File No. AI 20-30-09494

IN THE COURT OF APPEAL

BETWEEN:

MANITOBA FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE PARTNERSHIP TO DEFEND PUBLIC SERVICES), THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION, THE MANITOBA NURSES' UNION, THE MANITOBA TEACHERS' SOCIETY, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 2034, 2085, AND 435, MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS, UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 832, UNIVERSITY OF MANITOBA FACULTY ASSOCIATION, CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, ASSOCIATION OF EMPLOYEES SUPPORTING EDUCATION SERVICES, GENERAL TEAMSTERS LOCAL UNION 979, OPERATING ENGINEERS OF MANITOBA LOCAL 987, THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, UNIFOR, LEGAL AID LAWYERS ASSOCIATION, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 7975, 7106, 9074, and 8223, WINNIPEG ASSOCIATION OF PUBLIC SERVICE OFFICERS IFPTE LOCAL 162, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL UNION 254, BRANDON UNIVERSITY FACULTY ASSOCIATION, THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 63, THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION NO. 1515, PHYSICIAN AND CLINICAL ASSISTANTS OF MANITOBA INC., and UNIVERSITY OF WINNIPEG FACULTY ASSOCIATION,

(Plaintiffs) Respondents,

- and -

THE GOVERNMENT OF MANITOBA,

(Defendant) Appellant.

FACTUM OF THE RESPONDENTS

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File No. AI 20-30-09494

IN THE COURT OF APPEAL
WINNIPEG CENTRE

BETWEEN:

MANITOBA FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE PARTNERSHIP TO DEFEND PUBLIC SERVICES), THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION, THE MANITOBA NURSES' UNION, THE MANITOBA TEACHERS' SOCIETY, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 2034, 2085, AND 435, MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS, UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 832, UNIVERSITY OF MANITOBA FACULTY ASSOCIATION, CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, ASSOCIATION OF EMPLOYEES SUPPORTING EDUCATION SERVICES, GENERAL TEAMSTERS LOCAL UNION 979, OPERATING ENGINEERS OF MANITOBA LOCAL 987, THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, UNIFOR, LEGAL AID LAWYERS ASSOCIATION, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 7975, 7106, 9074, and 8223, WINNIPEG ASSOCIATION OF PUBLIC SERVICE OFFICERS IFPTE LOCAL 162, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL UNION 254, BRANDON UNIVERSITY FACULTY ASSOCIATION, THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 63, THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION NO. 1515, PHYSICIAN AND CLINICAL ASSISTANTS OF MANITOBA INC., and UNIVERSITY OF WINNIPEG FACULTY ASSOCIATION,

(Plaintiffs) Respondents,

\- and –

THE GOVERNMENT OF MANITOBA,

(Defendant) Appellant.

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I. INTRODUCTION

1. This appeal requires this Court to consider whether the trial Judge made a palpable and overriding error in finding that *The Public Services Sustainability Act* ("the *PSSA*") and the Appellant's conduct regarding 2016 bargaining between the University of Manitoba ("UM") and the University of Manitoba Faculty Association ("UMFA") substantially interfered in a meaningful collective bargaining process.

2. The legal test for a violation of freedom of association under s. 2(d) of the *Charter* is straightforward and well-established. The inquiry in every case is contextual and fact-specific.[1] The trial Judge heard a "significant body of evidence" from the Plaintiffs including 14 witnesses and 30 affidavits[2]. Her findings that the Appellant violated s. 2(d) of the *Charter* applied this evidence to the s. 2(d) test.

3. This appeal is about the facts of this case, not *Meredith v. Canada*.[3] The Supreme Court of Canada's (SCC) decision in *Meredith* reflects the factual context of that case. *Meredith* does not create a binding legal precedent that determines the outcome in other factual contexts.

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[1] *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 ("*Health Services*"), Appellant's Book of Authorities ("ABA"), Vol. 1, Tab 5, para 92., Trial Decision, para 306, *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 (dissenting reasons for judgement of Donald J.) ("*BCTF*"), Respondents' Book of Authorities ("RBA"), Tab 1, para 324; note that the SCC allowed BCTF's appeal "substantially for the reasons of Justice Donald": *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49, RBA, Tab 2

[2] Trial Decision, paras 2, 21

[3] *Meredith v. Canada (Attorney General)*, 2015 SCC 2, 1 S.C.R. 125 ("*Meredith*"), ABA, Vol. 2, Tab 8,

II. FACTS

A. Government Interference with Collective Bargaining through the *PSSA*

4. Collective bargaining is a democratic process wherein workers decide the bargaining proposals they want their union to advance on their behalf.[4] Wages and monetary benefits were top bargaining priorities for workers covered by the *PSSA*.[5]

5. The *PSSA* mandated maximum wage increases of 0, 0, 0.75 and 1.0% and prohibited other monetary gains over a four-year floating "sustainability period" that commenced when a collective agreement in effect on March 20, 2017 expired (and, as such, could apply until 2025).[6] The *PSSA* predetermined the monetary outcomes of bargaining for the next collective agreement, and effectively removed monetary issues from the table.[7]

6. The Appellant did not conduct a financial or economic analysis of the *PSSA* and its wage restraint levels before enacting it into law; the trial Judge described the *PSSA* as "at best, arbitrary."[8] Wage limits of 0, 0, 0.75 and 1% did not reflect collectively bargained outcomes in Manitoba's public sector.[9] Although 21 of 334 *PSSA* covered collective agreements were settled in compliance with the *PSSA*, the trial Judge found that they were settled under "duress", more "capitulation than

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[4] Appeal Book Volume 11, p. 3815, 3818, 3822-23
[5] Appeal Book Volume 11, p. 3816-3817, Trial Decision paras 42, 55, 74, 306 and 3077
[6] *The Public Services Sustainability Act*, S.M. 2017 c. 24 ("*PSSA*"), ABA, Vol. 3, Tab 22, ss. 2, 9, 12, 13 Trial Decision at para 320
[7] Trial Decision at para 307, Appeal Book Volume 11, p. 3822-24
[8] Trial Decision at para 392-93
[9] Trial Decision at paras 321

negotiation", affected by the threat of the *PSSA* "claw back provisions", and conditionally ratified subject to its constitutionality.[10]

7. Dr. Robert Hebdon provided expert evidence on behalf of the Plaintiffs about how the collective bargaining process would be detrimentally impacted by the *PSSA*. The trial Judge described his evidence as reasonable, persuasive, and "of particular importance in evaluating the constitutionality of the *PSSA*."[11]

8. Collective bargaining usually begins with non-monetary issues; monetary issues are "tougher" to discuss. This allows the process to generate momentum, but having monetary issues left on the table is also a source of bargaining power and leverage for both parties. This leverage is lost once monetary issues are settled.[12]

9. Dr. Hebdon opined that by excluding monetary issues from bargaining, the *PSSA* prevented meaningful collective bargaining on monetary and non-monetary issues alike, and unfairly tilted the balance of bargaining power towards employers.[13] Whereas in free collective bargaining, a union might negotiate wage restraint in exchange for job security, with monetary outcomes pre-determined by the *PSSA* unions would have little bargaining power on non-monetary issues of importance to

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[10] *PSSA*, ss. 15 and 28, ABA Vol. 3 Tab 22, Trial Decision at paras 1, 321, 344, 423.
[11] Trial Decision at paras 326 – 328
[12] Trial Decision para 128, Appeal Book Volume 11 p. 3816, 3822, Trial Transcript Volume 6 p. 18 L15 – p. 19 L25
[13] Appeal Book Volume 11, p. 3822 – 3823, Trial Transcript Volume 6 p. 26 L6 – L 20, Trial Decision at para 135

workers, such as job security.[14] He opined that "there is no compelling reason why any Manitoba employer would agree to enhanced job security when wages have been previously imposed by fiat …"[15] While not prohibiting strikes, 77% of strikes are over monetary issues; strikes are futile under the *PSSA*.[16]

10. Dr. Hebdon opined that the *PSSA* would have other harmful effects as well. The *PSSA* would cause worker frustration and anger; harm union-worker relationships and produce internal union conflict; and cause worker cynicism in the institution of collective bargaining.[17] Industrial unrest would be redirected towards grievances and other complaints, which in turn harms important employer-union relationships.[18] Legislative intervention such as the *PSSA* will also chill future bargaining processes and increase the likelihood of impasse; produce a negative wage effect in the next collective agreement; and discourage the use of free collective bargaining in tough climates of restructuring or economic challenges.[19]

11. Trial evidence corroborated many of Dr. Hebdon's predicted outcomes. Several union negotiators testified about how collective bargaining usually starts

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[14]Appeal Book Volume 11 at pp. 3822, 3824, 3825, Trial Transcript Volume 6, p. 26 L6 – p. 28 L36, Trial Decision at paras. 131, 132, 135
[15]Appeal Book Volume 11 at p. 3858, Trial Decision at para. 132
[16] Appeal Book Volume 11 at p. 3817, 3826; Trial Decision, paras. 133, 322, 332, 348, Trial Transcript Volume 6, p. 30 L 22 – P. 31 L3
[17] Appeal Book Volume 11 at p. 3820-21, 3823, Trial Decision at paras. 132, 330, 422, Trial Transcript p. 23 L5 – p. 26 L4
[18] Appeal Book Volume 11 at p. 3818-19, 3826, Trial Decision at para. 330, Trial Transcript p. 31 L 30 – p. 32 L35
[19] Appeal Book Volume 11 p. 3819, 3821, Trial Decision para 129-130, Trial Transcript Volume 6 p. 20 L 30 – p. 23 L3

with “less charged” non-monetary proposals before monetary issues are discussed; under the *PSSA*, the monetary outcomes of bargaining were known before it started, which one negotiator described as having turned the established bargaining process “on its head.”[20] Union negotiators testified that the *PSSA* would reduce their leverage at the bargaining table, because employers would achieve wage restraint without having to make trade-offs, and many experienced a real lack of bargaining power over non-monetary proposals.[21] Several negotiators testified that collective agreements settled under the *PSSA* contained only “minor” improvements, which was a reflection of the reduced bargaining power of unions.[22]

12. Following the 2008 global financial crisis, many public sector unions in Manitoba freely negotiated 2010-2014 collective agreements that included enhanced job security (no layoffs) in return for agreeing to two years of wage freezes.[23] By contrast, unions that negotiated job security in their 2010-2014 collective agreements were unable to negotiate it in the same workplaces under the *PSSA*. This reflected their reduced bargaining power in negotiations under the *PSSA*.[24] The

[20] Trial Decision paras 53-55, 82, 89, Trial Transcript Volume 7 p. 12 L15-22, Trial Transcript Volume 2, P. 9 L3-22, Appeal Book Volume 2, p. 383, Appeal Book Volume 1 p.79
[21] Trial Decision para. 58, 65, Appeal Book Volume 1, p. 197, Appeal Book Volume 2, p. 385, p. 644, Appeal Book Volume 5, p. 1604-5 Appeal Book Volume 4, p. 1279
[22] Trial Decision paras 72-75, 342, 348, 426, Appeal Book Volume 3, p. 1092, Appeal Book Volume 4 p. 1339
[23] Trial Decision para. 50, Appeal Book Volume 6, pp. 1976-8, 1982-3, Volume 5 p. 1600-1604
[24] Trial Decision para. 72, 73, 82, Appeal Book Volume 3, pp 1024-1028, 1087-1091, Appeal Book Volume 4, p. 1332-1334, Appeal Book Volume 5 p. 1605. In addition, several unions tried to negotiate new job security clauses under the *PSSA* without success. See, for example, Appeal Book Volume 2 p. 383, Volume 4 p. 1331-34, Trial Transcript Volume 5, n p. 63 L30 - P. 66 L37

Government admitted legislating wage restraint instead of trying to collectively bargain it in order to avoid having to negotiate tradeoffs and concessions, and to establish certainty, an approach to bargaining which the trial Judge described as "strident, inflexible and rigid."[25]

13. Trial evidence also demonstrated other labour relations harm caused by the *PSSA*. Several negotiators testified that their members were angry about restricted negotiations and questioned the value of being unionized and paying dues.[26] Many workers expressed a loss of confidence in their union's ability to effectively represent their priorities; workers in one workplace filed an unfair labour practice complaint against their union about *PSSA* bargaining.[27] Several workplaces experienced morale and recruitment/retention problems.[28] Labour relationships between unions and employers were also harmed.[29]

14. The trial Judge's decision that the *PSSA* violates s. 2(d) cites extensively from the evidence. She found that the *PSSA* substantially interfered with the collective bargaining process by removing the right to bargain monetary issues of fundamental importance to workers, as well as reducing union bargaining power over significant

[25] Appeal Book Volume 6 pp. 1950, 1984-6, Trial Decision paras 334, 343, 347
[26] Trial Decision paras 67, 77, 99, 106, 110, Appeal Book Volume 1 p. 184, 198, Appeal Book Volume 2, p. 380-81, 420-21, Appeal Book Volume 4, p. 1225, 1243,
[27] Trial Decision paras 42, 47-48, 60-61, Appeal Book Volume 2, p. 703, Appeal Book Volume 5, p. 1660, 1662-1664 and see para 25 and FN 40 below
[28] Appeal Book Volume 1 p. 182-184, Appeal Book Volume 5 p. 1585-86, 1595-1600, Appeal Book Volume 6 p. 2000
[29] Trial Decision para 42, Appeal Book Volume 5, p. 1599-1600

non-monetary issues including job security. Strike action was rendered "futile."[30] There was a demonstrated lack of union leverage to bargain non-monetary issues such as job security, as well as a variety of labour relations harm experienced.[31] Bargaining under the *PSSA* was not meaningful.

B. Government Interference in UMFA 2016 Collective Bargaining

15. The Appellant challenges the trial Judge's ruling, based on the evidence tendered at trial,[32] that it substantially interfered in the 2016 contract negotiations between UM and UMFA, thereby violating s. 2(d).

16. The evidence disclosed that numerous Government officials, elected and otherwise, were involved in communications[33] with UM, and Government decisions[34] were made that ultimately constituted substantial interference in the 2016 bargaining process. None testified at trial. The Government's only witnesses were its experts and three civil servants who testified as to the s.1 issue, not under appeal.[35]

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[30] Trial Decision paras 306-309, 311, 320, 322, 329, 331-34, 341 - 348

[31] Trial Decision paras 330, 331, 342, 348

[32] Affidavit and Supplemental Affidavit of Greg Flemming, UMFA Executive Director (Appeal Book, Volume 2, pp 430-618); testimony of Mark Hudson, UMFA President (trial transcripts, Volume 2, p. 60-106); Agreed Documents – Appeal Book Volumes 7 (pp. 2495-2669), 8 (pp. 2770 – 2949) and 10 (pp. 3780 - 3792

[33] Directly involved in communicating with UM officials were **Michael Richards** (Deputy Minister charged with overseeing the development of the *PSSA*), **Gerry Irving** (Sec. to the Public Sector Compensation Committee), **Rick Stevenson** (ADM – Labour Relations), **Cameron Friesen** (Minister of Finance), and **Lynn Zapshala-Kelln** (Sec. to the Treasury Board).

[34] Decision makers regarding the directives issued to UM included **Premier Pallister** and Cabinet Ministers **Friesen, Goertzen, Fletcher, Cullen, Stefanson, and Schuler** (all voting members of the Public Sector Compensation Committee of Cabinet).

[35] The Plaintiffs acknowledge that Mr. Irving would have been incapable of testifying for health reasons. Mr. Stevenson submitted two affidavits that were both evidence before the trial judge but neither affidavit addresses UM/UMFA 2016 negotiations.

17. The only evidence before the trial Judge was adduced by the Plaintiffs, including the Decision of the Labour Board in the unfair labour practice UMFA filed against UM.[36]

18. The Appellant's Notice of Appeal and Factum are littered with inaccurate references to the Government directive issued to UM on October 6, 2016 as a "new mandate" or a "change" in mandate. UM had been given no Government mandate whatsoever in 2016, prior to making its 17.5% wage offer on September 13, 2016.[37]

19. The following evidence was adduced regarding 2016 negotiations.

20. UMFA members' wages were the lowest of 12 other comparable Canadian universities, and this was of significant concern to both UM and UMFA. UM publicly communicated its wage offer of 17.5% as important to the University and that it was in a good financial position to make that offer.

21. Commencing on September 30, 2016, and in the weeks that followed, approximately 30 secret communications occurred between UM and Government officials (Irving, Stevenson, Richards) whereby the University was told that:

- It was likely that Government would move on public sector wage controls.

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[36] By agreement between the parties the trial Judge could accept the factual and legal findings in the Board's Decision, as if it were evidence at trial.
[37] Appeal Book, Volume 8, pp. 2876-7

- UM's September 13, 2016 wage offer to UMFA had been "embarrassing" to Government and would create a bad precedent for future bargaining regarding public sector wages across Manitoba.
- A 1% increase for UMFA could set a pattern such that it could effectively result in a $100 million cost to the Government across the broad public sector.
- The UM must remove its September 13, 2016 offer from the table and offer a one-year collective agreement with no wage increases.
- UM would have to "apply" to the Government for approval of wage increases in any subsequent years.
- Government's direction was a mandatory order, not a request, and non-participation by UM was not an option.
- It would be dangerous for UM to fail to comply, and there would be "financial consequences" for the University.
- The Government directed that these discussions remain confidential. UM could go back to the bargaining table and tell UMFA that they had changed their mandate, without mentioning the Government directly.

22. Mr. Juliano reported to UM that Government was "second guessing and essentially dictating, not just the mandate, but the University's bargaining strategy" and that Government was "so micromanaging things it's driving me crazy."[38]

[38] Appeal Book Volume 2, p. 553 and 555

23. On October 26, 2016, UM President Barnard wrote to Premier Pallister asking the Government to reconsider its imposition of a salary pause that would "seriously debilitate the University of Manitoba's almost completed (9 months into bargaining) negotiations with UMFA." Further, "…abiding by the pause would require us to backtrack from our latest offer and would – without doubt – lead to a prolonged and divisive strike with devastating impacts on this community." The President received no response.

24. The following day, at the commencement of mediation to attempt to avoid a strike, UM disclosed the Government's actions. The mediator advised both parties that he would not have flown in if he had known that salary was not open to negotiation.[39]

25. Dr. Mark Hudson testified that 2016 bargaining and the ensuing strike caused significant damage to the relationship between UMFA and UM, and between UMFA and its own members.[40]

26. The Labour Board found that UM had committed an unfair labour practice by abiding by the Government's requirement to keep its October 6, 2016 directive secret from UMFA. As to the directive itself, the Board stated:

> It is not contested that the University was ordered by the Provincial government, under warning of consequences, to comply with the new mandate requiring a pause (meaning 0%) in any wage increases for one year. The University complied

[39] Appeal Book Volume 2 p. 561
[40] Trial Transcript Volume 2, pp. 64-66

with the government's order having determined that the consequences of not doing so would be too severe in light of its financial dependency upon government and the substantial power and influence that the government could wield with respect to University governance.[41]

III. LIST OF ISSUES

A. Jurisdiction and Standard of Review on this Appeal

27. The Respondents agree with the Appellant's position in respect of jurisdiction. The Respondents agree that the standard of review with respect to questions of law is correctness, but questions of fact and mixed fact and law are reviewable on the standard of palpable and overriding error, as set out below.

B. Issues and Position of the Respondents

Issue 1: Did the trial Judge err in concluding that the restraint on wages set out in the *PSSA* resulted in substantial interference in collective bargaining and thus amounted to an infringement of the freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

28. No, based on the trial Judge's contextual and fact-specific analysis of the evidence in this case. The Appellant identifies five alleged errors. With the exception of alleged error (i) regarding the trial Judge's findings about the constitutionality of the *PSSA* (paragraphs 58 – 63 of the Appellant's factum), which raises an error of law reviewable on the correctness standard, all other errors identified by the Appellant involve questions of mixed fact and law. The trial Judge's decision respecting issue (i) is correct. The Appellant has not demonstrated a palpable and

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[41] *University of Manitoba Faculty Association v. University of Manitoba*, Manitoba Labour Board Case 215/16 ("MLB 215/16"), ABA, Vol. 1, Tab 1, p. 71

overriding error on the other issues, and her decision is correct in any event.

Issue 2: Did the trial Judge err in finding that the Government's conduct during the 2016 contract negotiations between the University of Manitoba and UMFA amounted to an infringement of freedom of association?

29. No. This is a question of mixed fact and law, which attracts deference on appeal. The Appellant has not established a palpable and overriding error, and her decision is correct in any event.

IV. ARGUMENT

The Trial Judge's Decision is Owed Deference

30. The Appellant incorrectly identifies an across-the-board correctness standard based on cases addressing standard of review in the administrative law context, as opposed to the civil appellate context. The correctness standard applies to constitutional questions arising from administrative decisions because of the judiciary's unique role in interpreting the Constitution and because the rule of law requires a final and determinate answer to constitutional questions from the Courts. These rationales do not apply to the appeal of a trial judge's decision.

31. This Honourable Court has held that the appellate standard of review in a civil case dealing with constitutional issues is the civil standard of review, which is determined by the nature of the real question raised by the specific ground of appeal.[42] This is the standard that has been applied by appellate Courts in s. 2(d)

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[42] *Young v. Ewatski*, 2012 MBCA 64, RBA, Tab 3, paras. 32-33, 42; *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235

cases. Questions of law are subject to a correctness standard. Questions of fact and questions involving the application of the law to the facts where there is no extricable question of law are subject to a standard of palpable and overriding error and entitled to deference. A palpable and overriding error is one that is so obvious that it can be "plainly seen" and has led the trial judge to a wrong result.[43]

32. As discussed in *BCTF*, the SCC "has gone to great lengths to emphasize the importance of deference to the trial judge when it comes to determinations of fact or questions of mixed fact and law." The contextual and fact-specific assessment of the constitutionality of government legislation or actions under s. 2(d) "deals entirely with discrete actions of government and the relationship between actual, identifiable, and knowable parties," not abstract questions of rights and freedoms. The actions of government, its motivations, and its consequent effects on unions and their members are facts best determined by a trial Judge. Findings underlying a conclusion that government substantially interfered with collective bargaining are therefore deserving of deference. As stated above, the trial Judge in this case had the benefit of an extensive body of evidence, which provided important context for applying the s. 2(d) test. The intimate familiarity she obtained as a result should not be lightly ignored, absent palpable and overriding error.[44]

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[43] *Canada (Attorney General) v. Meredith*, 2013 FCA 112, RBA, Tab 4, para. 60; *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 ("*Gordon*"), ABA, Vol. 3, Tab 13, paras 102, 240; *BCTF*, RBA, Tab 1, paras. 278, 324-328

[44] *BCTF*, RBA, Tab 1, paras. 324-329

Freedom of Association under s. 2(d) of the Charter – The Arc Bends Increasingly Towards Workplace Justice

33. In *Health Services*, the SCC determined that s. 2(d) of the *Charter* protects the right of members of labour unions to engage, in association, in a meaningful, good faith process of collective bargaining with respect to terms and conditions of employment of importance to them.[45]

34. The test set out by the SCC for determining a violation of s. 2(d) is whether the government action at issue, which may be in the form of either legislation or conduct, or both, has <u>substantially interfered</u> with the right to a meaningful process of collective bargaining. This test involves two inquiries:[46]

1) The importance of the matter affected to the process of collective bargaining;
2) How the measure impacts on the right to good faith bargaining.

35. In *Health Services*, the SCC held that contracting out, layoff conditions, and bumping, which are integral to job security and seniority systems, were matters "central to the freedom of association" and that legislation invalidating collective agreement provisions and prohibiting future bargaining on these "essential rights" violated s. 2(d).[47] The SCC noted that legislation may substantially interfere with collective bargaining "<u>either</u> by disregarding past processes of collective bargaining,

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[45] *Health Services*, ABA, Vol. 1, Tab 5, paras. 19, 22, 89-93, 111
[46] *Health Services*, ABA, Vol. 1, Tab 5, paras. 88, 93-94, 129
[47] *Health Services*, ABA, Vol. 1, Tab 5, paras 120-121, 126-128, 130, 132-136; note that the invalidation of provisions of collective agreements and prohibition on bargaining with respect to layoffs and bumping were temporary, but this fact did not render the interference insubstantial.

by pre-emptively undermining future processes of collective bargaining, or both." The facts of *Health Services* are not a minimum threshold for finding a breach of s. 2(d) in other cases.[48] The analysis in every case is contextual and fact specific.

36. The decision in *Health Services* was strongly influenced by Dickson C.J.'s dissent in *Alberta Reference*. Dickson C.J. held that the purpose of freedom of association is to enable individuals, who are vulnerable on their own, to come together to overcome power imbalances and participate more equally and effectively in society. In the labour context, collective bargaining has historically helped workers overcome the inherent inequality in the employment relationship, allowing them to participate in determining their employment terms instead of having to accept what their employer chooses to give them.[49]

37. The 2015 labour trilogy[50] represents a "watershed" in s. 2(d) jurisprudence,[51] where the arc "bends increasingly towards workplace justice."[52] In *MPAO*, the SCC clarified the scope of s. 2(d)[53] and established the following principles:

- Section 2(d) must be interpreted in a purposive and generous fashion.[54]

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[48] *Health Services*, ABA, Vol. 1, Tab 5, para 128; *Meredith*, ABA, Vol. 2, Tab 8, para 28
[49] *Alberta Reference (Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313 ("*Alberta Reference*"), RBA, Tab 5, paras 22-23, 86-87, 89-93, 97
[50] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, 1 S.C.R. 3 ("*MPAO*"), ABA, Vol. 1, Tab 4; *Meredith*, ABA, Vol. 2, Tab 8; *Saskatchewan Federation of Labour v. Saskatchewan* ("*SFL*"), 2015 SCC 4, 1 S.C.R. 245, ABA, Vol. 2, Tab 7
[51] *Canadian Union of Postal Workers v Her Majesty in Right of Canada*, 2016 ONSC 418 ("*CUPW*"), RBA, Tab 6, para 112
[52] *SFL*, ABA, Vol. 2, Tab 7, para 1; *CUPW*, RBA, Tab 6, para 112
[53] *MPAO*, ABA, Vol. 1, Tab 4, para 1
[54] *MPAO*, ABA, Vol. 1, Tab 4, para 47

- The primary purpose underlying freedom of association is "to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power."[55]
- The SCC recognized that the purpose of s. 2(d) is "[n]owhere more pertinent than in labour relations", since it is only by banding together and strengthening their bargaining power that workers can overcome the inequalities in the employment relationship and meaningfully pursue their workplace goals.[56]
- Section 2(d) guarantees the right to a meaningful process of collective bargaining: the process is not meaningful if employees' negotiating power is reduced, thereby denying employees the power to pursue their goals.[57]
- A meaningful process of collective bargaining also includes providing employees with choice and independence to enable them to determine their collective interests and meaningfully pursue them: a bargaining process "limited to picking and choosing from among the interests management permits [workers] to advance" is not a meaningful one.[58]
- The s. 2(d) test remains a "substantial interference" test,[59] wherein "the ultimate

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[55] *MPAO*, ABA, Vol. 1, Tab 4, paras 55, 57-58, 62, 70
[56] *MPAO*, ABA, Vol. 1, Tab 4, para 70
[57] *MPAO*, ABA, Vol. 1, Tab 4, para 71
[58] *MPAO*, ABA, Vol. 1, Tab 4, para 89
[59] *MPAO*, ABA, Vol. 1, Tab 4, paras 73-77, 80

question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining…"[60]

- The balance of power may be disrupted in a variety of ways, including restricting the subjects that can be discussed, imposing arbitrary outcomes, making employees' workplace goals impossible to achieve, or setting up a process that employees cannot effectively control or influence.[61]

38. In *SFL*, the SCC found that s. 2(d) protects the right to strike as an important dispute resolution mechanism in a meaningful bargaining process, describing striking as the "powerhouse" of bargaining. The decision affirmed the importance of workers having relative equality in bargaining power *vis a vis* the employer.[62]

39. The labour trilogy has been applied by lower Courts in a variety of decisions that affirm the right to meaningful collective bargaining:

- In *CUPW*, the Court determined that back-to-work legislation disrupted the balance between the parties and substantially interfered with a meaningful process of collective bargaining, thereby violating s. 2(d).[63] The legislation ordered a cessation of rotating strikes and a nation-wide lockout in a bargaining dispute between CUPW and Canada Post, and imposed a final offer selection

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[60] *MPAO*, ABA, Vol. 1, Tab 4, para 72
[61] *MPAO*, ABA, Vol. 1, Tab 4, para 72
[62] *SFL*, ABA, Vol. 2, Tab 7, paras 3, 53-57, 75, 77
[63] *CUPW*, RBA, Tab 6, paras 1-5, 171, 191-194. Neither the government nor Canada Post appealed.

arbitration process to settle the terms of a new collective agreement if further negotiations proved unsuccessful (with legislatively mandated wage increases of 1.75%, 1.5%, 2%, and 2% over the term of the agreement).

- In *OPSEU*, the Court concluded that the Ontario government substantially interfered with the longstanding collective bargaining process in the education sector. Ontario established central negotiations and acted as *de facto* negotiator for employer school boards. It required bargaining to take place pursuant to certain "parameters" (including a 2-year wage freeze), which it claimed would meet both its fiscal goals and other policy objectives and, after the process broke down, enacted legislation to set the terms of outstanding collective agreements.[64] This decision reiterated that "the general thrust of the evolution of [s. 2(d)] is an effort to equalize the gap in power" between employees and employers.[65]
- In *UCCO*, the Quebec Court of Appeal upheld the finding that a legislative prohibition against collective bargaining staffing issues and the pension plan, which were of critical importance to the union and its members, substantially interfered with the collective bargaining process. The law restricted the subjects that could be discussed, such that the balance necessary to ensure the meaningful

[64] *OPSEU v. Ontario*, 2016 ONSC 2197 ("*OPSEU*"), RBA, Tab 7,, paras 4, 8-15, 17, 23-25, 97-100, 171-173, 179. Ontario did not appeal this decision.
[65] *OPSEU*, RBA, Tab 7, para 3

pursuit of workplace goals was disrupted.[66]

The SCC did not Constitutionalize Wage Restraint Legislation in *Meredith*

40. The Appellant's appeal hinges on *Meredith*. The outcome of *Meredith*, like any s. 2(d) case, was driven by its factual context. The Appellant's argument would have *Meredith* definitively constitutionalize wage restraint legislation without regard to the facts of other cases, contrary to the SCC's direction that each analysis must be contextual and fact specific.

41. *Meredith* dealt with the impact of the *Expenditure Restraint Act* ("*ERA*")[67] on RCMP associational activity exercised through the Pay Council process. The *ERA* was introduced in response to the 2008 global financial crisis and capped wages in the federal public sector at levels consistent with outcomes reached in collective bargaining (at 2.5%, 2.3%, 1.5%, 1.5%, and 1.5% over a 5-year period). The *ERA* did not freeze wages, and permitted increases in certain benefits. The *ERA* rolled back 3 years of previously announced salary increases for the RCMP.[68]

42. *Meredith* was a companion case to *MPAO*. In *MPAO*, the SCC held that the statutory exclusion of RCMP members from collective bargaining and imposition of

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[66] *Procureur général du Canada c. Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2019 QCCA 979 ("*UCCO CA*"), RBA, Tab 8, para 32; *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCA-SACC-CSN) c. Procureure générale du Canada*, 2018 QCCS 2539 ("*UCCO*"), RBA, Tab 9, , paras 3, 6-13, 187-189 (citing *MPAO* at para 72); leave to appeal to the SCC dismissed: 2020 CanLII 10500 (SCC)

[67] *Expenditure Restraint Act*, S.C. 2009 c.2 ("*ERA*"), ABA, Vol. 3, Tab 21

[68] From 3.32%, 3.5%, and 2% for 2008-2010, to 1.5% in each of 2008-2010: *Meredith*, ABA, Vol. 2, Tab 8, paras 7, 10

a non-unionized labour relations regime violated s. 2(d). The Pay Council was one of the components of the unconstitutional RCMP labour relations scheme. It was a committee that made non-binding recommendations regarding RCMP members' pay and allowances to the Treasury Board, which decided RCMP members' wages. RCMP members could not negotiate collective agreements.[69]

43. Although not a "true" collective bargaining process, the SCC held that the Pay Council was associational activity that attracted *Charter* protection. The unique issue in *Meredith* was "whether the *ERA* amounted to substantial interference with that activity despite its constitutional deficiencies."[70] *Meredith* did not consider the impact of wage restraint legislation on a constitutional bargaining process, and is thus limited to its facts.[71]

44. The SCC held that the *ERA* did not violate the s. 2(d) rights of RCMP members for several reasons.[72] The *ERA* capped wages for RCMP members at the "going rate" reached in public sector collective agreements, thus reflecting "an outcome consistent with actual bargaining processes." The *ERA* did not preclude consultation on other compensation-related issues and contained an exception[73] that permitted increases to certain RCMP allowances, which resulted in "significant

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[69] *Meredith*, ABA, Vol. 2, Tab 8, paras 1-6
[70] *Meredith*, ABA, Vol. 2, Tab 8, paras 4, 25
[71] *Meredith*, ABA, Vol. 2, Tab 8, paras 1-4, 25, 30
[72] *Meredith*, ABA, Vol. 2, Tab 8, paras 28-30
[73] *ERA*, ABA, Vol. 3, Tab 21, s 62

benefits", including increases to service and standby pay.

45. Moreover, the SCC held that "[a]ctual outcomes are not determinative of a s. 2(d) analysis, but, in this case, the evidence of outcomes support[ed] a conclusion that the enactment of the *ERA* had a minor impact on the appellants' associational activity."[74] The SCC thus concluded that "the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place."[75]

46. The Appellant misstates several of the SCC's findings in *Meredith*.

- The facts before the SCC in *Meredith* were not the facts found at paras. 34-43 of the Appellant's factum. The Appellant has assembled an amalgam of facts from four separate *ERA* cases, which were not before any one Court.
- The SCC considered the narrow question of whether the *ERA* interfered with the unconstitutional RCMP Pay Council consultation process.[76] Contrary to the Appellant's argument, the SCC did not decide how the *ERA* impacted collective bargaining more generally.[77]
- The Appellant's claim that it was "critical" in *Meredith* that the *ERA* did not override a collective agreement is nowhere to be found in the decision.[78] The

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[74] *Meredith*, ABA, Vol. 2, Tab 8, para 29
[75] *Meredith*, ABA, Vol. 2, Tab 8, para 30
[76] *Meredith*, ABA, Vol. 2, Tab 8, paras 4, 25
[77] Appellant's Factum, para 46
[78] Appellant's Factum, para 46

RCMP were not even subject to a collective agreement.

47. The Court of Appeal decisions regarding the *ERA* are also distinguishable.

- In *Syndicat Canadien*, the Quebec Court of Appeal noted that the *ERA* permitted bargaining on other monetary terms of employment (such as vacation), had wage caps consistent with the "going rate" reached in meaningful collective bargaining, and did not impose "draconian" salary freezes.[79]
- In *Federal Dockyards*, the British Columbia Court of Appeal concluded that the rollback of a single-year wage increase as a result of the *ERA* (the other wage increases were within the *ERA* limits) did not violate the s. 2(d) rights of dockyard workers, based on the following: "The government met its constitutional obligations through its attempts to negotiate until the last moment, and to signal the potential effects of the impending legislation. Its response was proportional to the looming fiscal emergency."[80]
- In *Gordon*, the Ontario Court of Appeal held that the "key" to *Meredith* was the finding that the level of capped wage increases under the *ERA* reflected the results of free collective bargaining.[81] The Ontario Court found that during the pre-*ERA* phase of bargaining everything, including wages, was under discussion and real

[79] *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163 ("*Syndicat canadien*"), ABA, Vol. 2, Tab 10, paras 48, 50-51, 55, 59; definition of "additional remuneration" in the *ERA*, ABA, Vol. 3, Tab 21, s. 2
[80] *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156 ("*Federal Dockyards*"), ABA, Vol. 2, Tab 11, paras 9(11), 10, 93
[81] *Gordon*, ABA, Vol. 13, Tab 13, para 159, also see: 123, 126-127, 139

progress was made on wages, which demonstrated a meaningful process.[82]

48. Finally, the contextual analysis in all of the *ERA* cases was informed by the 2008 global financial crisis. In *Health Services*, the SCC observed that "situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith."[83] In contrast, the *PSSA* was not enacted in response to a similar financial crisis, nor did the Appellant argue that a financial crisis existed.[84]

The Trial Judge did not Err in Concluding that the *PSSA* Violates s. 2(d)

(i) The Trial Judge Recognized that the Issue before the SCC in *Meredith* was Fundamentally Different than the Issue in the Present Case

49. The Appellant argues that the trial Judge erred in distinguishing *Meredith* on the basis that the SCC did not consider the impact of the *ERA* on a collective bargaining process. Relying on *Fraser*, the Appellant argues that s. 2(d) only protects collective bargaining "in the minimal sense of good faith exchanges" and that the trial Judge has effectively constitutionalized the "Wagner" model.

50. It is undeniable that the issue before the SCC in *Meredith* was limited to whether the *ERA* substantially interfered with the unconstitutional RCMP Pay Council consultation process. It was not an error for the trial Judge to point out what the Court did not consider (the impact of the *ERA* on a constitutional bargaining

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[82] *Gordon*, ABA, Vol. 13, Tab 13, paras 88, 100
[83] *Health Services*, ABA, Vol. 1, Tab 5, para 107
[84] Trial Decision, paras 377-383

process), and to distinguish *Meredith* accordingly.[85]

51. Next, there is no evidentiary foundation to the Appellant's argument about the "Wagner" model of bargaining. The appellant called no evidence on the "Wagner" model or any features of "Wagner" collective bargaining that may exist.

52. Finally, based on the 2011 *Fraser* decision, the Appellant advances a barren and dated approach to s. 2(d) that is divorced from its purpose. *Fraser* has been surpassed by the 2015 Trilogy.[86] Following *MPAO* and *SFL*, it is clear that s. 2(d) protects more than a minimalist process of consultation. It protects a bargaining process that must be meaningful in the sense of maintaining an equilibrium of bargaining power between the parties. The scope of the constitutional protection of collective bargaining is a question of law, which the trial Judge answered correctly.

(ii) The *PSSA* Wage Levels do not Reflect or Respect Meaningful Collective Bargaining Processes

53. The Appellant argues that the trial Judge erred in finding that the *PSSA* was unconstitutional because the Appellant did not engage in pre-legislative bargaining. The real question raised by this ground of appeal is whether the evidence of wage rates reached in free collective bargaining as compared with the rates prescribed by the *PSSA* was indicative of substantial interference with collective bargaining. This

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[85] *OPSEU*, RBA, Tab 7, paras. 159-160
[86] The majority of the SCC in *MPAO* found that *Fraser* introduced a number of concepts that unnecessarily complicated and confused the s. 2(d) analysis: *MPAO*, ABA, Vol. 1, Tab 4, paras. 73-79

is a question of mixed fact and law subject to the deferential standard.

54. The question in every s. 2(d) case is how the government action at issue impacts the collective bargaining process. The factual nexus of the *ERA* cases included the significant finding, highlighted by the trial Judge, that the *ERA* capped wages at the negotiated "going rate" in public sector collective agreements. This was relevant to findings about the *ERA*'s impact on collective bargaining.[87] In contrast, the evidence before the trial Judge in this case was that certain bargaining units were able to negotiate higher wage increases after they learned they were not in fact subject to the *PSSA*. It was open to the trial Judge to conclude that this evidence <u>supported</u> her conclusion that the *PSSA* substantially interfered in the bargaining process of those unions subject to the *PSSA*.[88]

55. The trial Judge did not err in describing the bargaining that took place prior to the *ERA* as "good faith bargaining."[89] This was the conclusion reached by the Courts and the labour board that heard claims respecting the conduct of bargaining in the pre-*ERA* period on the record before them.[90] The evidence in the *ERA* cases showed that "everything, including wages and the possible wage restraints, was under discussion"; indeed, some progress was made on wage negotiations.[91]

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[87] *Meredith*, ABA, Vol. 2, Tab 8, para 28; *Syndicat canadien*, ABA, Vol. 2, Tab 10, paras 50-51; *Gordon*, ABA, Vol. 3, Tab 13, paras 123, 126-127, 139, 159; *OPSEU*, RBA, Tab 7, paras 159, 163

[88] Trial Decision, para 348; also see: 318-319, 321

[89] Appellant's Factum, para 66

[90] *Gordon*, ABA, Vol. 3, Tab 13, paras 68-102; *Federal Dockyards*, ABA, Vol. 2, Tab 11, para 92

[91] *Gordon*, ABA, Vol. 3, Tab 13, paras 88, 100

56. The trial Judge's references in para. 348 to pre-legislative bargaining that transpired under the *ERA* are not fairly characterized as a finding that the absence of pre-legislative bargaining made the *PSSA* unconstitutional. To the contrary, her decision included the finding that that there is no pre-legislative duty to bargain.[92].

(iii) The Trial Judge Found on the Evidence that the Government Sought to Avoid Having to make Tradeoffs Pursuant to the *PSSA*

57. The Appellant argues that the trial Judge erred in finding that the *PSSA* was unconstitutional because wage restraint could have been bargained. The trial Judge's finding that hard-cooperative bargaining could have been used by the Province instead of the *PSSA* is a factual finding deserving of deference. This was not a "speculative" finding; rather it was supported by a significant amount of evidence about negotiated wage restraint in 2010-2014, as well as the Appellant's admission that it legislated the *PSSA* in order to achieve certainty and avoid trade-offs.[93]

58. It was not the trial Judge's finding that hard bargaining could have been used *per se* that led her to conclude the *PSSA* was unconstitutional. Rather, the Appellant admitted in agreed facts that it was motivated to enact the *PSSA* to avoid trade-offs associated with bargaining wage restraint 7 years earlier.[94] It was directly relevant to the s. 2(d) analysis to consider evidence about a free bargaining process for wage restraint compared to the impact of the *PSSA* on the bargaining process. In doing so,

[92] Trial Decision, paras. 301-303
[93] Appeal Book Volume 6, p. 1950 and 1984-1986 and paragraph 12 above
[94] Appeal Book Volume 6, p. 1984-1986, Trial Decision at paras 334, 347, 428

the trial Judge was applying the evidence before her to the *Health Services* test, which is a question of mixed fact and law deserving of deference.

(iv) The Trial Judge Found on the Evidence that the Wage Freeze had a Structural Impact on the Collective Bargaining Process

59. The Appellant argues that the trial Judge erred in distinguishing *Meredith* on the basis that the *ERA* contained wage caps versus the *PSSA*'s wage and monetary freezes. The impact of these freezes on the bargaining process is a question of mixed fact and law, driven by the trial Judge's evidentiary findings, and owed deference.

60. The Appellant's argument contains several misstatements about the *ERA* decisions. *Meredith* did not decide that "the process of bargaining was sufficiently robust even though wages could not be negotiated" or that "removing wages" did not "change the overall process of bargaining."[95] The RCMP did not have a bargaining process (rather a consultation process), RCMP wages were never frozen by the *ERA*, and additional monetary benefits could be discussed and were obtained.

61. Unlike the trial Judge's finding that the *PSSA* impacted bargaining on non-monetary issues, contrary to para. 81 of the Appellant's factum, none of the Court of Appeal decisions found that the *ERA* impacted bargaining on other issues.

62. The trial Judge did not conflate the two-step s. 2(d) test. She very clearly considered the second step in finding that removal of monetary issues reduced

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[95] Appellant's Factum, paras. 78, 81

bargaining power. The trial Judge also found that the *PSSA* impacted bargaining on non-monetary issues. The Appellant inaccurately claims that the *PSSA* had no impact on the ability to bargain other workplace issues, including job security.

63. The trial Judge ultimately found that wage freezes under the *PSSA* had a structural impact on collective bargaining, which was different from the findings respecting the impact of the *ERA*. [96] This finding is not prohibited by *Meredith,* which only considered the facts in that case.

64. The Appellant argues that the trial Judge erred in not considering the scope of what was left for bargaining. This is not the law. For example, in *Health Services*, the SCC found that legislation pertaining to contracting out, bumping, and layoff rights violated s. 2(d) notwithstanding that other issues could still be negotiated. In *UCCO*, a legislative prohibition on bargaining staffing and pension issues violated s. 2(d) notwithstanding other issues that could still be bargained.[97]

(v) The Trial Judge did not Err in Finding that the *PSSA* was Unconstitutional because of its Detrimental Impact on Union Bargaining Power and Leverage.

65. The Appellant argues that the trial Judge constitutionalized a "Wagner" model of bargaining "favoured" by unions wherein monetary issues and tradeoffs were pivotal to bargaining power. The evidence about how the *PSSA* impacted on the

[96] Trial Decision, para 320
[97] *UCCO*, RBA, Tab 9, paras 187-189, 203

bargaining process used within the public sector is a question of mixed fact and law, which deserves deference.

66. The Appellant called no evidence on any so-called “Wagner” model of bargaining. In any event, *MPAO* and *SFL* constitutionalized the need for bargaining power for workers to pursue their goals in a meaningful bargaining process. The evidence before the trial Judge was that monetary issues and the ability to engage in trade-offs provided leverage in the bargaining process.

67. In addition, it was not the case that the bargaining model described by Dr. Hebdon was preferred only by unions. There was evidence from several Plaintiff unions that the parties’ practice in collective bargaining was to start with non-monetary issues and defer monetary to later in the process. Disregarding past processes of collective bargaining can violate s. 2(d).[98]

68. The trial Judge properly concluded that the “minor” improvements negotiated under the *PSSA* supported her finding of substantial interference. Although s. 2(d) protects process, not outcomes, which the trial Judge recognized, *Meredith* held that the outcome may reflect on the bargaining process.[99]

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[98] *Health Services*, ABA, Vol. 1, Tab 5, para 128

[99] *Meredith*, ABA, Vol. 2, Tab 8, para 29; also see *OPSEU*, RBA, Tab 7, para 169, Trial Decision, paras 309, 321, 342, 348

69. The Appellant ignores the trial Judge's findings that the 21 collective agreements settled under the *PSSA* were negotiated under duress.[100]

The Trial Judge did not Err in Concluding that the Government Substantially Interfered in the 2016 Collective Bargaining Between UMFA and UM

70. The evidence at trial confirmed that the Government's actions and its directive had several impacts. It significantly disrupted the balance between UM and UMFA that s. 2(d) seeks to achieve, undermining what was, up until the directive, a meaningful and productive process of collective bargaining, which was otherwise likely to result in a freely negotiated collective agreement. It did so on a matter that was vitally important to <u>both</u> the University and the Association in 2016, being faculty wages. It restricted the subjects that could be discussed in further bargaining, being anything monetary. It imposed an arbitrary outcome of 0% wage freeze for one year. It acted in bad faith, caused an immediate and significant disruption to the bargaining process, and significant damage to the relationship between the parties.

71. Based on the totality of the evidence, the trial Judge concluded that UM felt it was in a position to offer a 17.5% increase in salary. It pleaded with Government representatives to allow that offer to remain on the table. The Government refused, and this represented a clear example of substantial disruption to the collective bargaining process and harm to the relationship between UM and UMFA, as well as

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[100] *OPSEU*, RBA, Tab 7, para 163: "The idea that consistency with other agreements can be taken as a demonstration that the freedom of association was not breached pre-supposes that those prior agreements were fairly and freely negotiated through collective bargaining."

the union and its membership.[101] The trial Judge's finding is a question of mixed fact and law, deserving of deference from this Court. The Appellant has not demonstrated a palpable and overriding error. In any event, she was correct.

72. In coming to her conclusion regarding the Government's actions, the trial Judge clearly followed the guiding principles set out by the SCC in *MPAO* (disruption of balance between employees and employer),[102] including making it impossible for UMFA to achieve desired outcomes (wages) in 2016, and other examples of substantial interference such as are set out in set out in *Health Services* (e.g., acts of bad faith and taking important matters off the table.)[103]

73. The Appellant suggests that the trial Judge conflates the 2016 and 2017 bargaining years in referencing wage settlements that had been negotiated prior to the *PSSA* at other Manitoba universities. This is not accurate. The evidence was that recently bargained (as recent as August 2016) collective agreements for faculty at the Universities of Winnipeg and Brandon had achieved wage increases between 1.5% and 2.5% for 2016, 2017 and 2018.[104] Her comments at pp. 221-2 of the Decision apply to both the 2016 round of bargaining (0% increase at UM) and the 2017 round of bargaining (0%/.75%/1% in the three years that followed 2016). She notes that for UM, these four years (0/0/.75/1), which comply with the *PSSA* wage

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[101] Trial Decision, para 37 and 429
[102] *MPAO*, ABA, Vol. 1, Tab 4, para 72
[103] *Health Services*, ABA, Vol. 1, Tab 5, para 111
[104] Appeal Book, Volume 2, pp. 434-5

caps, are not consistent with the going rate reached in other similar Manitoba negotiated agreements, as contrasted against the facts in the *ERA* cases.

74. In paragraphs 100 and 101 of its Factum, the Appellant focuses only on the Government's wage freeze directive to UM, and fails to acknowledge the significance of the evidence before the trial Judge as to the timing, method of delivery, and secrecy of that directive, described by the UM President's letter to the Premier (which went unanswered) as seriously debilitating UM's almost completed negotiations with UMFA and which "would –without doubt –lead to a prolonged and divisive strike with devastating impacts on this community," negatively impacting revenues and enrolment. [105]

75. Finally, the Appellant argues that when the Government imposed the wage directive on UM on October 6, 2016, UM did not, at that time, have a wage offer on the table, given that, after its offer was made on September 13, 2016 UMFA did not accept it and advanced a counteroffer. This argument misrepresents labour relations law and was an argument the Labour Board soundly rejected:

> … A counteroffer does not necessarily permit the other party to collective bargaining to fundamentally deviate from previous positions taken. Principles applicable to contractual negotiations at common law cannot simply be applied to collective bargaining without regard to the obligations imposed by the duty to bargain in good faith;[106]

[105] Appeal Book, Volume 7, pp. 2620-1
[106] Appeal Book, Volume 8, pp. 2927

> The University's position in this regard… is best characterized as a contrived attempt to extricate itself from what it believed was a difficult position which it found itself in having been ordered by the provincial government on October 6, 2016 to comply with a new mandate requiring a pause in wages.[107]

CONCLUSION

76. The Respondents ask this Honourable Court to dismiss the appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Garth Smorang, Q.C.
Counsel for the Respondents

Estimated Time for Oral Argument: 3 hours

[107] Appeal Book, Volume 8, pp. 2928