IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

B E T W E E N :

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)	***H. S. Leonoff, Q.C.***, ***M. A. Conner*** *and* ***M. A. Bodner*** *for the Appellant (via videoconference)* ***G. H. Smorang, Q.C.***, ***S. L. Carson*** *and* ***K. M. Worbanski*** *for the Respondents (via videoconference)* *Appeal heard:* ***June 2, 2021*** *Judgment delivered:* ***October 13, 2021***

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	)

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2020 MBQB 92

CHARTIER CJM

Introduction and Issues

[1] The key question on this appeal is whether it is unconstitutional for legislation to prevent collective bargaining on wages for a limited period of time.

[2] The defendant (Manitoba) says that that question has been answered by the Supreme Court of Canada in *Meredith v Canada (Attorney General)*, 2015 SCC 2. It submits that *Meredith* stands for the legal proposition that broad-based, time-limited wage restraint legislation does not violate the freedom of association as guaranteed under section 2(d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and is, therefore, constitutional.

[3] Manitoba appeals the trial judge's judgment that *The Public Services Sustainability Act*, CCSM c P272 (the *PSSA*), which was passed in 2017, is unconstitutional, as well as her decision that Manitoba's conduct during the 2016 contract negotiations between the University of Manitoba (the U of M) and one of the plaintiffs, the University of Manitoba Faculty Association (UMFA), violated section 2(d) of the *Charter*.

[4] Since the advent of the *Charter*, courts have engaged in a constitutional dialogue with the legislative branch of government in regard to *Charter* rights. Legislatures enact laws based on policy choices elected representatives make. Courts ensure those choices conform to constitutional norms. Legislatures have the last word; they can revise constitutionally deficient laws based on the guidance of the courts. This appeal provides an opportunity to review the respective roles of the court and the Legislature in relation to this dialogue.

[5] In the case at hand, the *Charter* right concerns the right to associate in order to collectively pursue workplace goals pursuant to section 2(d). The main ground of appeal is whether the *PSSA* substantially interfered with the section 2(d) associational rights of employees to engage in a meaningful process of collective bargaining. The *PSSA* sets wage caps of 0%, 0%, 0.75% and 1% over a four-year period. This wage restraint legislation applies broadly across the public service

to both unionized and non-unionized employees, covering almost 20% of Manitoba's workforce.

[6] Manitoba argues that it has the right to impose broad-based, time-limited wage restraint legislation on the public sector in order to meet its budgetary priorities. It submits that the Supreme Court of Canada's decision in *Meredith* provides clear binding authority for its position that the *PSSA* does not infringe the section 2(d) right to associate. Manitoba also submits that the *PSSA* and the legislation that was the subject matter in *Meredith*, the *Expenditure Restraint Act*, SC 2009, c 2, section 393 (the *ERA*), are sufficiently similar so that if one of them is constitutional, so is the other. Finally, it makes the point that *Meredith* was subsequently relied upon by the appellate courts in Quebec, British Columbia and Ontario (the three appellate courts), who all upheld the constitutionality of the *ERA* in respect to other bargaining units. The Supreme Court of Canada denied leave to appeal the judgments in all three cases.

[7] The plaintiffs are the Manitoba Federation of Labour and 28 unions. Their position stands in stark contrast to that of Manitoba. They argue that *Meredith* does not create a binding legal precedent that can determine the legal outcome in other factual contexts. The plaintiffs submit that the trial judge was right to conclude that the *PSSA* substantially interfered with their associational activities. They argue that, given the inquiry to determine whether a government measure amounts to substantial interference is contextual and fact-specific, deference is owed to the trial judge's decision.

[8] Manitoba raises two grounds of appeal. First, it submits that the trial judge erred in finding that the manner in which wages are restrained in the 2017 *PSSA* brings about substantial interference in collective bargaining so as to

amount to an infringement of freedom of association under section 2(d). Second, Manitoba argues that the trial judge erred in finding that Manitoba's conduct during the 2016 contract negotiations between the U of M and UMFA amounted to an infringement of freedom of association.

[9] For the reasons that follow, I would conclude that the 2017 *PSSA* legislation does not substantially interfere with section 2(d) associational rights, but that Manitoba's conduct during the 2016 contract negotiations between UMFA and the U of M did substantially interfere with those rights.

The Decision of the Trial Judge

[10] To establish the proper footing for this appeal, it is helpful to identify the claims that were considered by the trial judge and how she dealt with them. The plaintiffs sued Manitoba. In a multi-faceted statement of claim (which was amended and then re-amended), they sought interim and/or interlocutory injunctions, declarations of *Charter* violations and numerous other orders.

[11] Before the trial judge, the plaintiffs were seeking the following relief:

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>
> 1. The Plaintiffs claim:
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> . . .
>
> (c) a declaration that [Manitoba] violated s. 2(d) and s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 ("the *Charter*") respecting the rights of employees represented by UMFA, and that the violation cannot be justified under s. 1 of the *Charter*;

(d) a declaration that [Manitoba] violated the s. 2(d) and s. 7 *Charter* rights of employees represented by the Plaintiff Unions by failing to give them an opportunity to engage in a timely, good faith process of collective bargaining with their respective employers prior to enacting the [*PSSA*], and that the violation cannot be justified under s. 1 of the *Charter*;

(e) in the alternative to paragraph (d), if a process of meaningful consultation between the Plaintiff Unions and [Manitoba] about the [*PSSA*] is a constitutionally adequate substitute for the process of timely, good faith collective bargaining between the Plaintiff Unions and their respective employers in the circumstances of this claim, which is denied, then:

> a. a declaration that [Manitoba] violated the s. 2(d) and s. 7 *Charter* rights of employees represented by [the] Plaintiff Unions who participated in the Fiscal Working Group (as herein defined), by failing to engage in a good faith process of negotiation and meaningful consultation process prior to enacting the [*PSSA*], and that the violation cannot be justified under s. 1 of the *Charter*; and
>
> b. a declaration that [Manitoba] violated the s. 2(d) and s. 7 *Charter* rights of employees represented by the Plaintiff Unions who did not participate in the Fiscal Working Group, by failing to engage in any process of good faith negotiation and meaningful consultation prior to enacting the [*PSSA*], and that the violation cannot be justified under s. 1 of the *Charter*;

(f) a declaration that sections 9 – 15 of the [*PSSA*] violate the rights and freedoms guaranteed by s. 2(d) and s. 7 of the *Charter*, cannot be justified under s. 1 of the *Charter*, and are invalid and of no force and effect;

. . .

(i) an order that any term or condition of the [*PSSA*] declared invalid does not bind any of the Plaintiff Unions, their members, or their employers;

. . .

[12] At trial, the plaintiffs advised the trial judge that they were no longer pursuing declarations pursuant to section 7 of the *Charter*; only declarations under section 2(d).

[13] The trial judge dealt with the above-mentioned five claims by dismissing three and accepting two, as set out below.

a) Claim 1(e) Dismissed

[14] Interestingly enough, the trial judge decided to start her analysis with the alternative argument found at Claim 1(e) (see paras 281-300). The plaintiffs argued that, because the *PSSA* legislation affected them, Manitoba had a duty to consult with them prior to enacting the legislation. Relying on Supreme Court of Canada authority, the trial judge denied this relief, holding that there is no duty on governments to consult affected entities prior to enacting legislation.

b) Claim 1(d) Dismissed

[15] The trial judge then dealt with Claim 1(d) (see paras 301-3). The plaintiffs argued that Manitoba had a duty to undertake timely and good faith bargaining as a prerequisite to the introduction of the *PSSA*. Relying essentially on the same principles found in her analysis with respect to Claim 1(e), the trial judge held that no such duty existed and denied this relief.

c) Claim 1(f) Accepted

[16] Next, the trial judge dealt with Claim 1(f) (see paras 304-425). The plaintiffs submitted that sections 9 to 15 of the *PSSA* violated the section 2(d) *Charter* rights of their members and that this violation could not be justified under

section 1. In comprehensive reasons, the trial judge granted the relief claimed, declaring that wage restraint of the *PSSA* was not constitutional.

d) Claim 1(c) Accepted

[17] The trial judge then dealt with the fourth claim, Claim 1(c) (see para 429). The plaintiffs claimed that Manitoba had substantially interfered in the 2016 collective bargaining between UMFA and the U of M, and had thereby breached the section 2(d) *Charter* rights of the UMFA members. The trial judge found a violation of section 2(d) and granted the relief claimed.

e) Claim 1(i) Dismissed

[18] Finally, in the last paragraph of her reasons (see para 434), the trial judge dealt with Claim 1(i). The plaintiffs had sought "an order that any term or condition of the [*PSSA*] declared invalid does not bind" them. In light of her conclusion of Claim 1(f), the trial judge found the relief sought at Claim 1(i) to be "redundant" and dismissed it (*ibid*).

[19] In the result, the trial judge granted the relief sought concerning Claim 1(c) and Claim 1(f), and she dismissed Claim 1(d), the alternative claim at Claim 1(e) and Claim 1(i). Manitoba's two grounds of appeal relate to the two claims that were successful at trial:

- Claim 1(c): Whether Manitoba had substantially interfered in the 2016 collective bargaining between UMFA and the U of M.

- Claim 1(f): Whether sections 9 to 15 of the *PSSA* violated section 2(d) and are, therefore, unconstitutional.

[20] Finally, Manitoba accepts that, if the *PSSA* is unconstitutional, the section 2(d) infringement cannot be justified under section 1 of the *Charter*.

Analysis

[21] Prior to starting my examination of the two issues on appeal, it would be helpful to review the analytical framework of section 2(d) as it relates to the right to associate in order to collectively pursue workplace goals.

a) The Analytical Framework of Section 2(d) in the Workplace Context

[22] Section 2(d) guarantees "freedom of association." It is often referred to as an "associational right" (see, for example, *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 90, 97, 112, 128-29; and, more recently, *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 62, 131, 147). In the workplace context, the section 2(d) right that is guaranteed is the right of employees "to associate in a process of collective action" (*Health Services* at para 19) in order "to engage in a meaningful process of collective bargaining" (*Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 1 (*SFL*)).

[23] The Supreme Court of Canada describes section 2(d) as "a limited right" (*Health Services* at para 91) in that it is restricted in the three following ways:

a) It is a procedural right: It guarantees the right to a process, not a certain substantive or economic outcome. This includes a right to a fair and meaningful process of collective bargaining, which incorporates a) the right of employees "to join together to pursue workplace goals"; b) the right "to make collective representations

to the employer, and to have those representations considered in good faith"; and c) "a means of recourse should the employer not bargain in good faith" (*SFL* at paras 1, 29).

b) It is general in nature: The associational right does not protect "all aspects of 'collective bargaining'" (*Health Services* at para 19). It guarantees the right to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method (see *Mounted Police* at para 67).

c) It is limited to "substantial interference": The associational right does not protect against all interference with the procedural right to bargain collectively, only against "substantial interference" with the associational activity (*Health Services* at para 90).

[24] As stated above, the interference with the associational activity must be "substantial" (*ibid*). This is not an easy threshold to meet. Merely interfering, impacting or impairing the collective bargaining process will not be enough to meet the "substantial interference" test. As the majority explained in *Health Services*, to constitute "substantial interference", the intent or effect of the government measure "must seriously undercut or undermine" (at para 92) the associational activity of the employees who were coming together to engage in a meaningful process of collective bargaining.

[25] The party claiming that the government has substantially interfered with its section 2(d) associational right has the onus of satisfying the judge on a balance of probabilities that the test has been met. If met, the onus shifts to the state to justify the violation under section 1 of the *Charter* (see *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 47 (*Fraser*)).

[26] The test to determine whether the government interference rises to the level or degree of "substantial", involves two "contextual and fact-specific" inquiries (*Health Services* at para 92). These inquiries are as follows (at para 93):

> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> [emphasis added]

[27] The need for the second inquiry only arises if the first inquiry criterion is met (see para 97).

[28] The first inquiry requires the judge to focus on the importance of the matter affected; is the issue so important or significant that it discourages or undermines the capacity of employees to pursue workplace goals collectively? The Supreme Court of Canada provided two examples of matters that may meet the first inquiry on the importance of the subject matter: (a) government measures that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer, and (b) measures that unilaterally nullify significant negotiated terms in existing collective agreements (see para 96).

[29] The substantial interference test does not end with the determination of importance at the first inquiry. If that criterion is established, the second inquiry is required. The second inquiry focusses on good faith; does the government

measure respect the fundamental precept of collective bargaining—the duty to consult and negotiate in good faith (see para 97)? As explained by the Supreme Court of Canada in *Health Services*, even where government measures involve matters of importance or significance, there will be no violation of section 2(d) if the measures taken "preserve a process of consultation and good faith negotiation" (at para 94).

[30] As a result, in order for the government measure to have substantially interfered with the associational rights of employees, the party claiming the section 2(d) violation must obtain from the judge an affirmative answer on the first question below and a negative answer on the second:

a) First inquiry: Is the issue so important or significant that it discourages or undermines the capacity of employees to pursue workplace goals collectively?

b) Second inquiry: Does the government measure respect the fundamental precept of collective bargaining, being the duty to consult and negotiate in good faith?

[31] I now turn to the case at hand.

[32] Manitoba raises two arguments. First, it submits that the trial judge erred in finding that the manner in which wages are restrained in the *PSSA* brings about substantial interference in the collective bargaining process. Second, Manitoba says that the trial judge erred in finding that its conduct during the 2016 contract negotiations between the U of M and UMFA infringed section 2(d).

b) Standard of Review

[33] Before going further, it is important to address the issue of the applicable standard of review with respect to each of the two issues on appeal. The nature of the questions raised by the two issues are quite different. The importance of this distinction cannot be understated because the nature of the question will also inform the applicable standard of review. While both grounds pertain to infringements of section 2(d), the nature of each alleged infringement differs.

[34] A government can infringe upon a section 2(d) right in two ways: by its legislation, or by its conduct. The first ground questions the constitutionality of duly enacted provisions of the *PSSA*, not the conduct (see *Reference re Public Services Sustainability (2015) Act*, 2021 NSCA 9 at para 19, leave to appeal to SCC refused, 39598 (8 July 2021)). The second ground, however, does question Manitoba's conduct.

[35] In the same way the positions of the parties on the merits stand in stark contrast, so do their positions on the applicable standard of review.

[36] Manitoba submits that both grounds of appeal raise constitutional issues and that the rule of law requires that they both be reviewed on a correctness standard.

[37] For their part, the plaintiffs submit that, since the Supreme Court of Canada held in *Health Services* that the inquiry to determine whether a breach of section 2(d) occurred "in every case is contextual and fact-specific" (at para 92), the trial judge's decision is owed deference, absent palpable and overriding error, on both grounds.

[38] One would have expected to find, at either the appellate court or the Supreme Court of Canada level, some commentary on the standard of review as it relates to:

a) whether the standard of review differs when the alleged infringement concerns the constitutionality of the legislation as opposed to the conduct of the government; and

b) whether the fact that a trial judge's analysis is "contextual and fact-specific" (*ibid*) demands a review on the palpable and overriding error standard.

Unfortunately, there is very little.

[39] Since this appeal arises from a civil action, the standards of review set out in *Housen v Nikolaisen*, 2002 SCC 33, apply. The first ground questions the constitutionality of the *PSSA*, whereas the second ground questions Manitoba's conduct during the 2016 contract negotiations between the U of M and UMFA. In my view, the nature of each question is different. Deciding whether legislation is constitutional involves the interplay between two laws: the impugned legislation, and the Constitution. Deciding whether certain conduct infringes a *Charter* right involves the interaction of a particular set of facts with the *Charter* provision.

[40] I will deal first with the standard of review on the constitutionality of the legislation. The plaintiffs submit that, because the trial judge's section 2(d) analysis is contextual and fact-specific in every case, her conclusion on this question is to be reviewed on the palpable and overriding error standard; not on correctness. I cannot accede to their submission.

[41] If the constitutionality of legislation does not raise a question of law, then I do not know what does. In my view, the constitutionality of the legislation is the quintessential question of law. Legislation is constitutional or it is not. The rule of law and the principle of universality requires that there only be one correct answer to that question; reasonable people cannot disagree on the answer. As the Supreme Court of Canada explained in *Housen*, "[T]he principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations" and are to be given "a broad scope of review with respect to matters of law" (at para 9). I cannot sum up my view of this issue better than by quoting from the majority decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (at para 53):

> . . . The application of the correctness standard for [constitutional] questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9], at para. 58.

[42] A correctness standard ensures this "consistency" (*ibid*), as well as the law-settling role appellate courts are called to exercise. The Supreme Court of Canada has held that the applicable standard of review with respect to constitutional decisions is correctness (see *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at para 26). However, there was a caveat. It stated that deference is owed "[w]here it is possible to treat the constitutional analysis separately from the factual findings that underlie it" (*ibid*; see also *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 49-56). It is of course understood that deference will only be owed to those factual findings that are relevant to the constitutional analysis.

[43] I want to address directly the point made by the plaintiffs that, because a court's section 2(d) analysis is contextual and fact-specific in every case, any conclusion is to be reviewed on the palpable and overriding error standard. An analogy is useful. Questions of statutory interpretation require courts to use the "modern contextual approach" (*Verdun v Toronto-Dominion Bank*, [1996] 3 SCR 550 at para 2; see also paras 1, 3-7; and see *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21). Despite requiring a contextual analysis, questions of statutory interpretation are questions of law that are reviewed on the correctness standard (see *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 33; and, more recently, *Rooplal v Fodor*, 2021 ONCA 357 at para 44).

[44] Moreover, the relevant contextual approach that is to be used on questions relating to constitutional decisions is not unlike the approach used on questions of statutory interpretation. The Supreme Court of Canada in *Consolidated Fastfrate* set out the guiding principles for the interpretation of constitutional provisions, stating that the provision "must be read in context" consistent with "[t]he history, purpose, and text" of the provision (at paras 32, 68). This is not that dissimilar to the guiding principles of statutory interpretation that legislation be construed in accordance with "*Driedger's Modern Principle*"; that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Prof Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 1, citing Elmer A Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67).

[45] As a result, despite requiring a contextual analysis, questions of constitutional interpretation, like statutory interpretation, are questions of law that are reviewed on the correctness standard.

[46] Whether legislation is constitutional is a quintessential question of law. Therefore, the applicable standard of review is correctness. However, to the extent that the section 2(d) inquiry is premised on an assessment of relevant facts, any relevant factual finding will be owed deference and will be reviewed on the palpable and overriding error standard (see *Consolidated Fastfrate* at para 26). The appellate court will then take a last look at the accepted relevant factual foundation and decide the ultimate issue (whether the legislation is constitutional) on the correctness standard.

[47] I now turn to the second ground, which pertains to state conduct during contract negotiations.

[48] While the principle of universality requires the answer on whether legislation is constitutional to be the same in all circumstances, that principle does not apply when determining whether state conduct infringes section 2(d) rights. In some situations, state conduct will infringe section 2(d), while in other situations, different state conduct will not. Since the relevant considerations with respect to the second ground, which pertains to Manitoba's conduct during contract negotiations, are more dependent on the particular factual matrix before the court, I am of the view that this calls for a less exacting standard of review than the first ground. It also requires a more nuanced standard of review analysis (see *R v Farrah (D)*, 2011 MBCA 49 at para 7; and *Young v Ewatski et al*, 2012 MBCA 64, leave to appeal to SCC refused, 35035 (28 March 2013)).

[49] Thus, I would conclude that, while raising a constitutional issue, the applicable standard of review on whether the state conduct infringes the section 2(d) *Charter* rights of individuals requires the following multi-faceted analysis:

a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.

b) The appellate court will then review the relevant factual findings underlying the judge's *Charter* analysis, to see whether there was an error. On this part of the review, the judge's decision is entitled to deference, absent palpable and overriding error.

c) The appellate court will also examine the application of the legal principles to the relevant facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the civil law context, this is a question of mixed fact and law that is reviewed for palpable and overriding error, unless an extricable legal error from the factual determination is evident, in which case the correctness standard applies.

[50] I will deal with the first ground of appeal; namely, whether the wage restraint *PSSA* legislation is constitutional.

c) Issue One—Whether the PSSA Is Constitutional

[51] Manitoba's position is unambiguous; *Meredith* is a binding precedent. It points out that *Meredith* was subsequently relied upon by the three appellate courts, with leave to appeal applications to the Supreme Court of Canada denied in all three cases. Manitoba submits that the trial judge improperly distinguished *Meredith* and the three appellate court decisions to overcome the binding precedent that upheld wage restraint legislation that is similar to the *PSSA*. The plaintiffs argue that *Meredith* does not create a binding legal precedent that determines the outcome in other factual contexts.

[52] Given that Manitoba's case stands or falls on *Meredith*, it is necessary to review *Meredith*, along with the three appellate court decisions.

I. Review of *Meredith* and the Three Appellate Court Decisions

[53] The critical issue in the present appeal is whether *Meredith* stands for the legal proposition that broad-based, time-limited wage restraint legislation does not violate the freedom of association as guaranteed under section 2(d) of the *Charter* and is, therefore, constitutional.

[54] Manitoba submits that the 2017 *PSSA* legislation and the legislation that was the subject matter in *Meredith*, the 2009 *ERA*, are sufficiently similar so that if one of them is constitutional, so is the other.

[55] A review of the history of the *ERA* will be helpful. In October 2008, the federal government decided to limit wage increases in order to respond to growing fiscal concerns. In the next few weeks, federal Treasury Board officials met with union representatives to advise that the Treasury Board had set a restricted

mandate regarding wage increases and that there was a desire to complete collective bargaining by the end of November 2008.

[56] On November 19, 2008, the federal Speech from the Throne was delivered. It indicated that the government intended to "table legislation to ensure sustainable compensation growth in the federal Public Service" (Canada, *House of Commons Debates (Hansard)*, 40-1, vol 143, No 2 (19 November 2008) at 15 (Hon Peter Milliken)). The negotiators were not authorized to discuss the terms of this legislation other than to inform the bargaining agents of their new mandate and that the legislation could include caps on increases to wage rates. The rates were not disclosed.

[57] On November 27, 2008, the federal Minister of Finance issued a fiscal statement that disclosed the *ERA* wage caps for the first time. The *ERA* was tabled in Parliament on February 6, 2009, and received Royal Assent on March 12, 2009. The *ERA* imposed broad-based, time-limited wage restraint increases in the public sector over a five-year period, retroactive to April 1, 2006; namely, 2.5%, 2.3%, 1.5%, 1.5% and 1.5% from fiscal year 2006-2007 to 2010-2011 (see section 16). While the *ERA* prohibited any other increases to compensation, it did contain an exception for RCMP members that permitted the negotiation of additional allowances to support "transformation initiatives" (the *ERA* at section 62).

[58] Which brings me to *Meredith*.

[59] *Meredith* involved a section 2(d) challenge by members of the RCMP to the *ERA*. More specifically, the members argued that rolling back scheduled wage increases for RCMP members without prior consultation violated their associational *Charter* rights. It should be noted that, at that time, the RCMP did not bargain collectively. Rather, a "Pay Council" recommended salary increases

and made recommendations to the Commissioner of the RCMP, the Minister and the Treasury Board. The Treasury Board had announced to the Commissioner salary increases of 3.32%, 3.5% and 2% for 2008, 2009 and 2010 for the RCMP members (see *Meredith* at para 7). However, the *ERA* caused these increases to be revised to 1.5% in each of 2008, 2009 and 2010 (see section 16).

[60] In *Meredith*, the majority of the Supreme Court of Canada (6:1) upheld the constitutionality of the *ERA*. It restated that "[s]ection 2(d) guarantees a right to a meaningful labour relations process, but it does not guarantee a particular outcome" and guarantees "the right of employees to associate in a meaningful way in the pursuit of collective workplace goals" (at para 25). It concluded that the *ERA* had not "substantially impaired the collective pursuit of the workplace goals of RCMP members" (at para 30).

[61] The *ERA* did not apply only to members of the RCMP. It applied to over 400,000 unionized and non-unionized federal public sector employees, as well as 48,000 employees working for federal Crown corporations. Moreover, unlike the RCMP members, these employees did not enjoy the same section 62 exemption referred to above at para 57. The *ERA* prohibited any other increases to compensation for them (see *Meredith* at para 13).

[62] Subsequent to *Meredith*, the three appellate courts considered the constitutionality of the *ERA* legislation as it applied to three different groups of employees (Canadian Broadcasting Corporation (CBC) employees; dockyard workers; and members of the Public Service Alliance of Canada (PSAC) and the Professional Institute of the Public Service of Canada (PIPSC)). See, respectively, *Canada (Procureur général) c Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163 (*Syndicat canadien*), leave to

appeal to SCC refused, 36914 (25 August 2016); *Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)*, 2016 BCCA 156 (*Dockyard Trades*), leave to appeal to SCC refused, 35569 (1 December 2016); and *Gordon v Canada (Attorney General)*, 2016 ONCA 625, leave to appeal to SCC refused, 37254 (16 February 2017).

[63] In *Syndicat canadien*, the Quebec Court of Appeal (the QCCA) looked at the *ERA* and how it impacted CBC employees. The *ERA* caused the loss of a portion of previously bargained wages and resulted in an obligation to repay certain amounts received in excess of the capped limits. Despite accepting that the *ERA* affected the previously signed collective agreement and the ability to freely negotiate a new agreement, the QCCA rejected the union's argument that any changes to an existing agreement would amount to a section 2(d) infringement. It stated that the question that needed to be answered was to what "degree or intensity" the measures interfered with the right to bargain collectively (at para 31).

[64] The QCCA held that there was still sufficient scope for collective bargaining, including on non-monetary issues such as hours of work, vacation, leaves, staffing, assignments and transfers (see para 55). After noting that there were cases where legislation had amended collective agreements without substantially affecting section 2(d) rights, it concluded that there had been no *Charter* violation in the case before it. The QCCA stated, "This is the conclusion of the Supreme Court in *Meredith*, and we should not depart from it" (at para 61).

[65] The QCCA held that, while the *ERA* placed prima facie limits on section 2(d) freedom of association rights, those limits "cannot be considered to substantially interfere with the exercise of this freedom" because they do "not

deprive the employees and associations that represent them of the possibility of having meaningful collective negotiations on workplace matters, the right to actual collective bargaining processes, or the ability to engage in collective bargaining" (at para 100).

[66] In *Dockyard Trades*, the British Columbia Court of Appeal (the BCCA) looked at the *ERA* and how it impacted dockyard workers. The *ERA* had invalidated a wage increase obtained through arbitration. Despite the rollback of this wage increase, the BCCA was not persuaded that it "undermine[d] the capacity of the union to collectively and effectively pursue its goals. The [*ERA*] explicitly guarantees the right to collective bargaining in ss. 6-10" (at para 91).

[67] The BCCA was "not persuaded that *Meredith* [could] be meaningfully distinguished from this case; both involved wage rollbacks under identical legislation" (at para 89). Applying the *Health Services* test, it concluded that there was no substantial interference with the bargaining process, stating (at para 93):

> . . . Moreover, I do not think it can be said, as contended by the appellants, that [the *ERA*] compromised the essential integrity of the collective bargaining process. It is not my view that [the *ERA*] can be said to significantly impair or thwart the associational goals of the Dockworkers. The [*ERA*] simply does not have that reach.

[68] Finally, in *Gordon*, the Ontario Court of Appeal (the ONCA) looked at the *ERA* and how *ERA*-imposed rollbacks impacted employees of the PSAC and the PIPSC, which represented "about 88% of unionized employees in the federal public service" (at para 2). It repeated what the Supreme Court of Canada had said in *Health Services* at para 94, that even if government action or legislation "substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation" (at para 175).

The ONCA concluded, "drawing on *Meredith*, *Dockyard Trades* . . . and *Syndicat canadien* . . ., that the rollbacks did not amount to substantial interference with the collective bargaining process and thus did not limit the [section] 2(d) *Charter* rights of the employees" (at para 164).

[69] The ONCA held that the federal government had "engaged in permissible hard bargaining during a period of economic crisis and government austerity" (at para 176). It noted that the *ERA* had capped wage increases for a limited period, that the limit imposed was in line with wage increases obtained through free collective bargaining, and that progress had been made on matters of interest in some of the bargaining units. It concluded that the unions "were still able to participate in a process of consultation and good faith negotiations. As such, neither the *ERA* nor the Government's conduct before or after the enactment of the *ERA* limited the appellants' s. 2(d) rights" (*ibid*).

[70] *Meredith* and the decisions of these appellate courts concluded (a) that the *ERA* did not render the bargaining process futile or undermine the activity of workers to come together in the collective pursuit of improving workplace conditions, and (b) that broad-based, time-limited wage restraint legislation did not fundamentally alter the collective bargaining process or preclude good faith bargaining from occurring on other important workplace conditions and on non-monetary matters.

[71] In the end, these courts held that, despite having such an important topic as wages taken off the bargaining table, the *ERA* did not substantially interfere with the right to collectively bargain as constitutionally protected by section 2(d). Moreover, the Supreme Court of Canada denied leave to appeal the judgments in all three cases (see para 62 herein).

II. Whether the Trial Judge Erred

[72] Manitoba's position is clear; *Meredith* and the above three appellate court decisions, whose leave to appeal applications were denied by the Supreme Court of Canada, are the "linchpins" to its submission. It submits that *Meredith* is a binding precedent that upheld the *ERA* broad-based, time-limited wage restraint legislation that is similar, albeit not identical, to the *PSSA*. Manitoba argues that the trial judge's attempts to distinguish *Meredith*'s applicability to the case at hand were in error. It argues that the trial judge erred in five ways.

i) Did the Trial Judge Err By Improperly Distinguishing Meredith on the Basis That It Was Decided in a Non-Union Context Given That the RCMP Did Not Have a Wagner Model of Collective Bargaining?

[73] Manitoba submits that the trial judge first attempted to distinguish *Meredith* on the basis that it was decided in a non-union context. The trial judge stated that, because the RCMP were not legally permitted to bargain collectively, "there was no consideration [in *Meredith*] of how the *ERA* impacted collective bargaining" (at para 312). While it appears the trial judge accepted Manitoba's interpretation of what *Meredith* and the three appellate court decisions stand for at the beginning of her reasoning (that broad-based, time-limited wage restraint legislation is constitutional), she seemed to resile from this view later in the same paragraph (*ibid*):

> [Manitoba] has relied upon the ***Meredith*** decision to argue that the ***PSSA*** restraints do not result in substantial interference with the collective bargaining process. This position was based on the Supreme Court's acceptance of temporary public sector wage restraint legislation in circumstances of financial difficulty. The acceptability of the ***ERA*** restraint legislation can also be seen in a number of Court of Appeal decisions, such as ***Dockyard Trades***,

> ***Gordon***, and ***Syndicat canadien***. However, it must be remembered that, specifically in ***Meredith***, there was no consideration of how the ***ERA*** impacted collective bargaining, as the issue before the Court was whether the ***ERA*** interfered with what had been found in [*Mounted Police*] to be an unconstitutional consultative wage determination process. The RCMP was not legally permitted to engage in collective bargaining at the time of that decision.
>
> [emphasis added]

[74] In my view, distinguishing *Meredith* on the basis that there was "no consideration of how the *ERA* impacted collective bargaining" (*ibid*) was incorrect in three ways.

[75] First, a review of *Meredith* shows that the Supreme Court of Canada did indeed consider how the *ERA* affected collective bargaining when it decided that:

1) The *ERA* did not preclude consultation on other compensation-related issues, either in the past or future (see para 28).

2) The level at which the *ERA* capped wage increases was consistent with the going rate reached in other agreements and so reflected an outcome consistent with actual bargaining processes (*ibid*).

3) The *ERA* did not prevent the consultation process from moving forward (see para 29).

4) The *ERA* cannot be said to have substantially impaired the collective pursuit of the workplace goals (see para 30).

[76] Second, distinguishing *Meredith* on the basis of the RCMP's non-union status amounts to saying that members of the RCMP have lesser substantive

Charter rights than unionized employees. Section 2(d) protects all persons irrespective of whether statutory labour regimes provide greater protection to unionized employees, who enjoy the Wagner model. All employees, unionized and non-unionized, have identical section 2(d) rights. They all equally have the right to come together to advocate for better workplace conditions. As the Supreme Court of Canada stated in *Fraser*, a case involving a non-unionized context, section 2(d) "broadly . . . includes the right to collective bargaining in the minimal sense of good faith exchanges" (at para 90).

[77] Finally, it was improper for the trial judge to attempt to distinguish *Meredith* based on the fact that the RCMP members were not at the table, able to bargain collectively, and had to use another process. That other process involved a Pay Council. That Council recommended salary increases and forwarded them to the Commissioner of the RCMP, the Minister and the Treasury Board. The Supreme Court of Canada recognized, in *Meredith*, that it did not have to consider the constitutionality of the Pay Council process. The only issue was the constitutionality of the *ERA* and whether it met the test set out in *Health Services*. It concluded that the *ERA* did and that it was constitutional.

[78] As I stated earlier, the *ERA* applied to over 400,000 unionized and non-unionized federal public sector employees, as well as 48,000 employees working for federal Crown corporations. It is my view that, if there was ever any doubt that *Meredith*'s ruling on the constitutionality of the *ERA* wage restraint legislation applied not only to RCMP members, but to everyone affected by the *ERA*, that doubt was removed when the Supreme Court of Canada denied leave to appeal the three appellate court decisions.

ii) Did the Trial Judge Err In Finding the PSSA Was Unconstitutional Because the Wage Cap Levels in the PSSA Were Not Comparable to Wage Levels Established Through Pre-Legislative Collective Bargaining?

[79] There are two aspects to this ground. One touches the issue of pre-*PSSA* collective bargaining and the other relates to wage comparability.

[80] In regard to the first aspect, one of the stated reasons for the trial judge's ruling that the *PSSA* was unconstitutional was that Manitoba "had not endeavoured to collectively bargain wage restraint within the public sector prior to the *PSSA*'s enactment" (at para 348) (emphasis added). Manitoba points out that, not only does *Meredith* not require collective bargaining in advance of wage restraint legislation, the jurisprudence establishes that governments owe no duty to consult or negotiate prior to passing legislation (see *Health Services* at para 157; see also, more recently, *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40).

[81] I agree. In this case, while Manitoba could have entered into pre-legislative collective bargaining, it chose not to. Given that the law does not require governments to do so, it was, in my view, improper for the trial judge to use Manitoba's decision not to engage in collective bargaining prior to tabling the *PSSA* as a reason to support her conclusion that the legislation was unconstitutional.

[82] With respect to the second point on wage comparability, the trial judge properly considered whether the level at which the *PSSA* capped the wages was consistent with the going rate reached in other agreements, thereby reflecting an outcome consistent with an actual bargaining process. She found that collective

agreements not captured by the *PSSA*, such as those negotiated with private companies operating long-term care facilities (i.e., Revera, ArlingtonHaus and Extendicare), were well above the caps under the *PSSA*. The trial judge stated, "Where actual collective bargaining occurred, the wage increases were above the *PSSA*-mandated compensation (i.e., ArlingtonHaus, Extendicare, Revera)" (at para 321).

[83] She later stated (at para 348):

> . . .
>
> . . . While actual outcomes are not determinative of a s. 2(d) analysis, the evidence of outcomes for bargaining units, such as Revera and ArlingtonHaus supports the conclusion of substantial interference and the major impact that has been occasioned upon associational activity;
>
> . . .
>
> [emphasis added]

[84] Manitoba submits that the trial judge's reliance on collective agreements negotiated with the private companies operating long-term care facilities (i.e., Revera, ArlingtonHaus and Extendicare) was wrong, and led her to improperly distinguish *Meredith* and conclude that the *PSSA* substantially interfered with the employees' section 2(d) rights.

[85] I agree. While members of one of the plaintiffs' unions work at Revera, ArlingtonHaus and Extendicare, they are not paid from the public purse. The payors in those cases are private corporations, not Manitoba. Those payors are strangers to the legislation, making irrelevant any agreement reached with them. When looking for comparatives, it must be apples to apples; it must be a valid

comparison. The payor must be the same in both cases. Unfortunately, the trial judge took into account irrelevant facts and fell into improper legal reasoning.

[86] In the case at hand, the record provides some examples of the going rate reached just prior to the *PSSA* legislation involving groups that had the same payor (Manitoba) and that were subject to the legislation. For example, the Direct Support Workers & Rural Child Development Workers' bargaining unit settled, on December 2, 2016, on a collective agreement that provided for two years of 0% wage increases in 2015 and 2016. This was negotiated just prior to the *PSSA* being introduced for first reading on March 20, 2017, and is consistent with what is in the *PSSA*.

iii) Did the Trial Judge Err By Finding That the PSSA Was Unconstitutional Because It Was Unnecessary Since the Outcomes Could Have Been Reached Through Hard Bargaining?

[87] The trial judge noted that wage freezes had been successfully bargained in the past. Indeed, the record shows that the previous government had issued a four-year general wage mandate for public sector unions in 2010-2011 of either 0%, 0%, 2.75% and 2.75%, plus a long-service step of 2% after 20 years; or 0%, 0%, 2.9% and 2.9%. That previous mandate, like the *PSSA* legislation, included a two-year wage freeze.

[88] The trial judge was satisfied "that hard or co-operative bargaining could have been utilized by [Manitoba] to support its desire for fiscal restraint" (at para 335). Manitoba contends that this shows that the trial judge concluded that the *PSSA* was unconstitutional because it could have bargained with the plaintiffs rather than tabling the legislation. It submits that this was improper legal reasoning because the question on the section 2(d) analysis is never whether

legislation is necessary or unnecessary. Manitoba argues that the fact that wage freezes had been bargained in the past without the need for legislation is an irrelevant consideration in the analysis.

[89] I agree for three reasons. First, while the necessity for the legislation is a relevant consideration under section 1 of the *Charter*, it is irrelevant during the section 2(d) analysis. When determining the constitutionality of the legislation under section 2(d), the question is not whether the legislation is necessary, but whether the legislation substantially interfered with the associational rights of employees to engage in a meaningful process of collective bargaining.

[90] Second, the fact that wage freezes were bargained in the past is irrelevant to the analysis. That fact does not mean that they can be successfully bargained under different circumstances in the future. That is speculative reasoning.

[91] Finally, the trial judge kept returning to the fact that Manitoba tabled the *PSSA* without first trying to negotiate wage restraints. However, that was not the legal question before her. The question before the trial judge was not about the wisdom of the executive branch's policy decision to table the legislation without first trying to negotiate; it was whether the *PSSA* was constitutional. As was recently pointed out by the Supreme Court of Canada in *R v Chouhan*, 2021 SCC 26, "The wisdom of political choices should be left to such institutions that are accountable to the public through electoral processes" (at para 141). See also *Vriend v Alberta*, [1998] 1 SCR 493, where the Supreme Court of Canada reminds all three branches of government to respect each other's role (at para 136):

> Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the

> dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> [emphasis added]

[92] The real question before the trial judge was not about the wisdom of tabling legislation without first engaging in consultation, negotiation or collective bargaining. There is no legal prerequisite on governments to consult or negotiate prior to passing legislation. Indeed, the trial judge drew this same conclusion in her reasons (see paras 296-303). Yet, she uses the lack of prior collective bargaining as a reason to support her conclusion that the *PSSA* is unconstitutional. The trial judge's focus should have been on the real question, which was the same question before the Supreme Court of Canada in *Meredith* and the three appellate court decisions; whether legislation that removes an important workplace issue like wages from the bargaining table infringes section 2(d) of the *Charter*.

iv) Did the Trial Judge Err By Improperly Distinguishing Meredith Based on the Lower Wage Caps in the PSSA, as Compared to the ERA, and in Finding the PSSA Unconstitutional on the Basis That It Did Not Provide Scope for Bargaining on Monetary Issues?

[93] The wage caps under the *PSSA* are 0%, 0%, 0.75% and 1%, and average 0.4375% over a four-year period. Those under the *ERA* were 2.5%, 2.3%, 1.5%, 1.5% and 1.5%, and averaged 1.86% over a five-year period. One of the stated

reasons for the trial judge's ruling that the *PSSA* was unconstitutional was that, while both the *ERA* and the *PSSA* imposed wage caps, those under the *PSSA* involved "draconian" wage freezes for two of the four years (at para 348). She considered this an "important distinction", given the "*ERA* provided some level of wage increase in each year of its implementation" (at para 320). The trial judge used this fact to distinguish *Meredith*.

[94] Manitoba argues this two-year 0% wage freeze is irrelevant to the constitutional analysis and that the trial judge's use of it as a distinguishing feature was improper. It submits that there was no legal reason for the trial judge to find this objectionable. It points out that the trial judge had noted in her reasons that 0% wage freezes had been successfully bargained in the past. The record shows that the previous government's four-year general wage mandate also included a two-year 0% wage freeze for the public sector unions.

[95] I agree. What is the legal conclusion that flows from the fact that the wage cap increases under the *PSSA* were lower than under the *ERA* or included 0% wage freezes? For the *PSSA*, the average cap over the four-year period was 0.4375%, while the *ERA* averaged out at 1.86% over a five-year period. Determining the constitutionality of legislation will not be done by decimal points. The fact that the wage caps averaged 1.4225% a year less under the *PSSA* than under the *ERA* is an irrelevant consideration. The trial judge should have been concerned with the process of bargaining, not the outcomes (see *Health Services* at para 91).

[96] Manitoba had always conceded that the first inquiry of the two-pronged test set out in *Health Services* had been met. The first inquiry is about "the importance of the matter affected to the process of collective bargaining" (at

para 93). Manitoba never took issue that the wage caps issue met this criterion. The issue before the trial judge was whether the second inquiry had been met. That inquiry required the trial judge to consider the manner in which the wage restraint legislation "impacts on the collective right to good faith negotiation and consultation" (*ibid*).

[97] As stated in *Health Services*, the section 2(d) right in the workplace context, is a "limited right" (at para 91) in that it guarantees the employees the right to a process, not a particular economic outcome. As in *Meredith*, the trial judge should have been concerned with the impact the *PSSA* had on the duty to consult and negotiate in good faith, not on the numbers set out therein.

v) Did the Trial Judge Err In Finding That the Negative Impact of the PSSA on a Union's Bargaining Power or Leverage Results in a Finding of Unconstitutionality?

[98] The plaintiffs argued at trial that the *PSSA* fundamentally alters a union's ability to bargain because, once wages are pre-determined, the union loses its leverage to trade-off wages for other concessions. The trial judge, relying on the evidence of an expert, Dr. Robert Hebdon (Dr. Hebdon), accepted this argument. She adopted his conclusion that, "[w]ith monetary issues already predetermined, meaningful bargaining is unworkable and almost impossible" (at para 333).

[99] Manitoba argues that, while it was open to the trial judge to accept Dr. Hebdon's evidence, she erred in the legal consequences that flowed from that evidence; namely, that it does not comply with *Meredith* and the three appellate court decisions on which leave to the Supreme Court of Canada had been denied.

[100] Again, I agree. The problem with the trial judge's conclusion is that it runs contrary to *Meredith* and the three appellate court decisions. The trial judge concluded that the "removal of monetary issues from the bargaining table" (at para 348) substantially interfered with the collective bargaining process. This conclusion is diametrically opposed to the jurisprudence which holds that legislation similar to the *PSSA*, which includes broad-based, time-limited wage restraint legislation, had not "substantially impaired the collective pursuit of the workplace goals" (*Meredith* at para 30).

[101] One other comment on this issue. Dr. Hebdon had opined that strikes will, in all likelihood, be "futile" under the *PSSA* (at para 133). Manitoba points to section 7(4) of the *PSSA* as a reason why that would not be the case. That section gives the Treasury Board the ability to exempt "any person or class of persons" from the wage restraint legislation.

[102] As explained in *SFL*, strikes play an essential and integral role towards achieving a meaningful process of collective bargaining. That is why the right to strike is constitutionally protected under section 2(d). When collective bargaining reaches an impasse, the ability to strike provides employees with the ability to withdraw services collectively for the purpose of placing economic pressure on employers in order to return to "meaningful" bargaining (see paras 46-55).

[103] In the present case, if a union goes on strike over the *PSSA*, the government has the ability under section 7(4) to exempt that union from the legislation, if it cannot withstand the economic pressures arising from the strike.

III. Open for This Court to Intervene

[104] As explained above, the trial judge at times collapsed the two-pronged *Health Services* test into one, conflated the section 2(d) analysis with the section 1 analysis, focussed on outcomes as opposed to process, and fused the limited section 2(d) constitutional rights in regard to collective bargaining with the broader rights given under statutory labour relations regimes. This caused the trial judge to err in the manner in which she distinguished *Meredith* and the three appellate court decisions.

[105] In the result, I am of the view that the trial judge erred in her constitutional analysis. Having so erred, it is open to this Court to substitute its own decision.

IV. The Constitutional Dialogue Between the Courts and Legislatures

[106] Judges must always be keenly aware of the role they play in a *Charter* analysis. While courts have a duty to ensure that laws enacted by legislatures are constitutional, it is important that they give legislatures "reasonable room to manoeuvre" in appropriate circumstances (*Chouhan* at para 84). In *Chouhan*, Moldaver and Brown JJ recently reminded us of that role (*ibid*):

> . . . The role of the courts in the *Charter* analysis "is to protect against incursions on fundamental values, not to second guess policy decisions", because when "struggling with questions of social policy and attempting to deal with conflicting (social) pressures 'a legislature must be given reasonable room to manoeuvre'" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 194, per La Forest J. (concurring); *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at p. 627). . . .
>
> [emphasis added]

[107] Rowe J also expounds on the importance of allowing for proper legislative flexibility (see *Chouhan* at para 133). However, this manoeuvrability must align with constitutional boundaries. The oft-cited decision of *Wells v Newfoundland*, [1999] 3 SCR 199, says it best, where Major J stated (at para 59):

> . . . Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate. . . .

[108] Unless constrained by the Constitution, Parliament and the provincial legislatures are supreme. The concept of parliamentary supremacy within constitutional boundaries leads to constitutional minimums as was explained in *R v Stillman*, 2019 SCC 40 by Karakatsanis and Rowe JJ (in dissent, but on another point), where they stated, "It is the courts, not legislatures, that ultimately interpret the Constitution and define constitutional minimums" (at para 148).

[109] The role of the courts is to interpret the Constitution and determine whether legislation or state conduct meet *Charter* standards. This oftentimes means defining constitutional minimums that will provide the legislatures with the "reasonable room to manoeuvre" in order to properly balance competing interests and social and economic pressures (*Chouhan* at para 84). Again, as long as legislatures remain within their constitutional boundaries, a court's role is "not to second guess policy decisions" of legislatures (*ibid*).

[110] Courts set constitutional minimums because the Constitution protects a floor, not a ceiling. Legislatures may choose and, more often than not, do choose to go beyond a constitutional minimum standard. This back and forth is a dialogue between the court and the Legislature. Courts refer to this as a "constitutional dialogue". The Supreme Court of Canada stated in *Chouhan*, "This is why the

relation between courts and legislatures has been described as one of dialogue among branches, in which legislatures can respond to the courts" (at para 134).

[111] While there can be no doubt that the imposition of broad-based, time-limited wage restraint legislation like the *PSSA* and the *ERA* impacts or interferes with the collective bargaining process, the Supreme Court of Canada has held that before courts can intervene, the legislative interference must be "substantial". The term "substantial interference" was not chosen without purpose. It was judiciously selected by the Supreme Court of Canada in order to allow legislatures some freedom to move within permissible constitutional limits.

V. The *PSSA* Was Based on Constitutional Dialogue

[112] As counsel for Manitoba pointed out at the appeal hearing, the *PSSA* came about through constitutional dialogue that started with the *ERA* and the subsequent court decisions in *Meredith* and the three appellate courts. Courts speak and legislatures take what they understand from binding precedent to draft legislation. The Supreme Court of Canada in *R v Hall*, 2002 SCC 64, gave an example of this constitutional dialogue (at para 43):

> Since the introduction of the *Charter*, courts have engaged in a constitutional dialogue with Parliament. This case is an excellent example of such dialogue. Parliament enacted legislation that permitted a judge to detain an accused person where detention was "necessary in the public interest". This Court considered this language and determined that the portion of s. 515(10)(*b*) that authorized pre-trial detention for reasons of public interest was unconstitutional. At p. 742 of *Morales* [*R v Morales*, [1992] 3 SCR 711], *supra*, Lamer C.J. severed the "public interest" ground from the rest of s. 515(10)(*b*) because the provision could still function as a whole. After considering this Court's reasons in *Pearson* [*R v Pearson*, [1992] 3 SCR 665] and *Morales*, *supra*, Parliament replaced the "public interest" ground with new language.

[113] In the case at hand, counsel for Manitoba explained that the 2017 *PSSA* legislation was drafted based on the 2009 *ERA*, following the 2015 *Meredith* decision and the three 2016 appellate court decisions. The record shows that the *PSSA* was introduced in the Manitoba Legislature for first reading on March 20, 2017. This was seven months after the last of the three appellate court decisions.

[114] The primary purpose of the *PSSA* is to create a framework respecting future increases to compensation for public sector employees that reflect the fiscal situation of the province (see section 1(a)). Indeed, the trial judge found that Manitoba "faced fiscal concerns with the resultant need to control expenditures" (at para 348). To assist in addressing this fiscal situation, Manitoba passed the *PSSA*, which imposed broad-based, time-limited wage restraints on public sector employees.

[115] The record shows that, albeit not identical, the *PSSA* is similar to the *ERA*. Many of the definition sections are essentially identical. Both contain identical headings and quasi-identical wording with respect to the sections dealing with the "Right to bargain collectively"; the "Right to strike"; and "Amendments permitted" (the *PSSA* at sections 3-5; and the *ERA* at sections 6-8).

[116] More importantly, the sections the trial judge found to be unconstitutional in the *PSSA* (see sections 9-15), are found, in some form or another, in the *ERA*, and they were held to pass constitutional muster by the Supreme Court of Canada and the three appellate courts. Below are the impugned sections of the *PSSA* and their functional equivalent in the *ERA*:

- Section 9: What is called the "sustainability period" in section 9 of the *PSSA* is referred to in the *ERA* as the "restraint period" in section 2.

- Section 10: This section requires any "additional remuneration" and "rates of pay" found in collective agreements or arbitral decisions to be based on "12-month periods." The *ERA* has the same "12-month period" requirement as set out in sections 16, 17 and 19.

- Section 11: This section prohibits the restructuring of rates of pay during the sustainability period. The *ERA* equivalent is found at section 23.

- Section 12: This section sets out the broad-based, time-limited wage restraint legislation that is found in section 16 of the *ERA*. Wording similar to the opening words of section 12(1) of the *PSSA* is found in section 17(1) of the *ERA*.

- Section 13: This section sets out restrictions on additional remuneration. The functional equivalent is set out differently, but can be found in sections 24 and 26 of the *ERA*.

- Section 14: This section allows for the possibility of negotiating additional remuneration in years three and four of the sustainability period. There is no equivalent in the *ERA*.

- Section 15: This section states that collective agreements or arbitral decisions that provide for a restructuring of rates of pay, for increases in a rate of pay or in additional remuneration, will

> be of no effect. The *ERA* functional equivalent is set out differently, but is found in sections 19, 26 and 29.

[117] This comparison of both pieces of legislation leaves no doubt that the *PSSA* came about through constitutional dialogue as it is, to a large extent, based on the *ERA* legislation that was upheld by *Meredith* and the three appellate courts.

[118] *Meredith* and the three appellate court decisions held that imposing broad-based and time-limited wage restraint legislation met both inquiries of the *Health Services* test. They determined that the *ERA* did not preclude a robust bargaining process on the other issues. It was concluded that this type of legislation did not substantially interfere with the collective right to good faith negotiation and consultation. *Meredith* is binding on this Court and the three appellate court decisions are highly persuasive.

[119] Like the *ERA*, the *PSSA* does not preclude meaningful changes to other important workplace conditions and nothing prevents the parties from participating in a meaningful bargaining process on non-wage workplace issues. Like the *ERA*, the *PSSA* preserves a wide scope of bargaining issues as well as a robust process. The *PSSA* does not affect the right to bargain collectively (see section 3) and the right to strike (see section 4). Nor does it impact the ability to bargain numerous workplace issues including (a) health and safety issues; (b) seniority and bumping procedures; (c) disciplinary procedures; (d) grievance procedures; (e) reclassification issues; (f) performance appraisals; (g) recruitment and retention; (h) contracting out; and (i) job security, including no-layoff clauses.

[120] Indeed, the facts as found by the trial judge establish that bargaining did take place because the *PSSA* did not affect the process to deal with workplace issues, other than wages. Bargaining went on because there remained a process

to do so in the *PSSA*. Some, however, chose to forgo the bargaining process, which is their right. For example, the largest union representing provincial civil servants, the Manitoba Government and General Employees' Union, after learning that the *PSSA* represented Manitoba's position on wages, chose to skip the bargaining process and exercise its rights under *The Civil Service Act*, CCSM c C110, in order to secure binding arbitration.

[121] Other unions chose to bargain. The record shows that 21 collective agreements had been completed before the *PSSA* was passed by the Legislature in 2017. While it must be noted that acceptance of the agreements was conditional on the *PSSA* being constitutional, the fact remains that bargaining continued for those unions wanting to participate in such a process. For example, in relation to the Red River Community College, and as stated by the trial judge, there were certain increases in remuneration, albeit many of those increases were required to update figures to reflect changes in the consumer price index, as well as to honour changes in legislation, such as to *The Employment Standards Code*, CCSM c E110. Additionally, there were agreed letters of intent to undertake a review and discuss issues such as long-term disability and pay scales.

[122] Another example was with respect to the University of Brandon. The trial judge found (at para 115):

> . . . [It was] acknowledged that a number of changes in the articles of the collective agreement had been achieved, which were reflective of employer acceptance of certain [Brandon University Faculty Association] benefit proposals for its members, such as: 10 paid sick days could be used as family leave, an increase in research days for professional staff from five to 10, and the establishment of working groups to explore certain issues. There was additional money made available for research, four new positions were created, and a re-opener clause was agreed if the ***PSSA*** was found to be unconstitutional.

[123] There are also a few sections of the *PSSA*, favourable to unions, which are not in the *ERA*. Unlike the *ERA*, the *PSSA* provides the plaintiffs with an opportunity, in years three and four of the wage restraint timeframe, to negotiate savings and increase employee compensation (see section 14). Unlike the *ERA*, the *PSSA* does not overturn any agreements ratified before the legislation was introduced in March 2017. Unlike the *ERA*, the *PSSA* contains a provision that gives the Treasury Board the ability to exempt "any person or class of persons" from the wage restraint legislation (at section 7(4)). Finally, like the *ERA*, the *PSSA* does not substantially interfere with a meaningful collective bargaining process on other workplace issues.

[124] As I indicated at the beginning of these reasons, the key question is whether it is unconstitutional for legislation to prevent collective bargaining on wages for a limited period of time. There can be no doubt that the intention of the *ERA* and the *PSSA* legislation was to remove the issue of wages from discussion at the bargaining table. In the end, the Supreme Court of Canada in *Meredith* and the three appellate courts concluded that removing the issue of wages from the bargaining process for a limited period of time did not substantially interfere with a meaningful collective bargaining process and, thus, the *ERA* complied with section 2(d).

[125] I have not been persuaded that there is any sound legal basis to distinguish *Meredith*. It is my view that *Meredith* stands for the proposition that it is not unconstitutional for a government to remove by statute the topic of wages from the bargaining table so long as:

a) the wage restraint legislation is broad-based and time-limited; and

b) it does not preclude a meaningful collective bargaining process from occurring on other important workplace matters.

[126] It is my view that the *PSSA* meets the above criteria. The *PSSA* is broad-based, given that it applies broadly across the public service to both unionized and non-unionized employees, covering almost 20% of Manitoba's workforce. The *PSSA* wage restraint legislation is also time-limited; it covers a four-year period.

[127] Moreover, I am of the view that the essential integrity of the collective bargaining process was not compromised by the *PSSA*. As stated in *Health Services*, section 2(d) does not protect all aspects of the associational activity of collective bargaining (see paras 90-94). It protects only against "substantial interference". Determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries: first, whether the measure substantially impacts the capacity of the union members to come together and pursue collective goals in concert; and second, whether the measure impacts on the collective right to good faith negotiation and consultation. If the first inquiry is not met, the measure does not violate section 2(d). If, on the other hand, it is met, the measure will still not violate section 2(d) if it preserves a process of consultation and good faith negotiation.

[128] In the case at hand, Manitoba conceded that the first inquiry was met. This is in line with what was decided in *Meredith* and the three appellate court decisions. I agree that taking wages off the bargaining table meets the first inquiry. However, even in situations where the measure deals with matters of significant importance, there will be no violation of section 2(d) if the measure taken preserves "a process of consultation and good faith negotiation" (*Health*

Services at para 94). As I explained above, it is my view that such a process was preserved by the *PSSA*. While there can be no doubt that the imposition of wage restraint legislation, like the *PSSA* and the *ERA*, impacts or interferes with the collective bargaining process, the case law establishes that that type of legislative interference does not amount to "substantial interference" when it is broad-based and for a limited period of time.

[129] In the result, I would conclude that sections 9 to 15 of the *PSSA* do not violate the freedom of association as guaranteed under section 2(d) of the *Charter* and are, therefore, constitutional. Having concluded that there is no *Charter* infringement, there is no need to carry out the section 1 analysis.

d) Issue Two—Whether Manitoba Substantially Interfered in the 2016 Collective Bargaining Between UMFA and the U of M

[130] Manitoba argues that the trial judge erred in finding that Manitoba's conduct during the 2016 contract negotiations between the U of M and UMFA amounted to an infringement of freedom of association under section 2(d) of the *Charter*.

[131] As I indicated in my standard of review analysis, even though this second ground raises a constitutional issue, it calls for a less exacting standard of review than the correctness standard that was applied to the question of whether the *PSSA* was constitutional. The reason for this distinction is that the nature of each question is different. Deciding whether legislation is constitutional involves the interplay between two laws: the impugned legislation; and the Constitution, while deciding whether certain conduct infringes a *Charter* right involves the interaction of a particular set of facts with the *Charter* provision which, in the civil law context, is a question of mixed fact and law.

[132] As a result, on this second ground of appeal, absent reversible errors of law (reviewable on the correctness standard) or fact (reviewable on the palpable and overriding error standard), deciding whether the impugned government conduct infringes section 2(d) of the *Charter*, is reviewable on the palpable and overriding error standard.

[133] The facts surrounding the impugned conduct are not in dispute.

[134] The current government was sworn into office on May 3, 2016. The U of M and UMFA were engaged in contract negotiations in the summer and fall of 2016. On September 13, 2016, after 20 bargaining sessions, the U of M offered UMFA a comprehensive offer which included a 7% wage increase over four years (1%, 2%, 2% and 2%). When market adjustments were added, this wage increase would have represented a 17.5% wage offer over the four-year period.

[135] That offer, while not accepted by UMFA, was still on the table when Manitoba heard about it for the first time on September 30, 2016. It was concerned that the September 13 wage offer would create a bad precedent for future bargaining regarding public sector wages across the province. As a result, on October 6, 2016, it directed the U of M to bargain for a one-year agreement with a 0% wage freeze for UMFA. It also ordered the U of M not to disclose to UMFA that it was the one that gave this new mandate. Prior to this mandate, the U of M had not been given any government direction with respect to these negotiations.

[136] The U of M strongly disagreed with this new mandate, given how far the parties had progressed in the bargaining process and given the September 13 wage offer to UMFA. Despite its disapproval, the U of M felt it had no option

but to abide by the mandate after being told that there would be "financial consequences" were it not to do so.

[137] On October 26, 2016, the President of the U of M, Dr. David Barnard (Dr. Barnard), wrote to the Premier of Manitoba requesting him to reconsider "the decision to impose the salary pause on the [U of M] and allow [it] to continue to bargain in good faith." He also stated that the new mandate would "seriously debilitate the [U of M's] almost completed (nine months into bargaining) negotiations with UMFA".

[138] The following day, on October 27, 2016, at the commencement of a mediation session, the U of M informed UMFA of the mandate it had received from Manitoba. Unsurprisingly, UMFA reacted negatively and, on November 1, 2016, its members commenced a legal strike.

[139] During the course of the strike, the parties continued to bargain and engage in a conciliation process. On November 20, 2016, the parties agreed to a one-year collective agreement with a 0% wage increase. UMFA did make some gains, including workload protections, a collegial process for the determination of tenure and promotion criteria, and some improvement to performance metrics.

[140] Afterwards, UMFA filed with the Manitoba Labour Board (the Labour Board) an unfair labour practice against the U of M for not disclosing the one-year 0% wage freeze mandate during a three-week period (October 6-27, 2016). The Labour Board ruled that the U of M's failure to make appropriate and timely disclosure "was tantamount to a misrepresentation and constituted a breach of section 63(1) of [*The Labour Relations Act*, CCSM c L10] and an unfair labour practice pursuant to section 26." The Labour Board held that the U of M "failed

to provide full and candid disclosure and, as such, did not bargain in good faith and make every reasonable effort to conclude a collective agreement."

[141] Afterwards, UMFA also sought a declaration that Manitoba had violated its members' rights to freedom of association during the 2016 contract negotiations. The trial judge granted this declaration. She found that Manitoba's conduct substantially interfered with the collective bargaining process and held that section 2(d) had been violated. Her analysis of this second ground is set out as follows (at para 429):

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

[142] It is from this decision that Manitoba now appeals. This ground of appeal concerns Manitoba's conduct during the 2016 contract negotiations

between the U of M and UMFA, and whether it amounted to an infringement of freedom of association.

[143] Manitoba raises three arguments. First, Manitoba submits that the trial judge improperly brings the *PSSA* into her analysis. It makes the point that, given the *PSSA* was not introduced until several months after the contract negotiations were completed, the *PSSA* had nothing to do with the 2016 UMFA bargaining process. Second, Manitoba argues that the trial judge considered an irrelevant factor in her legal analysis when she found that the U of M had the financial resources to offer more than Manitoba's mandate of 0%. It questions how this is relevant to the trial judge's analysis on whether Manitoba's conduct violated section 2(d). Third, Manitoba argues that the trial judge erred when she found that the new mandate imposed on the U of M "represented a substantive disruption of the collective bargaining process, harmed the relationship between [the U of M] and UMFA, and . . . significantly altered the relationship between the union and its membership" (at para 429). It states that this was not sufficient to constitute a violation of section 2(d).

[144] The plaintiffs submit that it was open to the trial judge to find that Manitoba's conduct undermined what was, up until the new mandate, a meaningful and productive process of collective bargaining, harming the relationship between the U of M and UMFA in the process, given the timing, method of delivery and secrecy surrounding that mandate. It argues that these findings are owed deference and that appellate intervention is unwarranted.

[145] I will deal first with Manitoba's submission that it was improper for the trial judge to consider the *PSSA* legislation in her analysis, given that it was not introduced until several months after the 2016 UMFA contract negotiations were

completed. In my view, the trial judge's reference to the "*PSSA* wage caps" (at para 429) was inconsequential to her conclusion on whether Manitoba's conduct had violated section 2(d). Evidence that Brandon University and the University of Winnipeg Faculty had, pre-*PSSA*, negotiated wage rates between 1.5% and 2.5% in 2016 was not an irrelevant consideration. As was explained in *Meredith*, "the going rate reached in agreements concluded with other bargaining agents", by the same payor, are relevant as they reflect outcomes "consistent with actual bargaining processes" (at para 28). As argued by the plaintiffs, Manitoba's one-year 0% wage freeze to UMFA was not in accordance with what was freely bargained for that same year with the two other largest universities in the province.

[146] Manitoba's second argument is that the trial judge considered an irrelevant factor in her legal analysis when she found that the U of M had the financial resources to offer more than Manitoba's mandate of 0%. It questions how the U of M's fiscal position is relevant to the constitutionality of Manitoba's conduct. While I agree with Manitoba on the issue of relevance, I am of the opinion that this reference was inconsequential to the trial judge's conclusion on whether Manitoba's conduct had violated section 2(d).

[147] The critical issue on this ground is Manitoba's third point. Manitoba's argument rests on the premise that the conduct that was being scrutinized as unconstitutional was that it had imposed a new mandate on the U of M late in the bargaining process. Manitoba submits that the trial judge failed to address the legal question of whether this action violated section 2(d). Manitoba states that the case law establishes that rolling back and overturning completed agreements does not necessarily amount to substantial interference (see *Meredith*; and *Syndicat canadien*). It submits that, if rollbacks do not amount to substantial

interference, then issuing new mandates late in the bargaining process also does not.

[148] I would agree with Manitoba's submission if that were the conduct being scrutinized as unconstitutional. The problem with Manitoba's position is that the impugned conduct before the trial judge was not simply the imposition of a new mandate late in the bargaining process. It was more than that. The impugned conduct has two facets: (1) the imposition of a mandate on the U of M late in the bargaining process that was significantly different from what it had offered UMFA three weeks prior, and (2) instructing the U of M not to tell UMFA that the new mandate came at the direction of Manitoba.

[149] The plaintiffs submit that the trial judge was right to find that the above-mentioned conduct brought about substantial interference in the collective bargaining between the U of M and UMFA, thereby infringing section 2(d).

[150] The test to determine whether Manitoba's conduct rises to the level or degree of "substantial" involves two "contextual and fact-specific" inquiries (*Health Services* at para 92). Manitoba has conceded that the first inquiry was met. The second inquiry focusses on good faith; does Manitoba's conduct respect the fundamental precept of collective bargaining—the duty to consult and negotiate in good faith (see *Health Services* at para 97)?

[151] In her reasons, the trial judge correctly stated the legal test set out in *Health Services*. She was very much aware and knew that section 2(d) was "to protect the good faith process of collective bargaining and not a particular bargaining model or outcome" (at para 210) and "to preserve the processes of good faith bargaining" (at para 348).

[152] While the trial judge's one-paragraph analysis on this second ground was indeed succinct, the entirety of her decision establishes that she well-understood the second inquiry legal principles to be applied to Manitoba's conduct. She reviewed considerations to be taken into account when determining whether government conduct had undermined a meaningful process of collective bargaining.

[153] Key to the trial judge's decision was her finding regarding the impact the impugned conduct (imposing on the U of M a mandate late in the bargaining process that was significantly different from what it had offered UMFA three weeks prior and instructing it not to tell UMFA that the new mandate came at the direction of Manitoba) had on the good faith bargaining process. The trial judge listed elements of good faith bargaining (at para 310):

> . . . The Supreme Court considered certain elements of good faith bargaining: a duty to engage in meaningful dialogue with a willingness to exchange and explain positions; an obligation to meet and engage in good faith discussions; the need for both parties to approach the bargaining table with good intentions; hard bargaining can transpire, however, it cannot be approached with the intention of avoiding a collective agreement or destroying a bargaining relationship; past processes of collective bargaining cannot be disregarded; a temporary limit to collective bargaining restraint does not render the interference insubstantial. In essence, did the measures adopted disrupt the balance between employees and employer to such a degree as to substantially interfere with the collective bargaining process? . . .

[154] The trial judge noted the letter from the U of M's President, Dr. Barnard, who requested "a reconsideration of [Manitoba's] salary pause to facilitate the continuance of good faith bargaining . . .. Dr. Barnard stressed that the new mandate would lead to a divisive state, and would have a devastating impact on the university community" (at para 39).

[155] In my view, a fair reading of the trial judge's entire reasons establishes that she concluded that Manitoba's conduct not only significantly disrupted the balance between the U of M and UMFA, but also significantly damaged their relationship, thereby seriously undermining what had been a meaningful and productive process of good faith collective bargaining.

[156] It is my view that Manitoba has not, on this second ground of appeal, demonstrated any error in principle by the trial judge. Neither have I been persuaded that the trial judge committed any palpable and overriding error with respect to the facts or in regard to her application of the facts to the section 2(d) *Charter* provision. Deference is owed to her findings.

[157] As a result, I would dismiss this ground of appeal.

Conclusion

[158] In the result, while I would dismiss Manitoba's appeal in regard to its conduct during the 2016 contract negotiations between UMFA and the U of M, which is the second ground, I would grant the appeal on the first ground and conclude that the *PSSA* does not violate section 2(d) of the *Charter*. In all the circumstances, given success is divided, each side should bear their own costs.

Chartier CJM

I agree: Cameron JA

I agree: leMaistre JA