative content.”⁵³ In fact, the Government had already reached the decision to implement wage restraint

⁴⁸ *Ibid* at para 14.

⁴⁹ *University of Manitoba Faculty Association v University of Manitoba*, 2018 CanLII 5426 (MB LB).

⁵⁰ *MFL QB 2020*, *supra* note 4 at para 429.

⁵¹ *Ibid* at para 17.

⁵² *Ibid*.

⁵³ *Ibid* at para 24.

legislation, and solidified the material details on the same day the “consultation period” began.⁵⁴

The *Public Services Sustainability Act* ultimately received Royal Assent on June 2, 2017, but, like the Nova Scotia Government, the Government of Manitoba refrained from proclaiming the legislation in force. In fact, the legislation was never proclaimed, and the provincial government repealed it on June 1, 2022.⁵⁵ The PSSA limited the compensation increases in any renewal collective agreements during each year in a four-year sustainability period to 0%, 0%, .75%, and 1%, annually and respectively.⁵⁶ Negotiation on non-compensation items was permitted.⁵⁷ The Act preserved the right to strike for BPS workers.⁵⁸ The following merit-based increases in compensation were also permitted: those associated with a promotion or reclassification, and “performance-based increases within an established pay range”.⁵⁹ The Act indicated that there was a prospect that “a portion” of the savings expressly negotiated in a collective agreement could be used to increase compensation during the last two years of the collective agreement if the Treasury Board approved it “in its sole discretion”.⁶⁰ Controversially, the legislation had retroactive effect, such that employees would have to repay any amounts over the caps in the legislation, even if these amounts were negotiated and paid before the legislation was proclaimed.⁶¹ These retroactive provisions were not present in the Nova Scotia legislation. The scope of the Manitoba legislation covered the BPS, including universities, school districts and school divisions, and health organizations.⁶²

⁵⁴ *Ibid.*

⁵⁵ *Public Services Sustainability Repeal Act*, S.M. 2022, c. 9.

⁵⁶ PSSA, *supra* note 3 at s. 12(1). Note that the legislation also applies to non-unionized employees in the BPS.

⁵⁷ *Ibid* at s. 3.

⁵⁸ *Ibid* at s. 4.

⁵⁹ *Ibid* at s. 6.

⁶⁰ *Ibid* at s. 14.

⁶¹ *Ibid* at s. 28.

⁶² *Ibid* at s. 7(1).

Following the Royal Assent of the legislation, there were almost no collective agreements reached in the BPS with payment provisions that exceeded the caps, nor were there any strikes.⁶³ Unions and their membership typically entered into collective agreements expressly maintaining that they did so under duress.⁶⁴ The PSSA impacted the relationship between the unions and their membership, with many members indicating that they had lost faith in their unions.⁶⁵

The Government took a number of other controversial steps around the time of the PSSA. It appears to have overstated the problems with the province's finances, in an attempt to sell the workforce and the general public on the necessity of wage restraints.⁶⁶ The Minister of Finance delivered the 2016 Budget, and projected a 1.012 billion dollar deficit, but at the close of public accounts four months later it actually proved to be \$846 million, about 15% less.⁶⁷ The Government took steps to make the deficit appear larger than it was. They did this by making conservative assumptions and moving certain assets off the books. This caused the Auditor General of Manitoba to express significant concerns about the Government's compliance with Generally Accepted Accounting Principles, and issue a qualified opinion in 2018 and 2019.⁶⁸ The Government also took a number of steps that belied the allegedly dire financial situation of the province: the Government reduced sales taxes, representing a loss of revenue in the amount of \$395.4 million dollars annually,⁶⁹ and income taxes, representing a loss of revenue in the amount of \$153 million

⁶³ For a list of collective agreements that are not reflective of the provisions, see *MFL QB 2020*, *supra* note 4, para 125. Many of these are expected to ultimately agree to PSSA limits in subsequent collective agreements.

⁶⁴ *MFL QB 2020*, *supra* note 4 at paras 45, 115.

⁶⁵ See, for example, *Ibid* at paras 33, 47, 106, 110, 111.

⁶⁶ Swimmer, *supra* note 19 at 26.

⁶⁷ *MFL QB 2020*, *supra* note 4 at paras 12, 156.

⁶⁸ *Ibid* at para 372.

⁶⁹ *Ibid* at para 159.

annually,⁷⁰ and made a contribution of \$407 million to a “rainy day fund” in the 2018/2019 fiscal year.⁷¹

On July 4, 2017, the Manitoba Federation of Labour⁷² and 28 unions brought a challenge to the PSSA before the Manitoba Court of Queen’s Bench, claiming that the legislation violates their right to collective bargaining under s. 2(d) of the *Charter*.

III. DECISION BY MANITOBA COURT OF QUEEN’S BENCH

The plaintiffs originally brought an application for an interlocutory injunction restraining the government from proclaiming portions of the PSSA into force, but this application was dismissed.⁷³ The substantive case was heard by Madam Justice McKelvey. The trial involved a substantial body of evidence and took approximately 13 days of hearings, plus four days of final argument.⁷⁴ The Plaintiffs presented 14 witnesses (including at least two experts), 34 affidavits, and 25 supplementary affidavits; The Government led evidence from five witnesses (including at least two experts), four affidavits, and two supplementary affidavits.⁷⁵ The case also involved the complicated and evolving jurisprudence on freedom of association in the labour context. The decision was released in June 2020, and was 434 paragraphs long.

A. *Status of PSSA*

One of the issues before McKelvey J. was the legal status of the PSSA, given the fact that it had not been proclaimed. The Government was arguing that the PSSA had no legal effect, and was

⁷⁰ *Ibid* at para 167.

⁷¹ *Ibid* at para 192.

⁷² The Manitoba Federation of Labour is chartered by the Canada Labour Congress, and is an umbrella organization representing affiliate unions in Manitoba.

⁷³ *Manitoba Federation of Labour et al v The Government of Manitoba*, 2018 MBQB 125.

⁷⁴ *MFL QB 2020*, *supra* note 4 at para 4.

⁷⁵ *Ibid* at para 21.

not subject to *Charter* scrutiny.⁷⁶ The Plaintiffs argued that it should be considered to be law.

Ultimately, the judge sided with the Plaintiffs. The main thrust of her reasoning centred on the fact that the parties themselves treated the legislation as binding. McKelvey J. used the apt phrases “sword of Damocles” and “The Elephant in the Room” to describe the effect of the *PSSA*. She emphasized the provisions that give the legislation retroactive impact: The unions and employers could negotiate, the employees could receive pay under the agreement reached, then the legislation could be proclaimed by the government, and the employees would be obliged to pay back any amount they received in excess of the compensation levels mandated in the *PSSA*. The judge provided her reasoning in the following passages:

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.⁷⁷

...

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 [sic] 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

⁷⁶ *Ibid* at para 274.

⁷⁷ *Ibid* at para 276.

in the union's affidavit evidence and by the testimony of the witnesses called on its behalf.⁷⁸

This is the first time that there has been a ruling on this issue in Canada, and it is the correct one in my opinion. This ruling may serve as persuasive precedent in other Canadian jurisdictions, and might also make an avenue of legal opportunism less attractive to other governments.

B. Duties of Pre-Legislative Consultation and Negotiation

The unions made two separate but related arguments: that the government had a duty to consult the unions prior to the enactment of the PSSA; and that the government had a duty to engage in collective bargaining before passing the PSSA. Justice McKelvey found that consultation in this case was “limited and perfunctory”, and that “[t]he consultation was not meaningful in nature as to the need for legislation or with respect to its content.”⁷⁹ Nevertheless, relying on Supreme Court jurisprudence,⁸⁰ she ruled that there was no duty on the Government of Manitoba to consult before passing legislation. Similarly, in response to the second argument, Justice McKelvey relied on precedent, and ruled that the Government was also not under a duty to negotiate before passing the PSSA.⁸¹ I believe that the analysis of these issues could have been more nuanced, and I will discuss this below, in the Critique section.

C. Violation of Right to Collective Bargaining

The central issue at trial was whether the PSSA violated the unions' right to collective bargaining under s. 2(d) of the *Charter*. Ultimately, Justice McKelvey determined that the legislation did constitute a violation of the *Charter*.

⁷⁸ *Ibid* at para 280.

⁷⁹ *Ibid* at para 295.

⁸⁰ *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018] 2 SCR 765 [Mikisew]; *BC Health Services*, *supra* note 1.

⁸¹ *MFL QB 2020*, *supra* note 4 at paras 301-303.

Justice McKelvey deployed the two-part test from *B.C. Health Services*. Regarding the first part, she found that the PSSA impacted matters of vital importance: wages and monetary benefits. She ruled that the PSSA effectively removed public sector unions' ability to collectively bargain any monetary terms or benefits.⁸² Moreover, she held that monetary terms and benefits were not only important in and of themselves, but they provided unions with leverage to pursue other associational goals.⁸³ Having determined that the first part of the test was met, Justice McKelvey moved on to the second part of the analysis: the impact on the process of meaningful collective bargaining. In this part of the test, she analyzed the *Meredith* case. The Supreme Court Justices in *Meredith* considered the federal *Expenditure Restraint Act*,⁸⁴ but ruled that the provisions did not violate RCMP members' right to collective bargaining. In her analysis, Justice McKelvey found that the PSSA had created more interference with the process of collective bargaining than the ERA. She identified four factors that differentiated the two cases. First, compensation was held to a lower level by the PSSA (four years at 0%, 0%, .75%, and 1%, respectively) than the ERA (four years at 2.3, 1.5, 1.5, and 1.5, respectively), with the PSSA's two-year freeze being particularly egregious because it removed any negotiations on compensation from the bargaining process over that time period. Second, the wage levels set in the ERA were reflective of amounts that had recently been negotiated in good faith collective bargaining, whereas evidence suggested that the PSSA was substantially lower than the figures being negotiated outside of the regime. Third, there was evidence of duress in the bargaining process under the PSSA, but not the ERA. Finally, the ERA provided the parties with advance notice of the legislation, to give them an opportunity to negotiate an agreement consistent with government mandates prior to the act taking effect.⁸⁵

Justice McKelvey examined the evidence and found that the PSSA did not generally permit collective bargaining on non-

⁸² *Ibid* at para 307.

⁸³ *Ibid*.

⁸⁴ *Meredith*, *supra* note 29.

⁸⁵ *MFL QB 2020*, *supra* note 4 at paras 310-325.

monetary issues such as working conditions and job security. Unions did not have the leverage to trade-off monetary items for non-monetary items. She found that monetary issues were significantly more important than non-monetary issues in the negotiations in question, and that even though the right to strike was preserved, the unions could not muster the support from their memberships to strike over non-monetary issues.⁸⁶ The right to strike was described as “futile”.⁸⁷

The judge held that the wage restraint regime did not provide any realistic possibility of workers sharing identified sustainability savings in the latter half of the four-year austerity period. The savings would have to come out of concessions the unions would make, and the extent to which the union might share in them is within the sole discretion of the government. Not surprisingly, there has been no instances where sustainability savings were negotiated.⁸⁸

Justice McKelvey briefly discussed international law, and the jurisprudence of the International Labour Organization, in the decision. She stated, “... 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 is a very important issue, one on which respected academics and judges disagree.⁸⁹ Due to the

⁸⁶ *Ibid* at paras 326-336.

⁸⁷ *Ibid* at para 322.

⁸⁸ *Ibid* at para 336.

⁸⁹ Professor Patrick Macklem provided an affidavit, arguing that the actions of the Government of Manitoba constitute a violation of international law. He discusses the role of international law in Patrick Macklem, “The International Constitution” in Judy Fudge, Eric Tucker & Fay Faraday, eds, *Const Labour Rights Can Farm Work Fraser Case* (Toronto: Irwin Law, 2012) 272. For works which support this contention, see the following: Roy J Adams, “The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille Commentary on Cases, Legislation and Policy” (2008) 14 CLEJ 317-328; and Roy J Adams, “*Fraser v Ontario* and International Human Rights: A Comment Commentary on Cases, Legislation and Policy” (2008) 14 CLEJ 379-394. See also the dissenting decision of Justice Abella in *Meredith*, *supra* note 29 at para 67. For a work that impugns the role of

complexity of the issue, and the fact that international law did not materially impact the decision, an analysis is outside the scope of this article.

Justice McKelvey ruled that the PSSA violates s. 2(d) of the *Charter*, and her decision on this point is summarized in the following passages:

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.”⁹⁰

...

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.⁹¹

...

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.⁹²

international law on Canada’s freedom of association jurisprudence, see the following: Brian A Langille, “Can We Rely on the ILO” (2006) 13 CLEJ 273–300. See also the dissenting opinion of Justice Rothstein in *Saskatchewan Federation of Labour v Saskatchewan*, [2015] 1 SCR 245 at paras 150-157.

⁹⁰ MFL QB 2020, *supra* note 4 at para 341.

⁹¹ *Ibid* at para 342.

⁹² *Ibid* at para 347.

D. *Oakes Analysis*

Justice McKelvey went on to consider whether the legislation could be saved under s. 1, using the *Oakes* test.⁹³ She found that the legislation failed at multiple stages of the *Oakes* test. She ruled that the Government did not have a pressing and substantial objective, which is particularly surprising given that this is a stage that is almost always passed in *Charter* challenges.⁹⁴ In her analysis of this phase, the judge ultimately concluded that the Government's goal of reducing the budget deficit must not have been pressing enough to justify a reduction in pay in real money terms for public sector employees, in light of the choices the Government was making to reduce available revenues through sales and income taxes.⁹⁵ While the Government was able to establish a rational connection between its deficit management objective and the PSSA, Justice McKelvey found that the legislation also failed at the minimal impairment stage.⁹⁶ She ruled that the Government's failure to meaningfully consult must be considered at this stage.⁹⁷ She stated, "I am not satisfied that the Government intended to engage in meaningful consultation towards any avenue other than the legislation model."⁹⁸ She went on to find, "The pre-legislative consultations between the unions and Government did not demonstrate a meaningful discussion of any options – even legislative options."⁹⁹ The unions proposed an alternative to legislation that involved the collective bargaining process, which had been successfully used before in Manitoba to manage budget deficits.¹⁰⁰ She concluded that "[t]he Government's mind was closed to such alternatives and only sought cost certainty for public

⁹³ *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

⁹⁴ Peter W Hogg, *Constitutional law of Canada*, 5th ed. supplemented. ed (Scarborough, Ont: Thomson/Carswell, 2007) at section 38.9(b).

⁹⁵ *MFL QB 2020*, *supra* note 4 at paras 355-383.

⁹⁶ *Ibid* at paras 384-394.

⁹⁷ *Ibid* at para 400.

⁹⁸ *Ibid* at para 407.

⁹⁹ *Ibid* at para 410.

¹⁰⁰ *Ibid*.

sector compensation – collective bargaining was never an option.”¹⁰¹ Lastly, Justice McKelvey found that the legislation failed the final balancing/overall proportionality phase of the *Oakes* test.¹⁰²

IV. DECISION OF COURT OF APPEAL OF MANITOBA

The Government of Manitoba appealed this ruling to the Manitoba Court of Appeal, and Chief Justice Chartier, as he then was, wrote a unanimous decision for the Court, released on October 13, 2021.¹⁰³ The Government raised two grounds of appeal. First, it submitted that the trial judge erred in finding that the manner in which wages were restrained under the PSSA brought about substantial interference in the collective bargaining process. Second, it argued that the trial judge erred in finding that the Government’s conduct during the 2016 contract negotiations between the University of Manitoba and UMFA (before the PSSA was introduced in the Manitoba legislature) infringed section 2(d).

In deciding the first ground of appeal, the Court framed the issue narrowly to focus exclusively on the PSSA, rather than including broader Government conduct. Justice Chartier cited *Meredith* as standing for the proposition that broad-based, time-limited wage restraint legislation does not violate the freedom of association guarantee under s. 2(d) of the *Charter*, and relied heavily on that case as binding precedent. The Court ruled that Justice McKelvey committed a number of reversible errors by differentiating the case at bar from *Meredith*, including the following: She erred in relying on the fact that the Government of Manitoba made no attempt to collectively bargain wage restraint before enacting the PSSA;¹⁰⁴ She erred in using as comparatives collective agreements negotiated with private companies operating

¹⁰¹ *Ibid.*

¹⁰² *Ibid* at paras 419-424.

¹⁰³ *MFL CA*, *supra* note 6.

¹⁰⁴ *Ibid* at paras 80-81.

in long-term care facilities;¹⁰⁵ She erred in determining that the Government of Manitoba could have achieved its fiscal restraint objectives through hard bargaining;¹⁰⁶ She erred by improperly distinguishing *Meredith* based on the lower wage caps in the PSSA relative to the ESA;¹⁰⁷ and she erred in relying on the negative impact of the PSSA on public sector unions' bargaining power in finding substantial impairment of the right to collective bargaining.¹⁰⁸

Justice Chartier dismissed the second ground of appeal, finding that the conduct of the Government during the 2016 round of collective bargaining between the University of Manitoba and UMFA amounted to substantive interference.¹⁰⁹ This government conduct was requiring the University of Manitoba to rescind salary increases that had already been offered to UMFA, and instructing the University not to disclose that the directive had come from the Government.¹¹⁰ Justice Chartier's analysis of this ground was noteworthy in that he was more explicit that government conduct, rather than legislation, was engaged here than was Justice McKelvey. This aspect of the case was returned to Justice McKelvey, for an assessment of *Charter* damages against the Government. She quantified the damages based on the difference between the rescinded offer (17.5%) and what was ultimately agreed to (1.75%) over the life of the collective agreement (a four year period), discounted for a number of contingencies.¹¹¹ The award amounted to \$19 million, and is currently being appealed by the Government of Manitoba.¹¹²

¹⁰⁵ *Ibid* at paras 82-86.

¹⁰⁶ *Ibid* at paras 87-92.

¹⁰⁷ *Ibid* at paras 93-97.

¹⁰⁸ *Ibid* at paras 98-103.

¹⁰⁹ *Ibid* at paras 130 to 157.

¹¹⁰ *Ibid* at para 148.

¹¹¹ *Manitoba Federation of Labour et al v The Government of Manitoba*, 2022 MBQB 32 [MFL QB 2022].

¹¹² Darren Bernhardt, "Manitoba government appeals order to compensate U of M union members \$19.3M", *CBC News*, (May 19, 2022), online:

V. CRITIQUE OF THE DECISIONS

I believe that the Court of Queen's Bench of Manitoba decision of 2020 was largely correct, and was more consistent with the Supreme Court's freedom of association jurisprudence than was the Manitoba Court of Appeal's. In the interest of brevity, I will focus my commentary on three interesting aspects of wage restraint legislation and freedom of association raised by the case of Manitoba: the necessity to consider government action in addition to legislation; the requirement to incorporate the lack of consultation and negotiation into the analysis of any s. 2(d) breach; and the need to examine the impact of the overall wage restraint scheme on bargaining power in assessing substantial interference with collective bargaining. It is hoped that this commentary will be helpful to courts in other jurisdictions considering similar issues, and to governments contemplating wage restraint regimes.

A. Need to Consider Government Action

1. Background

At trial, the Government of Manitoba framed the threshold issue of the case as whether its wage restraint policies could be challenged *at all*, because the PSSA had not been proclaimed. The Government argued that this threshold issue be answered in the negative. Ultimately, Justice McKelvey rejected this argument, and ruled that the PSSA had the effect of law, because of the combined effect of it having received Royal Assent and having retroactive effect if proclaimed. I believe that a myopic focus on the legislative process in wage restraint cases is dangerous, and that the analysis in such instances must be broadened to include the actions of a government's executive branch. This is analogous to the debate that raged among physicists for centuries about whether light exhibited the properties of particles or waves. While either theory gave an adequate accounting of the behaviour of light in certain

<<https://www.cbc.ca/news/canada/manitoba/manitoba-appeal-umfa-ruling-compensation-contract-interference-1.6459194>>.

circumstances, the most accurate understanding of light, proven over time, comes from a model of wave-particle duality.¹¹³ Similarly, the actions of both the Government of Manitoba's legislative and executive branches need to be scrutinized in *Charter* analysis related to s. 2(d).

Government conduct and legislation can be challenged on the basis of s. 32(1)(b) of the *Constitution Act*.¹¹⁴ That subsection states, "This Charter applies to the legislature and government of each province..." [emphasis added]. Scholar Peter Hogg describes what is meant by the term "government" in this provision: "Obviously, it includes action taken by the ... Lieutenant Governor in Council, by the cabinet, by individual ministers and by public servants within the departments of government."¹¹⁵ This means that the actions of these individuals are subject to *Charter* scrutiny. The fact that government action, in addition to legislation, is subject to *Charter* scrutiny was expressly recognized in the freedom of association context in *BC Health Services*:

Before going further, it may be useful to clarify who the s. 2(d) protection of collective bargaining affects, and how. The *Charter* applies only to state action. One form of state action is the passage of legislation. In this case, the legislature of British Columbia has passed legislation applying to relations between health care sector employers and the unions accredited to those employers. That legislation must conform to s. 2(d) of the *Charter*, and is void under s. 52 of the *Constitution Act, 1982* if it does not (in the absence of justification under s. 1 of the *Charter*). A second form of state action is the situation where the government is an employer. While a private employer is not bound by s. 2(d), the government as employer must abide by the *Charter*, under s. 32 ...¹¹⁶ [emphasis added]

¹¹³ Carl J Pratt, *Quantum physics for beginners: From Wave Theory to Quantum Computing. Understanding How Everything Works by a Simplified Explanation of Quantum Physics and Mechanics Principles* (Stefano Solimito, 2021).

¹¹⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

¹¹⁵ Hogg, *supra* note 94 at section 37.2(e).

¹¹⁶ *BC Health Services*, *supra* note 1 at para 88. In *BC Health Services*, the focus was exclusively on legislation, as "there [was] no allegation that the government of British Columbia, *qua* employer, violated s. 2(d) of the *Charter*" (para 88).

It is important to understand that the tests in the freedom of association jurisprudence have not established a bright-line distinction between legislation and government action. This is particularly understandable in the context of public sector labour relations, where the government plays so many roles, including those of employer and rule-maker. The two-part test established in *BC Health Services* was clear that both government action and legislation were relevant to considerations of a breach of s. 2(d) of the *Charter*:

In summary, s. 2(d) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(d) be breached.¹¹⁷ [emphasis added]

The above passage expressly discusses a process of “good faith negotiation” with unions regarding changes to the status quo, which could only be undertaken by representatives of the executive branch (including those acting in the capacity as employer), not the legislative branch.

The dissent of Justice Donald in the British Columbia Court of Appeal’s *British Columbia Teachers’ Federation v British Columbia*¹¹⁸ decision was even more explicit about the close association between legislation and government action, the inability to draw a bright-line distinction between the actions of the legislative and executive branches, and the need to incorporate both branches into s. 2(d) *Charter* analysis. The ruling of Justice Donald was expressly adopted by the Supreme Court of Canada, when the case came before it.¹¹⁹

¹¹⁷ *Ibid* at para 109.

¹¹⁸ *British Columbia Teachers’ Federation v British Columbia*, 2015 BCCA 184 [BC Teachers’].

¹¹⁹ [2016] 2 SCR 407.

Justice Donald explained that it made no difference whether the government passed terms of employment through legislation or whether the government acted as employer through the collective bargaining process. What mattered was “whether the employees were given the opportunity to associate and effectively pursue workplace goals.”¹²⁰ He ruled that high quality consultation in the pre-legislative phase, a form of action by the executive branch, can save legislation that would otherwise violate the right to collective bargaining under the *Charter*. He explained: “Thus, the unilateral imposition, alteration, or deletion of employment terms by the Legislature is, in most circumstances, the final step in an agenda of the executive branch; the same executive branch that both develops policy and has a constitutional obligation to consult or negotiate with collective representatives.”¹²¹ This indicates that, often, both legislation and government action need to be analyzed, to determine whether there is a s. 2(d) *Charter* breach.

2. Justice McKelvey’s ruling was sound...

In finding that she had the authority to consider the legislation, despite lack of proclamation, Justice McKelvey accurately summarizes the law. It is true that courts have generally demonstrated deference to the legislative and executive branches regarding the bringing into force of legislation.¹²² Courts ought to

¹²⁰ *BC Teachers'*, *supra* note 118 at para 287.

¹²¹ *Ibid* at para 289.

¹²² In *Criminal Law Amendment Act, Reference*, [1970] SCR 777, the Supreme Court of Canada was asked by reference by the Governor-General in Council (GGIC) whether he may proclaim some sections of the amending legislation and not others. The legislation in question amended the *Criminal Code* to require one detained on suspicion of drunk driving to provide a sample of his breath for analysis, and to create a new offence of refusing to give such breath sample. The Supreme Court ruled that it could not review the GGIC’s decision to selectively proclaim some provisions, but not others. (The GGIC had refrained from proclaiming provisions requiring that the accused be given a sample of his breath, for independent testing, given that the technology to do this did not exist.) In a British case, *R v Secretary of State for the Home Department, ex p Fire Brigades Union*, [1995] [1995] UKHL 3, the House of Lords was asked by a group of unions to force the government to

respect the fact that, oftentimes, the government has good reasons for delaying proclamation, including allowing citizens time to adjust to the new law; giving the executive branch preparation time to administer the legislation; awaiting intergovernmental consensus or coordination; and attempting to accomplish the policy goals of the statute in other ways.¹²³

Since the advent of the *Charter*, the main challenges have come from citizens attempting to force governments to proclaim legislation on the basis that delay is depriving them of certain benefits under the legislation, constituting a violation of their *Charter* rights.¹²⁴ This is not directly analogous to the case at bar, because the plaintiff unions were not seeking proclamation of the *PSSA*, but rather to challenge its constitutionality.

There are some precedents and scholarly statements questioning the wisdom of allowing challenges to legislation that has not been proclaimed. Justice McKelvey cites some of these,¹²⁵ and there are also others.¹²⁶ However, it is clear that courts have discretion in these situations to consider the challenges.¹²⁷ Additionally, Justice McKelvey makes effective use of the differentiating factor of the retroactivity of the *PSSA*: In deciding that the issue is ripe for adjudication, she puts substantial weight on the fact that the government can, at any time of its choosing, proclaim the legislation into force and require that employees repay amounts already received in excess of the *PSSA* limits. This aspect

declare a statutory scheme for criminal injuries compensation into force. (The government had instead decided to provide a less generous scheme on a non-statutory basis.) The House of Lords declined to do so, stressing the need for caution when interfering with Parliament's exclusive jurisdiction to pass legislation.

¹²³ John Mark Keyes, "May the Force Be With You: The Netherworld of Unproclaimed Statutes" (2007) 20 Can J Adm Law Pract 261 at 266.

¹²⁴ See e.g. *R v Cornell*, [1988] 1 SCR 461; *R v Bussiere et al*, 1990 CanLII 7810 (SK CA); *Paquette v Canada*, 1987 ABCA 228; *R v Van Vliet*, 1988 CanLII 3281 (BC CA); *R v Langille*, 1992 NSCA 33.

¹²⁵ Hogg, *supra* note 94; *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121.

¹²⁶ *R. v Langille*, *supra* note 124 at para 6.

¹²⁷ *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

of the decision was not challenged on appeal before the Manitoba Court of Appeal.

3. ...but incomplete.

I am not asserting that Justice McKelvey was wrong in deciding that the PSSA could be challenged *qua* legislation. However, I would argue that, even if the PSSA could not be challenged as legislation, the Government of Manitoba could still be found to have violated workers s. 2(d) right to collective bargaining on the basis of its actions. Remember the two-part test from *B.C. Health Services*. The first part deals with the importance of the matter impacted, and the second part deals with whether a process of collective bargaining, or some reasonable alternative such as consultation and negotiation, is preserved that enables workers to pursue collective goals.

Let us apply these principles to the actions of the Government of Manitoba. The focus of the Government's actions related to restraining compensation increases for workers in the BPS. The evidence established that compensation was a very important issue for workers in the BPS, meaning that the first part of the test is met. In regards to the second part of the test, the government substantially interfered with the process of free collective bargaining between the workers and public sector employers by rigging the process in favour of government employers. The provincial government clearly established an absolute compensation freeze in the first two years, followed by strict limits of increases of .75% and 1% in years three and four for all renewal collective agreements. This bargaining mandate, expressed in unproclaimed retroactive legislation, was in essence a condition precedent to begin collective bargaining. No amounts above these limits would be entertained, no matter how justifiable the reason. In the case of bargaining between the University of Manitoba and the University of Manitoba Faculty Association, the Government of Manitoba induced the University into bad faith bargaining by forcing it to take its offer of modest compensation increases off the table and not permitting the University to explain why. The government put all public sector unions in a catch-22 situation that severely undermined their bargaining power. Either unions had to agree to

these compensation limits “voluntarily”, or the government would proclaim into force the PSSA and any gains exceeding the limits would be retroactively clawed back. Note that the unproclaimed legislation here plays a different role in the analysis. Here, whether the legislation is proclaimed is irrelevant—It is the way that the executive branch is using the prospect of the PSSA as a threat in negotiations.

Although the process set up by the Government of Manitoba executive branch permitted collective bargaining to proceed on non-compensation items, the potential for meaningful collective bargaining was more illusory than real. The BPS unions simply did not have any leverage to obtain gains on non-compensation issues, because trade-offs on compensation could not be made, due to the fact that compensation was restricted by legislative fiat.

When the action of the executive branch is incorporated into the analysis, it is also possible to examine the Government’s consultation efforts. This was an area that I believe was missing from Justice McKelvey’s analysis. I will briefly describe the lack of consultation in the case at bar here, but this will be discussed in more detail in the next section. Government actions which limit or eliminate free collective bargaining do not automatically lead to a breach under the Supreme Court’s analysis if the government instead provides a meaningful alternative, such as consultation or negotiation outside the collective bargaining process. The provincial Government did conduct a consultation process, but unfortunately it was a disingenuous one. The Government of Manitoba was committed to its single-minded ideologically-driven austerity agenda. The executive branch misled the unions about the state of their finances. They understated their assets, and overstated the deficit. They had a completely closed mind during the consultation process, and had already predetermined not only the use of legislation, but the details of the precise model. There were excellent ideas for cost-savings that were presented during this consultation process that were not pursued. Additionally, the Government of Manitoba did not share information in any meaningful way.

To summarize, it can be concluded that the actions of the Government of Manitoba, taken as a whole, amounted to a

substantial interference of collective bargaining even if the legislation was incapable of being challenged for want of being proclaimed.

4. Court of Appeal

Some aspects of Justice Chartier's analysis were correct on the need to consider government action, while others were problematic. As previously mentioned, the issues were framed narrowly on appeal. The first ground of appeal was whether the PSSA violated section 2(d). The second ground was whether the Government of Manitoba had substantively interfered in the 2016 collective bargaining between UMFA and the University of Manitoba.¹²⁸

Justice Chartier clearly recognized that there was an important distinction between government conduct and legislation. He explained, "A government can infringe upon a section 2(d) right in two ways: by its legislation, or by its conduct. The first ground questions the constitutionality of duly enacted provisions of the PSSA, not the conduct. The second ground, however, does question Manitoba's conduct."¹²⁹ Nevertheless, the Court of Appeal adopted a dichotomous characterization of legislation and conduct, and only analyzed legislation for the first ground, and conduct for the second.

By virtue of framing the first ground as purely legislative, the Court ignored all of the problematic conduct of the executive branch. In fact, in several places Justice Chartier actually impugned the analysis of Justice McKelvey where she took into account the conduct of the executive branch. For examples, the Court of Appeal suggested that it was improper for Justice McKelvey to use the government's decision not to engage in collective bargaining prior to tabling the PSSA in her finding that the government violated s. 2(d) of the *Charter*¹³⁰, and that her finding that the Government of Manitoba could have achieved its goals through hard bargaining

¹²⁸ *MFL CA*, *supra* note 6 at para 19.

¹²⁹ *Ibid* at para 34.

¹³⁰ *Ibid* at paras 81 and 91.

was “irrelevant during the section 2(d) analysis”.¹³¹ This is problematic for two reasons. First, the extent to which the process of fair negotiation has been impacted is part of the second prong of the test enunciated in *BC Health Services*. Second, the failure to engage in pre-negotiations, while not a violation of a duty, is relevant to the course of conduct of the Manitoba Government.

The Court of Appeal’s analysis of the second ground, involving the Government’s conduct during the University of Manitoba negotiations, was sound, as the focus was on conduct rather than the PSSA itself, which had not yet been introduced as a bill during the relevant time. Justice Chartier’s analysis should be preferred to Justice McKelvey’s on this point, because she was not particularly clear that her focus for this issue was on government conduct.

B. Pre-Legislative Consultation and Negotiation

1. Court of Queen’s Bench of Manitoba

Justice McKelvey ruled that the Government of Manitoba was neither under a duty to consult nor negotiate with public sector workers and their unions prior to enacting the PSSA.¹³² Narrowly speaking, this is correct. However, her reasons give the impression that lack of consultation/negotiation is irrelevant to the analysis of whether a government has substantially interfered with the right to collective bargaining, and this is contrary to the jurisprudence. While not analysing a failure to consult/negotiate under the s. 2(d) did not impact the ultimate result of McKelvey J.’s decision, it may change the results of others.

Strictly speaking, Justice McKelvey was correct that Supreme Court precedent does not require pre-legislative consultations. This is an accurate application of the principles in both *Mikisew* and *BC Health Services*. It is easy to see why this is good law. As Justice Karakatsanis explained in *Mikisew*, “...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

¹³¹ *Ibid* at para 89.

¹³² *MFL QB 2020*, *supra* note 4 at paras 300 and 303.

intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.”¹³³ Justice Karakatsanis also stated, “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.”¹³⁴

Nevertheless, Justice McKelvey does analyze the Government of Manitoba’s failure to meaningfully consult with the unions under the minimal impairment phase of the *Oakes* test. This is also appropriate. She concludes that the PSSA exceeded the minimal impairment threshold, because a meaningful consultation could have led to changes in the legislation that would have made it more reasonable, and it could have led to the identification of other methods of achieving reduction of budget deficits. In fact, the unions did try to put forward a series of proposals of alternative methods that were not seriously considered by the government.¹³⁵ She also concludes that the PSSA was unnecessary, because the government could have achieved its fiscal objectives through hard bargaining.

However, Justice McKelvey’s failure to use the government’s lack of consultation as an additional reason to find a breach of s 2(d) is problematic, as the Supreme Court has expressly endorsed this line of analysis. I am referring to Justice Donald’s minority opinion in *BCTF*, which was explicitly adopted by a majority of the SCC when the case came before it. In his decision, Justice Donald indicated as follows: “If the government, prior to unilaterally changing terms of employment, gives a union the opportunity to *meaningfully* influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees’ attempts at associating to pursue workplace goals were not pointless or futile: see *SFL* at para. 55. Thus, the employees’ freedom of association

¹³³ *Mikisew*, *supra* note 80 at para 32.

¹³⁴ *Ibid* at para 36.

¹³⁵ *MFL QB 2020*, *supra* note 4 at paras 395-418.

would likely not therefore be breached.”¹³⁶ Justice Donald went on to state, “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.”¹³⁷ He went on to state, “Pre-legislative consultation, then, can be seen as a replacement for the traditional collective bargaining process, but only if it truly is a *meaningful* substitution.”¹³⁸ So, meaningful consultation can act as a legitimate substitute for collective bargaining, and can prevent an infringement of workers s. 2(d) rights.

Here is a high-level summary of how the analysis on the s. 2(d) breach should have gone in the case at bar. The Government of Manitoba implemented a wage restraint regime that prevented any negotiations on increases to public sector compensation, even increases that kept pace with the cost of living. This regime also prevented workers from successfully negotiating increases on non-compensation items, because they had no leverage. Justice McKelvey expressly engaged in the analysis to this point, but more was required. In her s. 2(d) inquiry, Justice McKelvey should have gone further to expressly discuss how the government attempted to engage in a consultation process with the BPS unions. If this consultation process would have been done with an open mind, and given the unions a meaningful opportunity to advocate for the goals of membership, and the government earnestly considered the unions’ input, this consultation process would have been a meaningful substitute for collective bargaining, such that a s. 2(d) breach would not have occurred. However, because the consultation process was disingenuous on the Government’s part, it did not act as a meaningful substitute, and a s. 2(d) breach did occur in this case. Deploying the two-part test from *BC Health*, an important issue was impacted (compensation), and the process

¹³⁶ *BC Teachers’*, *supra* note 118 at para 287.

¹³⁷ *Ibid* at para 288.

¹³⁸ *Ibid* at para 291.

followed was faulty (no collective bargaining or reasonable substitute like meaningful consultation).

Instead, Justice McKelvey put all of the analysis about consultation in the *Oakes* test. In this case, it did not change the result (She ruled that s. 2(d) was violated without going into the consultation analysis, and this violation was not justified under the *Oakes* test). However, in another case, this omission might lead to a different outcome. The most obvious circumstance would be where the government has engaged in a series of meaningful consultations prior to enacting wage restraint measures. A breach of s. 2(d) would probably be mistakenly found if these meaningful consultations are not included in the s. 2(d) analysis.

2. Court of Appeal

Closely related to its analysis on the first ground of the appeal being flawed by failing to account for government conduct, the Court of Appeal's analysis was incorrect on the issue of consultation and negotiation. The Court of Appeal ruled that it was improper for Justice McKelvey to take the following into account in her s. 2(d) analysis: the Government's lack of negotiations before enacting the PSSA; and the finding that the Government could have achieved its fiscal objectives through hard bargaining. I believe that this is simply wrong, especially given the Supreme Court's endorsement of Justice Donald's analysis on negotiation and consultation in *BCTF*.

C. Impact on Bargaining Power

In any s. 2(d) analysis, it is necessary to examine the impact of the wage restraint regime on the bargaining power of the union, given the contextual and fact-based nature of the inquiry required by the Supreme Court.

1. Court of Queen's Bench of Manitoba

Justice McKelvey correctly ruled that the PSSA constituted a substantial interference with the rights of BPS workers to collectively bargain, and her conclusion is supported by the academic literature regarding negotiation. It is possible to apply the negotiation literature to the wage restraint regime of the

Government of Manitoba, and Justice McKelvey's decision. Generally, each of the parties to a negotiation possess a degree of "bargaining power". While the concept of "bargaining power" appears to be self-explanatory and intuitive, it is in reality an elusive concept, and the definition varies between and even within academic disciplines.¹³⁹ Nevertheless, a commonly accepted definition of bargaining power, particularly in the collective bargaining context, is the ability, at a given point in time, to secure another's agreement on one's own terms.¹⁴⁰ There are numerous sources of a union's bargaining power. The bargaining power of a union and its members is greatly impacted by their willingness and ability to sustain a strike.¹⁴¹ Additionally, significant determinants of union bargaining power are the legal rules regarding bargaining, and the legal environment under which collective bargaining is conducted.¹⁴²

Another source of bargaining power is the ability to make strategic trade-offs: to concede an item that is relatively more valuable to the other side, in exchange for your counterpart's concession on an item that is relatively more valuable to you. This is a technique known as "log-rolling" in the negotiation literature.¹⁴³ Recommendations from the negotiation literature

¹³⁹ Neil W Chamberlain & James W Kuhn, *Collective Bargaining* (New York: McGraw-Hill, 1965) at 162.

¹⁴⁰ *Ibid* at 170.

¹⁴¹ Harry C Katz, Alexander J S Colvin & Thomas A Kochan, *An Introduction to U.S. Collective Bargaining and Labor Relations*, 5th ed (Ithaca, NY: Cornell University Press, 2017) at 91.

¹⁴² *Ibid*; Richard P Chaykowski, "Collective Bargaining: Structure, Process, and Innovation" in Morley Gunderson & Daphne Gottlieb Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto: Pearson/Addison Wesley, 2009) 246 at 260.

¹⁴³ The term became popularized in US politics, to describe the vote-trading activities of legislators: One legislator trades a vote on a matter of little concern in her/his district in exchange for another legislator's vote on an important issue to the former legislator: See Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1982) at 333. The term originated in settler times, when one settler would help a fellow settler clear logs from his property, in the expectation the favour would be returned.

suggest that parties to a negotiation can improve joint outcomes if they move from negotiating a single issue to a negotiation where more issues are negotiated as a package. This is a process called integrative bargaining, and the parties can take advantage of different settlement preferences on different issues to enlarge the pie that they will eventually have to divide.¹⁴⁴ Research suggests that negotiators reach better agreements for themselves as the number of issues being negotiated increases.¹⁴⁵

Generally, financial issues like compensation are the most important for the parties in collective bargaining. In fact, many models of collective bargaining and striking by labour economists disregard non-economic items. For example, the Hicks model of strikes assumes that the parties are negotiating only over wages, and that the dominating calculus for the parties is the expected value of compensation following a strike, both when negotiating and when deciding to trigger a strike.¹⁴⁶ Collective bargaining is expressly structured in recognition of the overwhelming importance of compensation issues, and in anticipation that non-economic items will act as leverage for compensation issues. Generally, non-economic items are negotiated first, and tentative agreements are reached on these. Then, the parties negotiate compensation items, and explicit trade-offs are often made between the non-compensation items, and the compensation items. This provides momentum for the bargaining, and delays negotiating over wage issues, which are often the most emotional and divisive.¹⁴⁷

Let us apply this literature to the case at bar. Consistent with this literature, the evidence in this case indicated that wages were an extremely important issue for both the workers in the BPS and for the Government of Manitoba. Through its wage restraint actions, particularly the passing of the PSSA, the government removed virtually all compensation issues as being bargainable between the BPS and government employers, and instead

¹⁴⁴ *Ibid* at 131.

¹⁴⁵ Roy J Lewicki et al, *Essentials of Negotiation*, 1st Canadian ed (Whitby, ON: McGraw-Hill Ryerson, 2011) at 53.

¹⁴⁶ Katz, Colvin & Kochan, *supra* note 141 at 211.

¹⁴⁷ *Ibid* at 207-208.

implemented the outcomes it wanted. The BPS could no longer bargain compensation increases, and instead the status quo was maintained. The BPS unions no longer had any bargaining power with which to negotiate compensation increases, because of the freeze set by legislative fiat. What is more, the BPS unions lost bargaining power in negotiating non-economic issues, because they did not have compensation items to give up in exchange for government concessions on the non-economic issues. The room for integrative negotiation and logrolling was substantially limited by the government's wage restraint regime. Additionally, the bargaining power of the BPS unions was further reduced because they knew and, one assumes, the government knew too, that the non-economic issues were not important enough to their membership to sustain a strike over them.

Negotiation theory can also help to understand the lack of interest from BPS unions in negotiating sustainability savings, and why the possibility of such savings did not prevent a substantial interference. There were no collective agreements that had provisions related to these savings. The PSSA requires that the sustainability savings came from "an ongoing reduction of expenditures as a result of measures agreed to in a collective agreement that reduce or avoid costs".¹⁴⁸ The Management Board determines, in its sole discretion, whether any portion of the sustainability savings will be used to increase compensation in the last 24 months of the four year sustainability period.¹⁴⁹ One assumption of negotiations is that negotiators behave in an economically rational fashion. It is not economically rational for BPS workers to agree to sustainability savings, because they are giving up something of known value in exchange for a potential benefit that is likely much smaller, due to the discounting based on the entirely discretionary manner in which the Management Board can decide whether to allocate any of the savings back to the workers, and if so, what proportion. Additionally, negotiators are generally adverse to risk and uncertainty, and these tendencies are

¹⁴⁸ PSSA, *supra* note 3 at s. 14(2).

¹⁴⁹ *Ibid* at s. 14(1).

likely to apply to the BPS workers and their bargaining representatives.¹⁵⁰

All of this theory from the negotiation literature suggests that the government's wage restraint scheme has substantially attenuated the bargaining power for BPS workers in their negotiations. The following two hypothetical examples help to illustrate this.

2. *Example 1*

Mary is a homeowner with a front yard that is 50 feet wide and 30 feet deep. John is a university student in Mary's neighbourhood, who last summer did odd jobs around the neighbourhood to earn money for his education. One of his jobs was mowing Mary's front yard. He had taken to calling Mary every couple of weeks, and each time she would agree to have him cut her grass. They negotiated a price of \$20 per mow. Over the winter, John decided that he wanted to establish a full-time lawn-cutting business the upcoming summer. He decided that he would be willing to cut Mary's lawn at \$18 per cut, if she would commit to a summer-long contract with him. The reduced price is worth it to John, in order that he has the certainty of Mary's business over the entire summer. He plans to offer similar arrangements to all of his clients, as he is concerned that other neighbourhood kids might also establish lawn-mowing businesses, and compete with him.

So, John plans to negotiate with Mary, and there are really two issues to bargain over. One is the price per cut, and the other is the duration of the contract (either a summer-long contract for regular mows, or a series of *ad hoc* arrangements). Mary is resistant to the idea of a summer-long contract with John for a number of reasons. She liked the flexibility of the *ad hoc* arrangement last summer. Additionally, she worries that the quality of John's services might slide if he has her locked-in for the entire summer. However, Mary is willing to trade her desire for spontaneity and accountability for a discount, because money is tight for her. Therefore, in this negotiation, a deal is reached for the summer-long contract at \$18

¹⁵⁰ Eyal Zamir & Doron Teichman, *Behavioral law and economics* (New York, NY: Oxford University Press, 2018) at 508.

per mow. This situation is typical of most negotiations, where the parties are willing to make trade-offs: They are willing to make concessions on certain lower-priority items, in exchange for concessions on higher-priority items.

Now, let's introduce an (admittedly unlikely) disruptive event prior to John's and Mary's negotiation for the upcoming summer. The government passes legislation regulating charges for grass-cutting, in response to public perception that lawn services are too expensive. This legislation contains a formula that, in Mary's and John's case would yield a maximum charge of \$18 per cut. The legislation permits homeowners and lawn-cutters to agree to long-term contracts, as long as the maximum charge per cut is not exceeded. If the legislation is in force, John's bargaining power in relation to getting a summer-long contract is substantially reduced. Mary can get the discounted price of \$18 without having to agree to a full-summer contract. Mary and John would continue their *ad hoc* arrangement (rather than a summer-long contract for lawn-mowing service) at the price of \$18 per hour. This is analogous to the impact of the PSSA. The government, like Mary, can obtain labour from the BPS workforce at an artificially depressed price. Moreover, the workers, like John, are unable to bargain any concessions on non-monetary items, because they have lost their leverage.

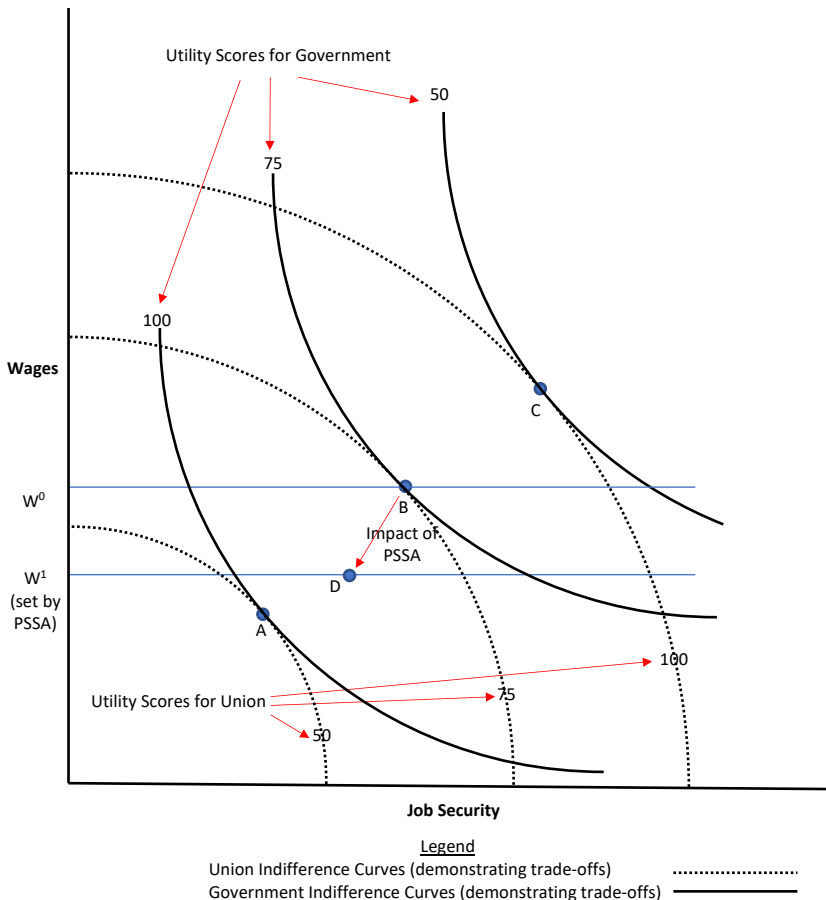
3. Example 2

The insights from Example 1 can be illustrated more formally, using a different hypothetical example based on economics constructs of indifference curves (also called iso-value curves) and the efficient frontier (also called the Pareto optimal frontier).¹⁵¹ Let us assume that a fictitious government and union are going into collective bargaining, and there are only two issues to be negotiated. One is wage levels (a monetary item), and the other is job security (a non-monetary item). It is possible to construct a series of indifference curves for both the union and for government. Each indifference curve demonstrates the trade-off that one of the parties would make between wages and job security at a given level of

¹⁵¹ Raiffa, *supra* note 143 at 150-160.

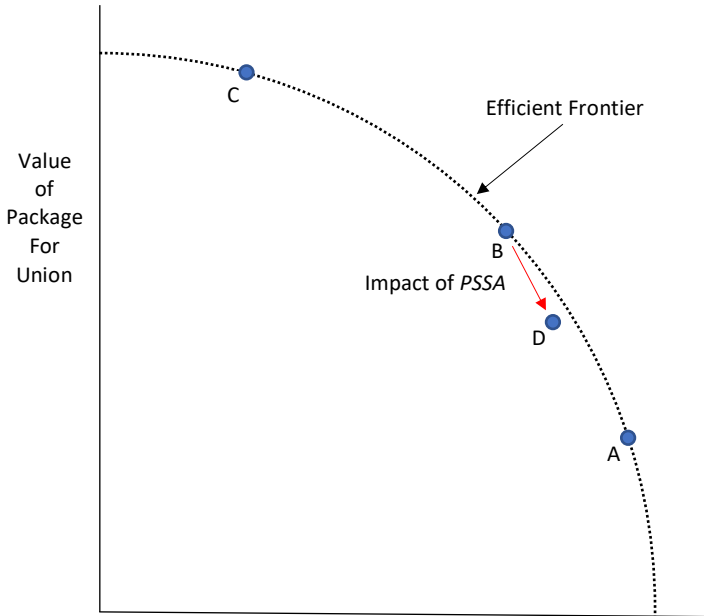
utility. The union would be willing to offer a decrease in job security for an increase in wages, just as the government would be willing to increase job security in exchange for lower wages. The union's utility curves are concave, suggesting a preference for higher levels of both wages and job security, and the government's utility curves are convex, suggesting a preference for lower levels of these two items. Figure 1 shows three indifference curves for the government (illustrated by solid lines), and three such curves for the union (shown by dotted lines).

Figure 1: Indifference Curves
Two-Issue Negotiation Between Public Sector Union
and Government Employer



In this hypothetical example there is a utility score assigned to any agreement that is reached on any given utility curves. If the union bargains a collective agreement at any point on its inner utility curve, it achieves a score of 50 utility points (Point A is on this curve). If it negotiates a collective agreement anywhere on the middle curve, which includes Point B, it achieves a score of 75 points. If it negotiates a collective agreement on the outermost curve (with Point C), it achieves a score of 100 points. In negotiations, the union always wants to reach a deal on the outmost curve in the north-easterly direction. The opposite is true for the government. The government always wants to reach the lowest curve in the south-westerly direction. This is reflected by the utility scores assigned to its curves. The most south-westerly curve for the government (with Point A) has a value of 100. The middle curve, which includes Point B) has a score of 75, and the curve that is the most north-easterly (with Point C) is least desirable, with higher values for wages and job-security, and a score of 50. Points A, B, and C on Figure 1 are special, in that they indicate settlement possibilities in which the combined utility of the parties is maximized. Point B represents a point in which each side achieves a score of 75. If the parties reach a settlement at Point A, this means that the overall utility of the agreement continues to be maximized (the so-called efficient frontier) but the settlement is better for the government—It has achieved gains at the expense of the union. If the parties move from a settlement at Point B to one at Point C, the settlement is on the efficient frontier, but the union's gains come at the expense of losses from the government.

Figure 2: Efficient Frontier
Two-Issue Negotiation Between Public Sector
Union and Government Employer



A graph of the efficient frontier, Figure 2, can be derived from Figure 1. Points along the efficient frontier indicate collective agreements where *overall utility* is maximized, *not points where the utility of one of the parties is maximized* (except for the intercepts of the X and Y axes, where utility is maximized for the government and union, respectively). Points A, B, and C on both Figure 1 and Figure 2 fall along the efficient frontier. Let us assume that the parties agree in the context of collective bargaining to a settlement at Point B, which intuitively seems fair and reasonable given the fact that it gives both parties a utility score of 75. The wage level at this point is marked by W^0 on the Y axis of Figure 1.

It is possible to use the hypothetical example, along with Figures 1 and 2, to illustrate how the PSSA interferes with workers' right to collective bargaining. Using the PSSA, the government has arbitrarily set the wage level at W^1 (This is illustrated in Figure 1), and therefore wages are lower and no longer subject to collective bargaining. This essentially leaves job security as the only item for negotiation. The agreed level of job security will wind up also being worse for the union, rather than better, at a level around point D on Figures 1 and 2.

A couple of points are noteworthy about this example. First, the union's ability to extract concessions from the employer on job security is substantially reduced, for a number of reasons: they do not have the ability to offer to trade-off wages; wages are likely substantially more important than job security and the workers in this case are probably unwilling to strike over the issue of job security alone; and the government knows about the lack of an appetite to strike over job security. Second, this is likely to produce an overall package that favours the government (note the move from B to D results in an increase in the value to the government's package in Figure 2, at the expense of the value of the union's package), and is sub-optimal in that point D is below the efficient frontier on Figure 2 (The curved line where overall value of the collective agreement is maximized).

It is important to acknowledge that the example above is an abstraction of reality. In real life labour relations, there are many more issues than two. However, the example does serve to illustrate how wage restraint legislation has the potential to interfere with collective bargaining. One of the key assumptions in this second example is the very high importance of compensation issues to the parties, relative to the non-compensation issues. This assumption appears to hold in the case at bar, as it was amply supported by the evidence before Justice McKelvey.

4. Decision of Court of Appeal

The Court of Appeal ruled that Justice McKelvey erred in her analysis of the impact of the wage restraint regime in the case at bar on union bargaining power. Justice Chartier interpreted *Meredith* as standing for the proposition that any legislation similar to the

ERA, such as the PSSA, which includes broad-based, time-limited wage restraint legislation does not substantially impair the collective pursuit of workplace goals, and therefore it was inappropriate to factor bargaining power into the s. 2(d) analysis. While *Meredith* provides scater reasons than one might like, I do not believe this is the appropriate interpretation of the case. The Supreme Court jurisprudence has repeatedly stressed the need to engage in a contextual fact-based analysis. While it's difficult to be entirely sure based on the brief reasons, the Supreme Court appeared to engage in an analysis of the impact on bargaining power in *Meredith*. It discussed the reduction in compensation increases for the RCMP, and appeared to find them minor. It was bolstered by this conclusion when it examined general trends in bargaining over the period, and stated "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." It also appeared to take into account the global financial crisis at the time the ERA was enacted. Justice McKelvey engaged in a similar contextual, fact-based analysis, and found, on the basis of the evidence before her, that the impact of Manitoba's wage restraint regime on bargaining power was far worse. Therefore, she was not bound to render the same result as in *Meredith*. I would submit that her decision on this point was correct, and that it is necessary in many cases to engage in a contextual fact-based analysis of the impact on bargaining power, as some wage restraint regimes that are broad-based and time-limited will sufficiently attenuate bargaining power to the point of a s. 2(d) breach.

VI. CONCLUSION

To summarize, I think the experience of Manitoba yields three important pieces of advice regarding wage restraint regimes for governments and courts in other jurisdictions. It is hoped, in the fullness of time, that the Supreme Court will provide additional clarity on these points. First, it is often necessary for courts to scrutinize both government conduct and the legislative provisions,

as they often interact to amplify the interference in a way that is greater than the sum of the parts. Second, the quality of any pre-legislative consultation and negotiation is an important part of the contextual and fact-specific analysis, even though there is no absolute legal duty to consult and negotiate before legislation is passed. Third, it is appropriate to analyze the extent to which government conduct and legislative provisions impair union leverage and bargaining power, to determine whether the substantial interference threshold has been met. If the Court of Appeal's formalistic interpretation of *Meredith* as authorizing any broad-based, time-limited wage restraint regime, no matter how egregious, is adopted by other courts, this is a major step backwards towards what Justice Dickson described as a conceptualization of freedom of association as "legalistic, ungenerous, indeed vapid."¹⁵² The freedom will be, in the words of the song Me and Bobby McGee, "just another word for nothin' left to lose".

Moreover, constitutional constraints on wage restraint legislation are consistent with good labour policy. Governments need to be made to understand that wage restraint legislation should be avoided in virtually all cases. Wage restraint legislation is tempting to governments of all political stripes, but especially to fiscally conservative governments, because it appears to be a solution that is both immediate and certain in managing budgetary deficits.¹⁵³ Nevertheless, wage restraint legislation is generally ill-advised and/or unnecessary. A review conducted in the late 1980s of the impact of the wage restraint programs in several provinces found that there was no direct association between provincial economic growth and the degree of restraint.¹⁵⁴ A decade later,

¹⁵² *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 363.

¹⁵³ Roy J Adams, "Public-Sector Labour Relations: Canadian Developments in Perspective" in Gene R Swimmer, ed, *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills, Ont: Oxford University Press, 2001) 212.

¹⁵⁴ Mark Thompson, "Public Sector Industrial Relations in Canada: The Impact of Restraint" in B Denis, ed, *Proceedings of Annual Spring Meeting 1988 Industrial Relations Research Association* (Madison, WI: Industrial Relations Research Association, 1988).

Gene Swimmer, a Professor of Canadian public administration, surveyed the 1990s experience of various Canadian jurisdictions in terms of wage restraint legislation, and concluded that governments that negotiated were just as effective at meeting their financial goals as governments that legislated.¹⁵⁵ Industrial relations professor Roy Adams, after a review of developments in the 1980s and 1990s, concluded that hard bargaining, as practised in certain Canadian jurisdictions, was as effective in achieving desired financial results as restraint legislation.¹⁵⁶ It is important to note that all of these reviews were done *before* the advent of the Supreme Court of Canada's development of the right to collective bargaining and the right to strike jurisprudence, which has the potential to make wage restraint legislation an even less effective tactic for governments in the long run, once prospective legal costs and court awards are factored in. In 2012, the Commission on the Reform of Ontario's Public Services, headed by economist Donald Drummond, expressly rejected the use of wage freezes to deal with Ontario's relatively high debt levels, on the basis that such freezes damage labour relations and are often followed by wage catch-ups.¹⁵⁷

Governments have a clear and preferable alternative to the use of wage restraint legislation: engaging in collective bargaining with a view to the prudent fiscal management of the compensation of public sector employees. In fact, in the wake of the 2008 financial crisis, the Government of Manitoba successfully negotiated zero percent wage increases for 2010 and 2011 with the Manitoba General Employees' Union.¹⁵⁸ The evidence suggested that Manitoba was NOT in a fiscal crisis when the PSSA was drafted and passed. The employees of the province clearly have been interested in being a part of the solution, and have brought forward ideas for cost-savings that the Government of Manitoba has to date not been interested in exploring. This employee willingness opens up the

¹⁵⁵ Swimmer, *supra* note 19.

¹⁵⁶ Adams, *supra* note 153 at 220.

¹⁵⁷ *Public Services for Ontarians: A Path to Sustainability and Excellence*, by Donald Drummond et al (Commission on the Reform of Ontario's Public Services, 2012).

¹⁵⁸ *MFL QB 2020*, *supra* note 4 at para 18.

possibility of integrative bargaining, where the interests of both the workers and the government can be accommodated. It may be that it will occasionally become necessary for the government to engage in “hard bargaining” with certain groups of workers. This tactic can be deployed successfully, as demonstrated by Saskatchewan and Alberta. These provinces have been able to successfully contain compensation costs at the bargaining table, and have forced employers in the broader public sector, like universities and hospitals, to negotiate reductions in compensation by reducing funding.¹⁵⁹ This approach has the advantage of being more targeted, allowing workers who are clearly being undercompensated to negotiate raises, while red-lining or reducing the pay for bargaining units who are over-compensated. Collectively bargained agreements are preferable to wage restraint legislation, because they are viewed by the stakeholders as having a higher degree of legitimacy. Wage restraint legislation leads to a whole host of problems, including low morale, difficulty with recruitment and retention, and ultimately a public sector workforce that is not as engaged and productive as it needs to be, due to the lack of any real influence over the wages and working conditions through a fair collective bargaining process.¹⁶⁰ Negotiated collective agreements are far better in the long-run, as the public will get an engaged public sector delivering services at a fair price. That is really what government and taxpayers want.

¹⁵⁹ Swimmer & Bartkiw, *supra* note 13.

¹⁶⁰ Adams, *supra* note 153.