CITATION: OPSEU v. Ontario, 2024 ONSC 3644
COURT FILE NO.: CV-18-00590573-0000
DATE: 20240711

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION and R.M. KENNEDY and J.P. HORNICK, Applicants

– and –

THE CROWN IN RIGHT OF ONTARIO as represented by THE ATTORNEY GENERAL OF ONTARIO, Respondent

– and –

COLLEGE EMPLOYER COUNCIL, Intervenor

BEFORE: Justice E.M. Morgan

COUNSEL: *David Wright, Laura Johnson, and Behzad Akhkend*, for the Applicants

Sean Hanley, Rochelle Fox, and Sean Kissick, for the Respondent

Frank Cesario, Eleanor Vaughan, and Danika Winkel, for the Intervenor

HEARD: April 4-5, 2024

REASONS FOR DECISION

[1] On November 19, 2017, the *Colleges of Applied Arts and Technology Labour Dispute Resolution* Act*, 2017*, S.O. 2017, c. 21 (the "Act") ended a 5-week strike by academic staff at the 24 Colleges of Applied Arts and Technology across Ontario. The strike – the longest in Ontario college history – had impacted on approximately 257,000 full-time students, 78,000 part-time students and 1,400 apprentice students. It was threatening to undermine the academic term, college degrees, and professional accreditations of college students.

[2] The Applicants, representing approximately 19,000 full-time academic employees of the 24 colleges ("OPSEU"), submit that the Act was an unjustifiable infringement of its members' rights under section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The Respondent ("Ontario") and the Intervenor, being the government mandated bargaining agent for Ontario's 24 colleges as employer (the "Council"), submit that the Act did not infringe section

2(d) or, alternatively, that any infringement of the OPSEU members' rights was justified under section 1 of the *Charter*.

[3] The Act required OPSEU and its members to immediately end the strike and to return to work. It also referred to binding interest arbitration before a neutral arbitrator the issues which remained in dispute between OPSEU and the Council.

[4] OPSEU seeks a declaration under section 52 of the *Constitution Act, 1982* that the Act is of no force and effect, along with damages under section 24(1) of the *Charter*.

I. Collective bargaining in the College sector

[5] Ontario's 24 colleges deliver approximately 3,000 postsecondary programs in four broadly defined divisions: Applied Arts, Business, Health and Technology. Generally speaking, these programs prepare students for entry into the Ontario labour market. They are established and governed under the *Ontario Colleges of Applied Arts and Technology Act*, *2002*, SO 2002, c.8, Sched. F, pursuant to which each college's board of governors is responsible for approving programs of instruction, articulating the college's vision, setting its strategic directives, and steering its overall goals and outcomes

[6] The college programs lead to a number of different degrees and qualifications. These include one-year certificates and graduate certificates focused on specific knowledge and skills in a defined range of activities, two-year or three-year diplomas and advanced diplomas focused on a broader range of technical, managerial, and/or administrative qualifications, and four-year degrees focused on conceptual approaches and more specialized knowledge in a given discipline. The colleges also deliver Employment Ontario training programs and apprenticeships.

[7] The *Colleges Collective Bargaining Act, 2008*, S.O. 2008, c. 15 ("CCBA") governs collective bargaining in the college sector. It defines the bargaining parties, their roles, the bargaining process and the terms and conditions before and during a strike. The Minister of Colleges and Universities (the "Minister") has a policy interest in education and in the colleges, but does not administer them and is not a party to the collective bargaining. OPSEU is the bargaining agent for full-time and part-time academic employees at the 24 colleges, while the Council, a corporate entity with separate legal status, has exclusive statutory responsibility for negotiating on behalf of the colleges collectively.

[8] OPSEU and the Council began the process of bargaining toward a new collective agreement in July 2017, in anticipation of the expiry of the previous collective agreement on September 30, 2017. Although they managed to reach agreement on certain issues, there were three sticking points in the negotiations: a) OPSEU's proposal for the creation of an academic senate for each college, b) OPSEU's proposal for a guarantee of college faculty academic freedom to be written into the collective agreement; and c) OPSEU's proposal for a reduction in the number of part-time faculty.

[9] The Council objected to the first two of these proposals on the grounds that they represented fundamental governance changes for the colleges and were contrary to the statutory governance schemes in force. They were seen as attempts by OPSEU to remove authority from the colleges' boards of governors. Both sides appear to have dug in their heals, with OPSEU declaring that there would be "no labour peace" without movement on these issues, and the Council declaring that it would not agree to changes that diluted the management authority of the colleges' boards.

[10] In accordance with statutory requirements, on July 11, 2017 OPSEU requested that the Ministry of Labour appoint a conciliator to meet with the parties. The conciliation process was ultimately unsuccessful, and the strike by OPSEU's membership began on October 16, 2017, resulting in the cancellation of instruction in all 24 colleges.

[11] On November 6, 2017, OPSEU and the Council each put forward a settlement offer. The Council declared that its offer was a "final offer" and, as it saw further negotiating unlikely to produce any compromise result, requested that the Ontario Labour Relations Board schedule a vote by OPSEU members pursuant to s. 17(2) of the CCBA. That vote was held on November 14 to 16, 2017, resulting in 95% of eligible voters participating and 86% of the voters rejecting the Council's final offer.

[12] Counsel for OPSEU put great emphasis on the lopsided result of this union vote. They characterize it as a moment of increased empowerment for OPSEU, putting it in a far stronger bargaining position and making the legislature's back-to-work bill that followed an impermissible violation of the union members' rights. Quoting J.P. Hornick, the president of OPSEU, counsel state at para. 4 of their factum:

> The rejection of the Employer's final offer by such a significant majority showed that the members of the bargaining unit strongly supported the Union's bargaining position and was 'an absolute game changer in bargaining terms.' It was an event that significantly 'changed the bargaining dynamic' and increased the momentum and the bargaining power of the Union and its members. [citations omitted]

[13] For its part, the Council perceived the vote as a confirmation of the parties' deadlock. It so advised the government, which very shortly thereafter introduced legislation that the evidence suggests may already have been drafted and waiting in the wings. In fact, later in the afternoon on the very same day that the government was advised of OPSEU's vote on the Council's final offer, the government announced that it would be introducing legislation requiring the OPSEU members to return to work at the colleges.

[14] Evidence in the record from Ontario's own affiant establishes that the government had determine that the strike could go on for six weeks before a critical stage was reached and the educational goals of the colleges would be in jeopardy. Nevertheless, the government sprung into legislative action at the 5-week point, reducing the bargaining time by what OPSEU considers to have been a critical week. Despite this accelerated timing, the preamble to the Act, then known as Bill 178, as well as statements by government members in the legislature, stated that the back-to-

work statute was being introduced as a measure of last resort following a breakdown in negotiations:

> The parties have engaged in collective bargaining for a new collective agreement for almost 5 months, including mediation with the assistance of the Ministry of Labour, but have failed to resolve the issues in dispute. A strike commenced on October 16, 2017, and classes have been cancelled for approximately five weeks. Continuing efforts of the Ministry of Labour to assist the parties in resolving their differences through mediation have proved unsuccessful.
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> . . .
>
> On this side of the House, we do respect the collective bargaining process. That's why we have supported both parties over the past five weeks. We very much wanted them to reach an agreement at the table. We needed the parties to exhaust all options before we would even think about entertaining this type of legislation, but when the final offer vote was not accepted, the Premier and I called both parties to a meeting. We implored them to come together to reach a negotiated settlement or to agree to a process for binding arbitration. Later that day – that was on Thursday – they informed us that they were at a complete deadlock. Given the deadlock between the parties, we determined that the time had come to bring forward this legislation. This legislation is a last resort. We understand the constitutional protections afforded to striking workers, and we respect those constitutional protections.
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> Act, preamble; Legislative Assembly of Ontario, Official Report of Debates (Hansard) No. 119, 2nd session, 41st Parliament, Saturday November 18, 2017, at p. 6368.

[15] The Act was passed by the legislature and received Royal Assent on November 19, 2017. It terminated the strike and required all outstanding bargaining disputes between OPSEU and the Council to be resolved by neutral binding mediation-arbitration by William Kaplan, an experienced arbitrator who by all appearances was respected by both sides.

[16] The Act required the arbitrator to consider all relevant factors, including criteria similar to those contained in interest arbitration statutes. It also directed the arbitrator to take into account the purposes of the *Public Sector Dispute Resolution Act*, SO 1997, c. 21, s. 1 – ensuring expeditious resolution, encouraging settlement through negotiation, and supporting effective and affordable public services. Within those parameters, the arbitrator was given broad discretion in resolving the dispute. The legislation did not purport to pre-determine any substantive outcome for the arbitrator to endorse.

[17] On December 20, 2017, following a three-day arbitral session in which submissions were heard from both sides, Arbitrator Kaplan issued his ruling. The award contained the terms for a new collective agreement, to be in force for the period October 1, 2017 to September 30, 2021.

[18] Counsel for OPSEU contend at paras. 63 and 103 of their factum that continued bargaining would have resulted in a more favourable outcome for the union than that reached through the arbitration process. That said, the record shows that upon Arbitrator Kaplan's issuance of his decision, OPSEU declared the process to be a success. In fact, in a communiqué to its members, OPSEU described the award's language on academic freedom as "nothing short of historic".

II. Freedom of association and the right to strike

[19] Counsel for all parties spent considerable time and effort reviewing the law on section 2(d) of the *Charter*. In the factums and at the hearing, I read and heard much debate about whether the legislation at issue in this case violates OPSEU members' rights of freedom of association. While the law on freedom of association is not difficult to state generically, the application of the *Charter*-based principles to the Act and the to context in which the Act was enacted is much less straightforward.

[20] The Supreme Court of Canada has recently re-stated that the only proper approach to freedom of association under the *Charter* is one that "examines whether activities fall within the scope of s. 2(d) and whether government action has substantially interfered with those activities, in purpose or effect": *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, at para. 33. When applying this standard, there are some cases where "the state's responsibility in causing the substantial interference is self-evident. Consider, for example, legislation that prohibits a type of associational activity, such as a ban on striking…it is so self-evident that the interference is attributable to the state that it need not be discussed expressly": *Ibid*., at para. 34.

[21] In the labour context, it is the right to meaningful collective bargaining that is the important aspect of freedom of association under the *Charter*. "What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s. 2(d): *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3, at para. 93. "[T]he "burden imposed by s. 2(d) . . . focuses on…the ability to exercise a fundamental freedom": *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016, at para. 28.

[22] In turn, "the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations": *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245, at para. 3. With back-to-work legislation such as the Act in issue here, "the purpose or effect of the government action substantially interferes with associational Activity": *Société des casinos*, at para. 23. "The [Act] demonstrably meets this threshold because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process": *Ibid.*, at para. 78.

[23] Counsel for Ontario argue that the inquiry into whether a law substantially interferes with a meaningful process of collective bargaining is "contextual and fact specific". They contend that the fact that the Act prohibits all strike activity is not conclusive of the section 2(d) analysis.

Rather, Ontario submits, a court must examine the full context and history of the impugned statute to determine whether it constitutes substantial interference.

[24] Ontario's counsel go on to submit that the present case is distinguishable from *Canadian Union of Postal Workers v. Canada*, 2016 ONSC 418 ("*CUPW 2016*"), where back to work legislation was held unconstitutional. They point out that in *CUPW 2016*, the court found that there "was clearly some prospect of a negotiated solution to [the parties'] differences before any legislative intervention": *Ibid*., at para 193. By contrast, Ontario contends, the record before me shows that the parties were at an impasse such that there was no prospect of a negotiated resolution. The right to strike, according to Ontario's counsel, had run its course and was no longer a vehicle for meaningful collective bargaining.

[25] Counsel for OPSEU point out that while the Act may pronounce in its preamble, and government representatives may have stated in the legislature, that the matter was at an impasse, negotiations were ongoing. In fact, it is their view that the momentum of the negotiations had shifted to their advantage with the overwhelming rejection of the Council's final offer by the OPSEU membership. They view the impugned legislation as the government's means of depriving OPSEU of the advantage afforded by this new momentum.

[26] As indicated earlier in these reasons, there is reason to be skeptical of OPSEU's optimism about the negotiations having shifted to favour the union side. The "momentum", if that's what it can be called, was entirely one-sided; but it takes two to negotiate. OPSEU may have been energized to continue hard bargaining supported by a strike, but the Council was clearly frustrated and unprepared to continue the negotiations. The union membership's rejection of the Council's offer did not lead to any movement on the issues by the Council; rather, it prompted a conclusion by the Council, and by the government to which it reported, that the strike would be protracted and potentially interminable.

[27] OPSEU's counsel also submit that the critical time for trying to work through the impasse had not quite passed. In this they are certainly correct. The Act was put through the legislature after the strike was on for five weeks. The government's affiant, Ivonne Mellozzi, the Director of the Accountability Branch of the Ministry of Training, Colleges, and Universities, deposed in her affidavit that the Ministry had determined that a "tipping point" will have been reached after the strike goes on for six weeks.

[28] Ms. Mellozzi conceded that OPSEU's vote, and the legislation that came on the heels of that vote, effectively reduced the negotiating time by a week. The evidence of the government cutting the bargaining short from their own estimated timeline is clearly laid out in the Mellozzi affidavit, para. 121:

> [T]he Ministry identified the six-week mark as a 'critical tipping point' where the strike would have major impacts on the academic year and create risks to program accreditation (as discussed further below). Given the failure to reach a bargained resolution or an agreement by the parties to send remaining issues to voluntary interest arbitration, in order to avoid this critical tipping point return-to-work

> legislation would need to be introduced and passed by the Legislature before this point. The return-to-work legislation was passed on November 19, 2017, and college and academic staff returned to work on November 20, 2017 – five weeks to the day after the strike began.

[29] In light of the government's one-week acceleration of the back-to-work legislation, there is strenuous debate between the parties as to whether legislative intervention was sufficiently respectful of *Charter* rights. "The test," as the Supreme Court has said, "is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining": *SFL, supra*, at para. 78.

[30] According to the government's evidence, at the six-week point legislative action would have been too late to save the academic year and to prevent the turmoil that the year's loss would cause to college students. At the five-week point, the result is less clear. Legislative action may have interfered with collective bargaining, or, perhaps, it may have just ended the ongoing standoff between OPSEU and the Council. That assessment is inevitably speculative.

[31] It is arguable that in these circumstances the benefit of the doubt should be given to the government as the policy-making authority. After all, the government's prompt resort to legislative intervention had the effect of cutting short the negotiating period, but it also ensured that the school year would be saved. The evidence is indeterminate as to whether the government acted precipitously in interfering with collective bargaining, or acted responsibly in getting the students back to the classroom in the face of stalled collective bargaining.

[32] I cannot conclude that the timing of the Act – the very quick introduction of back-to-work legislation following the OPSEU membership vote – is truly comparable to the legislation at issue in *CUPW 2016*. In that case, the legislation's timing was such that its interference with ongoing and potentially fruitful collective bargaining was well established in the evidence. In fact, the evidence in *CUPW 2016* was not that the collective bargaining process was at a standstill. The offers were flowing back and forth with no real impasse between the negotiators. It had become clear, however, that the employer could not possibly get the terms it desired through the bargaining process alone. As the employer's representative put it, they did not need more time to negotiate over the union members' new wage increases; rather, "We needed more . . . we needed more savings": *Ibid.*, at para. 193.

[33] That is a form of intervention that is in principle very different than the legislative initiative at issue here. The government in the present case may have acted to save time, but the form of intervention was substantively neutral. The government in the *CUPW 2016* case acted not to save time but, in the most literal sense, to save the employer money. There is nothing neutral about that, and it was understandably found to be an interference with the meaningful process of collective bargaining and thus an abrogation of the right to strike: *Ibid.*, at para. 184-185.

[34] In the present case, the legislation's timing is in every sense a 'toss up' as to whether it interfered with any ongoing bargaining at all. Evidence in the record suggests that the accelerated enactment of the Act at the 5-week rather than the 6-week point may have driven the nail into the

coffin of the negotiating process. But the evidence also establishes that the collective bargaining between OPSEU and the Council was already all but dead and buried. The government may have jumped the gun by a week, or it may have acted prudently when seeing the writing on the wall.

[35] As the Supreme Court has instructed, "[t]o constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer: *Ibid*., at para. 92. The freedom to associate and to engage in meaningful collective bargaining "does not require the parties to bargain indefinitely" to no agreeable or foreseeable end: *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101, at para. 65.

[36] On the basis of the evidence before me, OPSEU has not satisfied its onus of establishing that the Act, which came after a 5-week strike and nearly 5 months of negotiations, all of which had culminated in a complete rejection by one side of the other side's final offer, interfered with a meaningful bargaining process. It ended what appeared to the government to be a bargaining impasse.

[37] As the Supreme Court has recently clarified, the section 2(d) substantial interference analysis is strict: *Société des casinos*, at para. 43, quoting J. Cameron and N. Des Rosiers, "The Right to Protest, Freedom of Expression, and Freedom of Association", in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 737, at p. 749. If there is substantial interference with meaningful collective bargaining, then there is an infringement of s. 2(d). But if there is no substantial interference, the government can act and the legislature can enact an end to the strike. While the timing of the Act may have accelerated the end to the negotiating process, the government assessed that it had reached the point of diminishing and, likely, no returns.

[38] Although that was a judgment call by government, there is nothing in the evidence that, on the balance, contradicts the government's assessment. In these circumstances, the legislation's imposition of an alternative to stalled negotiations did not amount to a substantial interference with meaningful collective bargaining.

[39] Accordingly, the Act did not infringe section 2(d) of the *Charter*.

III. The section 1 justification

[40] Given my conclusion that the Act did not interfere with meaningful collective bargaining, and therefore did not infringe section 2(d), there is no need to fully analyze the arguments put forward by the parties under section 1 of the *Charter*.

[41] That said, the jurisprudence provides that even legislation that clearly interferes with meaningful collective bargaining can be "justified in abrogating the right to strike and substituting a fair arbitration scheme": *RWDSU v. Saskatchewan*, [1987] 1 SCR 460, at para. 31. Accordingly, in the event that I am wrong in my conclusion under section 2(d) of the *Charter*, and since all counsel

have devoted considerable time and attention to the section 1 arguments, I will take this opportunity to run through the test albeit somewhat more briefly than I might had I concluded that the Act actually infringed section 2(d).

[42] If a breach of a *Charter* right is made out, the government assumes the onus under section 1 of establishing that the purpose and the effect of the infringement are justified: *The Queen v. Big M Drug Mart Ltd*., [1985] 1 SCR, 295, at paras. 139-141. The test under section 1 was originally set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 SCR 103. It is by now very well known.

[43] The government must demonstrate, on a balance of probabilities, that: a) the objective of the measure is pressing and substantial; b) there is a rational connection between the objective and the measures taken to achieve it; c) the measure minimally impairs the *Charter* right in question; and d) the measure is proportionate as between its benefits and its infringement of a *Charter* right: *Ibid*., at paras. 67-71. Each of those steps must be analyzed in turn.

a) Pressing and substantial objective

[44] I have no trouble concluding that the legislative objective of resuming classroom instruction at Ontario's 24 colleges, and the consequent mitigation of the harm inflicted on students by a lengthy strike in those institutions, is pressing and substantial. The record establishes that the government's intervention was done to minimize the risk to the academic term, salvage the school year for students' employment and professional accreditation requirements, and address the substantial financial and personal implications for college students. Like the harms that might ensue from a lengthy public transportation strike, these are the type of serious personal and economic harms that appellate courts have identified as justifying legislative intervention: see *Amalgamated Transit Union, Local 113 v. Ontario*, 2024 ONCA 407, at paras. 75-79.

[45] In *RWDSU*, at para. 31, Chief Justice Dickson (dissenting) observed that "members of the public who do not participate in a particular collective bargaining process ought not to be unduly harmed when the bargaining fails to produce a settlement." Accordingly, the Supreme Court has more recently confirmed that an infringement of the right to strike can be justified where the strike involves "essential services, vital state administration, clear deadlocks and national crisis": *Health Services, supra*, at para. 108.

[46] Perhaps not surprisingly, the parties have engaged in some debate over whether colleges provide an essential state service. However, the evidence in the record certainly supports the notion that the parties were deadlocked. While counsel for OPSEU argues that there was still momentum to the negotiations at the time of the Act's enactment, it is also the case that the only "momentum" identified is the outright, definitive rejection by OPSEU of the Council's proposal. One can readily understand why one side's momentum is the other side's deadlock. It is hard to imagine a party waiting for a more definitive sign of deadlock than an overwhelming vote rejecting that party's position.

[47] The Act's stated objective of moving beyond the impasse and allowing the colleges to pursue their important educational purpose thus qualifies as a pressing and substantial objective.

At this stage, evidence of actual harm to students is not necessary; the theoretical and logical potential for such harm suffices to pass the first section 1 hurdle: *Harper v. Canada (Attorney General),* [2004] 1 SCR 872, at paras. 25-26, 93.

b) Rational connection

[48] As Ontario's counsel point out, the evidentiary burden at the rational connection stage of the section 1 test is not especially onerous. Simply put, "the measure must not be arbitrary, unfair or based on irrational considerations": *Ontario Catholic Teachers*, *supra*, at para. 186, citing *Canada v. Taylor,* [1990] 3 SCR 892, at 921. All the government needs to show under this heading is that the impugned measure may further the objective. There is no requirement here that the government bring proof that it will do so: see *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134, at para. 96.

[49] Under the circumstances, enactment of back-to-work legislation ending the strike and referring all issues to binding arbitration was rationally connected to the government's objectives of resuming college instruction and salvaging the academic year for college students.

c) Minimal impairment

[50] At the minimum impairment stage of the section 1 test, the court asks "whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on [the *Charter* right]": *R. v. Edwards Books and Art Ltd.,* [1986] 2 SCR 713, at para 132, That does not mean, however, that the government must measure the impairment of every single policy alternative imaginable in order to find the absolute minimally impairing option.

[51] As the Supreme Court put it in *Montréal (City) v. 2952-1366 Québec*, [2005] 3 SCR 141, at para. 94, "The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way." In other words, the impairment must be minimal, but "need not be the least impairing option": *Harper*, *supra*, at para. 110. It must impair the right "as little as reasonably possible in order to achieve the legislative objective": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, at para. 165.

[52] In the context of a section 2(d) infringement, this generally means that a "legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party": *Reference Re Public Service Employee Relations* Act *(Alta.),* [1987] 1 SCR 313, at para. 116. The government does not need to have exhaustively researched every potential arbitrator and every conceivable arbitral procedure, so long as it can "ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving [labour disputes] in a fair, effective and expeditious manner": *Ibid*.

[53] It is evident that the replacement for the right to strike that the Act put in place – the content-neutral mandate for a mutually acceptable arbitrator to conduct a process akin to an interest

arbitration –avoided the constitutional pitfalls of the *CUPW 2016* intervention. The *CUPW 2016* legislation had not only ended the strike by union workers, but had imposed a type of arbitration that restricted the arbitrator's discretion and that was designed not to replicate the collective bargaining process but to replace it. The legislation also contained "restrictions on the content of a new collective agreement. The term of the agreement and the extent of wage increases were fixed": *CUPW 2016*, at para. 7.

[54] In other words, the *CUPW 2016* legislation was an intervention into meaningful collective bargaining in that it guaranteed for the employer a substantive economic outcome that was against the union's wishes. While the right to strike under section 2(d) of the *Charter* it does not guarantee any particular outcome to the collective bargaining process, it prohibits government from fixing collective bargaining unfairly in its favour: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, at para. 91. The entire purpose of protecting the right to strike is to undo the inherent inequalities between union members and employers, not to exacerbate them: *SFL*, at para. 55.

[55] The form of arbitration imposed by the Act does not dictate an outcome or skew the process in the same rights-infringing way. As discussed above, it did not dictate any specific terms, it imposed a neutral form of arbitration, and it resulted in a "historic" achievement for OPSEU in reaching a new collective agreement.

[56] Accordingly, the Act's implementation of "an impartial and effective dispute resolution process" in lieu of a strike and direct negotiations satisfies the minimally impairing requirement of section 1 of the *Charter*: see *SFL*, at para. 92. That kind of content-neutral arbitral process is precisely what was missing in the *CUPW 2016* case, where the means chosen to accompany the *Charter* infringement imported an arbitration model that was "inappropriate for the complex issues in dispute and biased in favour of the employer": *CUPW 2016*, at para. 18.

d) Proportionality

[57] The proportionality stage of the section 1 test examines the "practical impact", not the objective or purpose, of the impugned legislation: *Canada (Attorney General) v. JTI-Macdonald Corp*., [2007] 2 SCR 610, at para. 45. The task for the court is to weigh the societal benefits against the law's deleterious effects on the holders of the infringed right.

[58] The contest between these two interests emerges with clarity in the present case. On one hand, OPSEU members ought not have their *Charter* rights undermined through removal of their collective ability to strike – the mechanism which, more than any other legal tactic available to them, puts workers on an equal bargaining footing with their employer: *SFL*, at para. 75. On the other hand, "members of the public who do not participate in a particular collective bargaining process ought not to be unduly harmed when the bargaining fails to produce a settlement": *RWDSU*, *supra*, at para. 31.

[59] In this fact-based, contextual exercise, "[t]he government has the onus of showing that the salutary effects of the [Act] outweigh its deleterious effects": *ATU Local 113 v. Ontario*, 2023 ONSC 3618, at para. 197.

[60] The evidentiary base put forward by the government for the salutary effects of the legislation – i.e. the respite it delivered to student members of the public disadvantaged due to the OPSEU strike – is summarized by Ontario's counsel in their factum, at para. 80:

> Here, the evidence demonstrates that the harm to students was palpable. The Ministry received approximately 700 pieces of correspondence from college students, family members, and the general public describing the financial, health, and academic impacts of the strike on them. These impacts were shown to be particularly acute for students with disabilities as well as for international students and others who do not permanently reside in Ontario. Student leaders of eight of Ontario's community Colleges also provided an open letter calling on the government to 'step in and help our students return to the classroom'. [citations omitted]

[61] As discussed above, OPSEU's counsel argues that the government jumped to a legislative intervention one week too early – at the 5-week point rather than at the 6-week "tipping point". However, they do not seriously debate that at *some* point the academic year would have been lost for the college students had the strike not been resolved. It is self-evident that the adverse impact on students of a lengthy strike would be severe.

[62] I note that OPSEU has put forward expert evidence by Dr. Stephanie Ross of McMaster University contending that a previous lengthy strike at York University did not produce lasting negative effects across the board on students. That may be true, but it does not seem relevant. The point of concern for the government, however, was not so much the long-term effects of the strike but the short-term effect – i.e. that loss of a school year would be harmful to the students in the moment.

[63] Ontario's expert on the impact of a college strike, Dr. Paul Grayson of York University, makes this very point. He opines that "if you're looking at the impact of a strike you don't look at whether they eventually got over it, you look at what they were going through at the time." The loss of a school year, like the loss of an opportunity or even the loss of a limb, can potentially be recovered or replaced down the road; but the loss was nevertheless harmful when experienced. Time may heal all wounds, but that does not mean that the wound was never inflicted and did not hurt.

[64] Counsel for Ontario submit, and it is difficult not to agree, that the weighing of competing interests here is not amenable to scientific precision. The contest faced by government in the instant case required a measuring of "the constitutional and social importance of the interests adversely effected, the relative importance to the individuals affected of the benefit of which they were deprived, and the importance of the state interest…[including] 'claims of competing individuals or groups on the distribution of scarce…resources": *McKinney v. University of Guelph*, [1990] 3 SCR 229, at 281.

[65] This kind of sociological assessment is within the core competence of government. In tackling a complex social problem or question, the government is entitled to a degree of deference: *JTI-MacDonald*, *supra*, at para 43. It exercised its responsibility to remedy the students' plight by terminating OPSEU's strike, and it exercised its responsibility to ensure a fair replacement process for collective bargaining by creating a neutral arbitral process where, as with direct labour negotiations, no outcomes were off the table.

[66] In this way, the government did what it could to ensure that the deleterious effects on OPSEU members of its intervention into the collective bargaining process did not outweigh the broad societal benefits gained through that intervention. It may have interfered with the collective bargaining process, but it was a measured, proportionate interference that was remediated by the appropriate arbitration put in its place. By proceeding in that way, the government did not engage in a disproportionate undermining of OPSEU members' rights.

[67] The Act was justified in that it was not contrary to the proportionality restriction in section 1 of the *Charter*.

IV. Disposition

[68] The Application is dismissed. The Act does not infringe freedom of association under section 2(d) of the *Charter*, and even if it were found to infringe section 2(d) its enactment was justified under section 1 of the *Charter*.

[69] By agreement among the parties, OPSEU shall pay Ontario costs of the Application in the all-inclusive amount of $100,000. There will be no costs paid by or to the Intervenor.

Date: July 11, 2024 **Morgan J.**