SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Teachers Union* v. *Nova Scotia (Attorney General)*, 2022 NSSC 168

Date: 20220613
Docket: HFX No. 469869
Registry: Halifax

Between:

Nova Scotia Teachers Union

Applicant

v.

Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	February 24, 25, March 1, 2 & 3, 2021, in Halifax, Nova Scotia
Final Written Submissions:	November 16, 2021
Counsel:	Gail Gatchalian, Q.C. and Jillian Houlihan, for the Applicant Kevin Kindred, for the Respondent

By the Court:

BACKGROUND AND BRIEF SUMMARY OF FINDINGS

[1] The Applicant Nova Scotia Teachers' Union ("**NSTU**") challenges the constitutionality of the *Teachers Professional Agreement and Classroom Improvements (2017) Act*, S.N.S. 2017, c. 1 (referred to by all parties as "**Bill 75**") which imposed, by statute, a new collective agreement upon the NSTU.

[2] NSTU argues that the Respondent Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia (the "**Province**") breached section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") by failing to negotiate in good faith; and that the *Act* epitomizes an unconstitutional abuse of its legislative authority because it:

1. Forced upon NSTU members a four-year collective agreement which:
    a. NSTU membership neither accepted nor was given the opportunity to vote upon;
    b. Imposed certain monetary terms (including wage restraint and eliminating ongoing accrual of a Service Award/Death benefit) that the Province deemed fixed and non-negotiable before the process of collective bargaining even began; and
    c. Established contractual terms that were worse than those negotiated during the period of collective bargaining which the Province itself says were conducted in good faith. NSTU says that the Province ultimately desecrated the process of collective bargaining by imposing legislation that did not even reflect their actual negotiations but, instead, punished NSTU for refusing to submit to the Province's demands.
2. Deprived NSTU of its constitutional right to engage in meaningful collective action by:
    a. Terminating ongoing negotiations;
    b. Terminating ongoing collective action including strike action
    c. Prematurely stripping NSTU of its ultimate form of expression and economic leverage (strike action) by exploiting

the government's ultimate form of leverage (imposing a collective agreement by legislation); and

d. Prospectively depriving NSTU of the right to engage in collective action during the term of the four-year collective agreement by engaging the provisions of the *Teachers' Collective Bargaining Act*, R.S.N.S. 1989, c. 460, as amended, which, in turn, rendered illegal any strike activity during the term of the statutorily imposed contract.

[3] The Province denies these allegations. It argues that section 2(d) of the *Charter* guarantees a process of good faith negotiations. While section 2(d) guarantees NSTU and its members the right to engage in meaningful, good faith collective bargaining with the Province, it:

1. Does not guarantee a particular outcome or result. The Province denies that any union or group can insist upon a pay package which the Province believes is unaffordable, unfair and/or fiscally irresponsible;

2. Does not prohibit the Province from establishing certain monetary boundaries or "lines in the sand" (including wage restraints and termination of the Service Award/Death Benefit) which are deemed essential for preserving the common good and the Province's long-term financial health. The Province points to its duty as steward of public funds and a related obligation to balance competing pressures for money across a wide array of important services which extend beyond education;

3. Related to this last point, the Province also points to the fact that the alleged misconduct during the course of collective bargaining occurred under the aegis of a different legislative measure (*Public Services Sustainability (2015) Act*, S.N.S. 2015, c. 34, referred to by the parties as "**Bill 148**") whose constitutionality is not put in issue in this proceeding and therefore is, by law, presumed to be constitutional and passed for a valid (not invalid) public purpose; and

4. Does not entitle NSTU to insist that discussions continue indefinitely until NSTU achieves further concessions on issues where the parties are deadlocked. The Province says that more than 15 months of meaningful negotiations yielded three tentative agreements. Each tentative agreement was approved by NSTU negotiating committee and NSTU executive who recommended to NSTU members. NSTU

> members voted to reject each of these tentative agreements. In these circumstances, the Province says the parties reached a legitimate but impenetrable impasse. The Province denies an obligation to continue negotiating for however long NSTU believes is appropriate - regardless of past failures, an existing impasse and the effects upon student education.

[4] Ultimately, the Province maintains that the facts in this case more than amply demonstrate that NSTU's rights under section 2(d) of the *Charter* were respected and fulfilled. Ultimately, the Province says that it was justified in finally ending the labour dispute as it did - through legislation which reflected its fiscal obligations to Nova Scotians.

[5] NSTU also claims that Bill 75 violates the right of expression under section 2(b) of the Charter and particularly focusses on section 13 of Bill 75 which requires teachers to comply with sections 42 and 45 of the *Education Act* "when schools are in session while teachers are present" regardless of any competing provision in the *Teachers' Collective Bargaining Act*, RSNS 1989, c. 460, as amended.

[6] As indicated, Bill 75 followed months of collective bargaining and three tentative collective agreements. NSTU's executive recommended approval of each tentative agreement. The teachers declined that advice and voted to reject all three agreements.

[7] After the teachers rejected the third tentative agreement, the Province responded promptly by drafting, passing in the Legislative Assembly and proclaiming in force Bill 75 which ended the labour dispute and forced a new collective agreement on NSTU members.

[8] The terms of the collective agreement imposed by Bill 75 were significantly inconsistent with and worse than the third and final tentative agreement that the Province says was the by-product of good faith bargaining. At best, Bill 75 was an over-zealous but misguided attempt at fiscal responsibility. At worst, Bill 75 was punitive or a vengeful attempt to gain some unrelated, collateral benefit related to ongoing negotiations with other public service unions at the expense of NSTU. Whatever the motivation, by selectively dismantling Tentative Agreement 3, Bill 75 failed to fully respect the process of good faith collective bargaining and was terribly wrong.

[9] For that reason, I conclude that Bill 75 violated section 2(d) of the Charter and is not saved by section 1. Bill 75 is declared unconstitutional and of no force or effect.

[10] Having said that, for clarity, I do not find that Bill 75 is unconstitutional based on certain additional criticisms advanced by NSTU regarding the collective bargaining process which preceded Bill 75. The collective bargaining process which ultimately led to Bill 75 was dominated by another, different legislative measure: Bill 148. The issue of Bill 148's constitutionality was not placed in issue in this proceeding, and, for clarity, I make no determinations regarding the constitutionality of that statute based on the specific facts and context of this case. However, in the absence of a legal challenge as to the constitutionality of Bill 148, the Court is required to presume at law that Bill 148 is constitutional and passed for a legitimate public purpose. To conclude that Bill 148 was passed for an invalid purpose and is evidence of the Province's intention to erode Charter rights and destroy good faith bargaining would contradict that legal presumption.

[11] Moreover, the impasse reached by the parties reflected an unwavering disconnect between the constraints created by Bill 148 and the NSTU's key demands, particularly with respect to phasing out the Service Award/Death Benefit. Given the presumption that Bill 148 is constitutional and passed for a valid public purpose, the Province's decision to hold firm to the provisions contained within that statute cannot, in the context of this proceeding, be denounced as intransigent and unreasonable. Unfortunately, there was no reasonable prospect of the parties overcoming the impasse.

[12] As to NSTU's claims under section 2(b), section 2(b) guarantees the right to freedom of expression. For reasons that are made more clear below, it is not necessary to engage in a section 2(b) analysis as I find the provisions of Bill 75 are unconstitutional under section 2(d) and of no force and effect. In my view, it is unnecessary to assess whether Bill 75 is doubly unconstitutional for having also violated section 2(b) and any such assessment does not add to the appropriate remedy, particularly given that NSTU's main issue is with the terms of the collective agreement imposed under Bill 75 and, more specifically, with the loss of the Service Award/Death Benefit.

THE LAW

[13] In order to properly understand how the Charter operates given the unique facts of this case, it is necessary to first explain the legal framework against which the facts are applied.

Section 2(d) and Its Basic Animating Principles

[14] Section 2 of the Charter is entitled "Fundamental Freedoms". Section 2(d) confirms that everyone has the fundamental right to freedom of association.

[15] There is no doubt that section 2(d) of the Charter encompasses and protects the process of collective bargaining. In *Health Services & Support-Facilities Subsector Bargaining Assn* v *British Columbia*, 2007 SCC 27 ("***Health Services***"), a majority of the Supreme Court of Canada confirmed that section 2(d) "…protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues" (at paragraph 19).

[16] The Supreme Court of Canada in *Health Services* further confirmed that: "[t]he right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control of a major aspect of their lives, namely their work" (at paragraph 84).

[17] However, section 2(d) does not extend Charter protection to all aspects of collective bargaining. Section 2(d) does not guarantee that any one party in a labour dispute is entitled to a particular outcome. In *Health Services,* the Court stated:

> Nor does [s.2(d)] ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals"
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> …
>
> Section 2 (d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued.
>
> …
>
> as the right is to a process, it does not guarantee a certain substantive or economic outcome.
>
> (at paragraphs 19, 89 and 91)

(See also *Meredith* v *Canada (Attorney General)*, 2015 SCC 2 at paragraph 25)

[18] The notion that section 2(d) protects the process of collective bargaining but does not guarantee a particular outcome is more complicated than it may appear at first blush. Even though section 2(d) does not guarantee a preferred outcome, this does not mean that evidence surrounding a party's preferred outcome is irrelevant to the section 2(d) analysis. On the contrary, the positions taken by the parties during collective bargaining and the content of their offers (i.e., their preferred financial or non-financial results) may shed light on whether the parties fully respected the process of good faith collective bargaining in accordance with section 2(d) of the Charter.

[19] Ultimately, section 2(d) protects the process (and not the outcome) by giving unions the opportunity for respectful dialogue and meaningful input into the working conditions of their members. As Donald J.A. wrote in *British Columbia Teacher's Federation v. British Columbia*, 2015 BCCA 184 ("***BCTF***"):

> 287 If the act of associating in order to collectively negotiate to achieve workplace goals is not substantially interfered with, the government has not breached s. 2(d). The mere act of passing the terms of employment through legislation rather than a traditional collective agreement makes no difference to whether the employees were given the opportunity to associate and effectively pursue workplace goals. If the government, prior to unilaterally changing terms of employment, gives a union the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees' attempts at associating to pursue workplace goals were not pointless or futile: see *SFL* at para. 55. Thus, the employees' freedom of association would likely not therefore be breached.
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> (Emphasis in original)[1]

[20] Similarly, in *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1 ("***MPAO***"), McLachlin C.J. and LeBel J., for the majority, wrote:

> Collective bargaining constitutes a fundamental aspect of Canadian society which 'enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work' (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee

[1] The Supreme Court of Canada subsequently allowed the employees' appeal "substantially for the reasons of Justice Donald" (2016 SCC 49).

> autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.
>
> (at paragraph 82)

[21] In determining whether employees were afforded the opportunity to "effectively pursue workplace goals" and "meaningfully influence the changes made, on bargaining terms of approximate equality", the Court remains sensitive to the power imbalances which historically motivated workers to associate. That underlying concern for balance and approximate equality at the bargaining table continues to inspire the constitutional protections enshrined in section 2(d). This notion of establishing equilibrium between the negotiating parties resonates throughout the jurisprudence. In *MPAO*, McLachlin C.J. and LeBel J. wrote:

> [80] To recap, s. 2 (d) protects against substantial interference with the right to a meaningful process of collective bargaining. Historically, workers have associated in order "to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict", namely, their employers: *Alberta Reference*, at p. 366. The guarantee entrenched in s. 2 (d) of the *Charter* cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore "the historical origins of the concepts enshrined" in s. 2 (d): *Big M Drug Mart*, at p. 344. It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.
>
> (Emphasis added)

[22] At paragraph 82 of *MPAO*, the majority continued by noting that the purpose of collective bargaining "is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties". (emphasis added)

[23] Likewise, in *BCTF*, Donald J.A. stated:

> 291 Pre-legislative consultation, then, can be seen as a replacement for the traditional collective bargaining process, but only if it truly is a meaningful substitution. To be meaningful, the bargaining parties must consult from an assumed position of "approximate equality". I note here that in *SFL*, Abella J., writing for the majority of the Court, found that a right to strike was essential in order to maintain "approximate equality" between employees and employers in the collective bargaining process: at para. 55, quoting Judy Fudge and Eric Tucker,

> "The Freedom to Strike in Canada: A Brief Legal History" (2009-2010), 15 C.L.E.L.J. 333 at 333.
>
> (Emphasis added)

[24] Finally, in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2016 ONCA 625, leave to appeal denied, [2016] S.C.C.A. Nos. 444, 445 ("***Professional Institute of the Public Service of Canada***"), Lauwers J.A., for the Court, wrote at para. 39:

> In the domain of labour relations, s. 2(d) protects "a meaningful process of collective bargaining", which is one "that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them": *MPAO*, at para. 81. Meaningful collective bargaining maintains a balance of bargaining power, or "equilibrium", between unions and employers: *MPAO*, at paras. 72 and 82; *SFL*, at paras. 56-57.
>
> (Emphasis added)

[25] Thus, the presence (or absence) of good faith collective bargaining compels the Court to critically examine whether the government has improperly created a power imbalance by abusing its ultimate legislative authority and improperly stripping employees of a meaningful opportunity to engage in collective bargaining.

[26] This is not to say that governments are entirely powerless to legislate when the parties are deadlocked. However, the statutory power to unilaterally end negotiations and impose a new collective agreement is constrained. Governments must first reasonably engage with their employees in good faith and cannot manufacture an "impasse" as a pretext for imposing its will through legislation. As Donald, J.A. warned in *BCTF*:

> The government could declare all further compromise in any context to be untenable, pass whatever it wants, and spend all "consultation periods" repeatedly saying "sorry, this is as far as we can go". This would make a mockery of the concept of collective bargaining. An impasse created by the Province through the adoption of unwavering, unreasonable positions and a lack of good faith is not a legitimate impasse.
>
> (at paragraph 340)

[27] Finally, it should be emphasized that the analysis under section 2(d) is highly contextual and the circumstances surrounding the impugned legislation and its impact on the process of collective bargaining must be considered (*Health Services*, at paragraphs 107 and 109).

[28] The recent decision of the Nova Scotia Court of Appeal in *Reference re Bill 148, An Act Respecting the Sustainability of Public Services*, 2022 NSCA 39 ("***Reference re Bill 148***") reinforced the importance of context. In this decision, the Nova Scotia Court of Appeal considered the recent decision in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85 ("***Manitoba Federation***"), including the following conclusion:

> [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).
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> [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:
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> a) the wage restraint legislation is broad-based and time-limited; and
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> b) it does not preclude a meaningful collective bargaining process from occurring on other important workplace matters.

[29] The Nova Scotia Court of Appeal did not interpret *Manitoba Federation* as stamping any and all time-limited wage restraint legislation with the Court's imprimatur of constitutional validity. Rather, the Courts must still carefully consider the legislation, the context within which the legislation was enacted, and its impact on the process of collective bargaining. Writing for the panel, Wood, CJ concluded:

> In my view, *Manitoba Federation* does not add any new principles to the jurisprudence with respect to s. 2(d) of the Charter. The Attorney General relies heavily on this decision because of the similarities between the legislation under consideration and the *PSSA*. He argues it stands for the proposition time limited wage restraint legislation is always constitutional. If the suggestion is this conclusion can be reached without the need to consider the surrounding context, this runs contrary to the clear advice of the Supreme Court of Canada in *Health Services* , *Meredith* and *British Columbia Teachers' Federation*. I would not adopt such an interpretation of *Manitoba Federation*.

(at paragraph 49).[2]

The Test Under Section 2(d)

[30] The parties agree that the test for determining whether impugned legislation violates section 2(d) of the Charter involves two distinct inquiries:

1. "The first inquiry is into the importance of the matter affected by the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert" (*Health Services* at paragraph 93). Interference with insignificant matters will obviously not be considered sufficiently substantial as to attract Charter protection.

2. The second inquiry examines the meaningfulness of the collective bargaining process and "the manner in which the measure impacts the collective right to good faith negotiation and consultation" (*Health Services* at paragraph 93). The Province correctly notes that NSTU bears the burden of proving that the bargaining process leading up to Bill 75 did not meet the standard contemplated by section 2(d).

[31] In *Health Services*, the majority expressed the second inquiry this way:

> …does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining — the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2 (*d*), even if the content of the measures might be seen as being of substantial importance to collective

[2] A related question arises as to whether a government is required to engage in negotiations at all prior to enacting time-limited wage restraint legislation. In *Manitoba Federation*, Chartier, J.A. agreed with the government's argument 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" (at paragraph 80) Chartier, J.A. further observed that while the Manitoba government could have entered into pre-legislative collective bargaining, it was not required to do so. (at paragraph 81) Paragraph 157 of *Health Services* and the Supreme Court of Canada's decision in *Mikisew Cree First Nation* v *Canada (Governor General in Council)*, 2018 SCC 40 ("***Mikisew***") were cited in support of this conclusion. Paragraph 157 -161 of *Health Services* considers the absence of consultation regarding contemplated legislation and the absence of contractual negotiations in the context of a section 1 analysis and whether legislation already deemed to have violated section 2(d) of the Charter minimally impaired the employee's Charter rights. These issues (lack of consultation or negotiation) supported the Court's conclusion that "the government has not shown that the Act minimally impaired the employees' s. 2(*d*) right of collective bargaining." (at paragraph 161) Mikisew considered the duty to consult in the process of developing, passing and enacting legislation affecting First Nation treaty rights. In any event, it is not necessary to consider this issue further in this case as the parties were actively engaged in a collective bargaining process prior to enacting Nova Scotia's *PSSA*.

> bargaining concerns, since the process confirms the associational right of collective bargaining.
>
> (at paragraph 97)

[32] There seems to be no real debate that the impugned legislative provisions meet the first inquiry under the *Health Services* test for substantial interference with collective bargaining. Monetary issues like wages and any potential changes to the Service Award/Death Benefit are acknowledged to be of critical importance to NSTU and teachers, and therefore to the process of collective bargaining. The NSTU filed an expert report authored by Dr. Robert Hebdon[3] which provides empirical support for this same conclusion:

> It may be helpful to cite some evidence on the importance of monetary issues in collective bargaining. Labour Canada attempted to record the key strike issues in all strikes. From 1946 to 1999, they managed to record strike issues in 82% of all strikes. Addendum 1, Table 1 shows that monetary issues were key strike issues in 77% of strikes.
>
> (at page 7)

[33] However, the issues which were folded into the collective bargaining process included other important issues as well including additional leave with pay, additional guarantees regarding time for teachers to complete their professional obligations, and a concrete commitment to jointly work towards improving working conditions. Some of these issues were also incorporated into the impugned legislation (Bill 75) while others were unilaterally changed or withdrawn.

[34] While monetary concerns surrounding wages and the Service Award/Death Benefit certainly figured most prominently, the totality of the issues affected by the legislative measure are more comprehensive and enhance the underlying importance of Bill 75 to the NSTU.

[35] This case turns on the second inquiry related to the impact of the legislation on the collective right to good faith negotiation and consultation.

[36] The parties disagree as to the scope of the second inquiry. The Province says that the second inquiry compels the Court to consider whether the parties came to the table "with the sincere aim of concluding an agreement." Even if parties hold hard and fast positions, they must still "approach bargaining with the hope that it

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[3] Dr. Hebdon was qualified to give expert opinion evidence on issues related to public sector collective bargaining and labour relations.

will succeed" (Province Reply Brief filed January 22, 2021, paragraph 45). The question as posed by the Province is: "…was the Province, like the government in [*BCTF*], going through the motions of consultation while always intending to pass Bill 75, or was it instead committed to sincere efforts to reach its goals through agreement before resorting to legislation."

[37] NSTU states that the second inquiry "…deals with the manner in which the impugned measures, i.e., the provisions of Bill 75 that impose wage freezes and restraint and end the Service Award accrual, impacts on those *fundamentally-important matters*" (NSTU Reply Submissions filed February 12, 2021, paragraph 8, emphasis in submissions). Thus, NSTU argues:

> …the focus is narrowed on the impugned legislative provisions that affect subject matters that have already been determined to be of fundamental importance to the process of collective bargaining, in this case, the wage and Service Award provisions of Bill 75. The focus is not expanded out again under the second inquiry, as the Employer would have it, to the Employer's attitude towards collective bargaining generally.
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> (NSTU Reply Submissions filed February 12, 2021, paragraph 8)

[38] Respectfully and in my view, the Court is not limited at the second stage of the inquiry to consider only the monetary issues of wages and Service Award/Death Benefit. My reasons include:

1. NSTU cites paragraph 97 of *Health Services* which states:

> Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining — the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(*d*), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.

Respectfully, the Supreme Court of Canada refers to respect for "the fundamental precept of collective bargaining" – which is a process and not a more narrow examination into "subject matters that have already been determined to be of fundamental importance to the process of collective bargaining", as argued by NSTU. In other words, the inquiry compares the legislative measures (which, as here, may extend beyond

specific monetary issues) against the Charter-protected duty to consult and negotiate in good faith.

2. I agree that the monetary issues surrounding wages and the Service Award/Death Benefit are clearly of significant importance and sufficient to satisfy the first inquiry under *Health Services*. I also agree that when assessing whether Bill 75 respected the fundamental precepts of collective bargaining, the impact of these monetary issues (wages and Service Award/Death Benefit) should properly be afforded greater weight proportionate to their importance. However, that does not mean that the remaining issues which formed part of the negotiations are irrelevant. As indicated, Bill 75 affected other issues that enhanced the importance of this legislative measure to teachers. Indeed, NSTU's submissions in this proceeding included comprehensive coverage all of the various other issues which during collective bargaining and were affected by Bill 75. (See, for example, NSTU Written Submissions filed December 18, 2020, at paragraph 197). NSTU's expert, Dr. Hebdon, similarly focussed on wage restraint and the Service Award/Death Benefit but did not ignore other aspects of Bill 75. Paragraph 450 of NSTU's Written Submissions filed December 18, 2020, summarizes Dr. Hebdon's report by saying: "In the expert opinion of Dr. Hebdon, the removal of the Service Award in Bill 75, <u>along with other aspects of Bill 75</u>, was 'unfair, biased, punitive and inappropriate for a back-to-work law.'" (emphasis added)

3. Removing all aspects of the collective bargaining other than monetary matters creates an artificial and potentially false impression of the collective bargaining process. It also risks ignoring or masking the impact of non-monetary problems that may be relevant to the question of whether the employer respected the fundamental precepts of the collective bargaining process. This concern arises here because the third and final tentative agreement negotiated between the Province and NSTU contained both monetary <u>and</u> non-monetary terms which the Province insists flowed from good faith negotiations. The Province subsequently and unilaterally altered those same terms when enacting Bill 75. Referring again to NSTU's expert, Dr. Hebdon emphasizes that the negotiating leverage available to a party during collective bargaining is heavily influenced by the extent to which monetary issues remain open for discussion and debate:

> …monetary issues are pivotal to the exercise of bargaining power of both labour and management. The parties know that when monetary issues are settled it is almost impossible to generate pressure on any other issues because they are central to the negotiations.

Again, I do not dispute the vital importance of monetary issues to the process of collective bargaining. The Court obviously reserves the right to appropriately assess the manner in which monetary issues were addressed in a way that recognizes, and is proportionate to, their significance and their impact on the presence (or absence) of approximate equality between the negotiating parties. However, again, this does not mean (and Dr. Hebdon does not say) that the non-monetary aspects of Bill 75 are inconsequential and should be ignored – particularly for the purpose of conducting the second inquiry under *Health Services* and examining the government's conduct in a way which is both fair and accurately reflects the negotiating process. To do otherwise would, in my view, result in a distorted view as to the nature and scope of the government's conduct during the course of collective bargaining.

[39] Returning to the factors which bear upon the second inquiry, at paragraphs 101 – 109 of *Health Services*, the Supreme Court of Canada provided a helpful guide to the issues which inform the duty of good faith collective bargaining. By way of summary:

1. Employees have the right to have their representations considered (not simply received) by their employer. Thus, collective bargaining is not a series of passive, unproductive meetings. "The parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract …" As Cory J. said in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369:

   > In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.
   >
   > (at paragraph 101)

2. Parties engaged in good faith collective bargaining are not compelled to reach agreement. They may legitimately reach either a breaking point or adopt a "take it or leave it" position (paragraphs 102 – 103).

3. "…if the nature of its proposals and positions is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship, the duty to bargain in good faith will be breached" (at paragraph 105).

4. As indicated above, "…regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith" (at paragraph 107). Ultimately, "… substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished" (at paragraph 109).

[40] To this helpful synopsis, I would add the following:

1. The amount of time spent negotiating is not as important as the quality of the negotiations. In *Canadian Union of Postal Workers* v *Her Majesty in Right of Canada*, 2016 ONSC 418, the *Restoring Mail Delivery for Canadians Act* ended ongoing strike action by postal workers after almost nine months of negotiations, mediation and conciliation, a Union put itself in the position to strike and then, after more than 100 days of bargaining under the shadow of a potential strike, engaged in rotating strikes. Firestone, J. determined that the *Restoring Mail Delivery for Canadians Act* breached section 2(d) of the Charter and section 2(b) (freedom of expression); and that the breach was not justified under section 1. In reaching that conclusion, Firestone, J. determined, among other things, that "there is no support for a temporal limit on the right to strike in the jurisprudence of the Supreme Court of Canada" (at paragraph 185); and

2. Legislation unilaterally passed by the government following a period of collective bargaining must respect and remain faithful to the collective bargaining process protected by section 2(d) of the Charter. There is nothing in the case law that would suggest governments may negotiate in good faith and then, if an agreement is not reached, unilaterally release themselves from any ongoing obligations of good faith and assume the freedom to do whatever they want through legislation. In my view, that would mutate an otherwise legitimate process into a travesty. As Donald, J.A. said in *BCTF v. British Columbia:*

> …if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process. If the government does not have time to consult or negotiate with a collective bargaining unit because of exigent circumstances or emergency, it may then be found to have breached s. 2(d), but such a breach may be saved under s. 1.
>
> (at paragraph 293, emphasis added)

[41] Before leaving the issues, which inform the duty of good faith collective bargaining, there is one final issue that is important and merits more detailed discussion.

[42] In its written submissions, the Province acknowledges taking a hard position in its negotiations with NSTU, particularly with respect to the key monetary issues (wages and the Service Award/Death Benefit). However, it says that while "surface bargaining" is prohibited, parties are free to take unyielding, tough positions and engage in "hard bargaining".

[43] In support of these arguments, the Province relies on *Health Services*. This decision also involved back-to-work legislation and the majority of the Supreme Court of Canada specifically referred to the distinction between legitimate "hard bargaining" and impermissible "surface bargaining". It further described "surface bargaining" as follows:

1. "…inflexible and intransigent to the point of endangering the very existence of collective bargaining" (paragraph 103, quoting from *C.A.S.A.W., Local 4 v. Royal Oak Mines Inc.*, [1996] 1 S.C.R. 369, at para. 46); and
2. "…when one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship. It is the improper objectives which make surface bargaining a violation of the Act." (paragraph 104, quoting from *Canadian Union of Public Employees v Nova Scotia (Labour Relations Board)*, [1983] 2 S.C.R. 311 at p. 341)

[44] NSTU points out that this distinction between "hard bargaining" and "surface bargaining" arose in the private sector where "Wagner-style" labour negotiations prevail, and the underlying power equation is much different. In the private sector, the ultimate economic levers for exerting pressure on the other side are relatively

equal. Employees may strike. Employers may resort to a lock out. It is from that position of approximate equality that notions of "hard bargaining" and "surface bargaining" in the private sector emerged, "premised on the idea that each party 'is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the other side to make concessions." (NSTU Written Submissions filed February 12, 2021, paragraph 39 quoting from *BCTF* at paragraph 339)

[45] The dynamic changes in the constitutional context when the employer is the government and new concerns arise regarding an additional, formidable weapon in the employer's arsenal: back-to-work legislation. NSTU states that the power imbalance created by the government's statutory authority power exists only in the constitutional context and has no equivalent in the private sector. As such, assumptions embedded in the traditional Wagner-style approach break down and a different approach is required to recognize the government's inherent power advantage and restore some form of equilibrium between the negotiating parties.

[46] Recall the fundamental concerns discussed in *BCTF* regarding maintaining equilibrium or approximate equality between negotiating parties. Donald, J.A.'s reasons in *BCTF*, which came after the Supreme Court of Canada's decision in *Health Services* and, the NSTU says, more fully appreciates the shifting power dynamic when one of the parties engaged in collective bargaining has the statutory authority to legislate an end to any labour dispute. Although the decision of Donald, J.A. was rendered in dissent at the British Columbia Court of Appeal, its precedential value increased significantly when the Supreme Court of Canada allowed the union's appeal "substantially for the reasons of Justice Donald" (2016 SCC 49).

[47] NSTU emphasizes that the traditional jurisprudence developed in the context of private sector labour disputes and involving "Wagner-style" collective bargaining begins with the premise that the relationship between employer and employee during collective bargaining is adversarial; and the ultimate economic weapons through which employers and employees may pursue their respective interests are roughly equal thus ensuring a level playing field. Employees may engage in strike action in appropriate circumstances and employers may initiate a lock-out in appropriate circumstances. Based on this view of rough equality in economic power, neither side possesses an unfair advantage and, as NSTU notes, "each party 'is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the

other side to make concessions." (NSTU Written Submissions filed February 12, 2021, paragraph 39 quoting from *BCTF* at paragraph 339)

[48] In *BCTF*, Donald, J.A. adopted the basic reasoning in *Health Services* was adopted, but the perspective was sharpened and clarified to highlight the important contextual and constitutional differences which arise where, unlike private sector employers, government employers possess the additional power to enact legislation definitively ending the process of collective bargaining.

[49] Donald, J.A. began with two basic propositions:

1. "[E]mployees have a constitutionally protected right to strike in order to protect an approximately equal bargaining position with their employer" (at paragraph 279); and
2. Ensuring some form of equilibrium between the negotiating parties is essential to meaningful collective bargaining and to recognizing the basic reality that a government's ability to legislate an end to labour dispute confers upon it an inherent power advantage. Donald, J.A. wrote:

    a. "To be meaningful, the bargaining parties must consult from an assumed position of 'approximate equality'" (at paragraph 291);

    b. "It should be acknowledged that, absent checks and balances, the government may not feel obligated to maintain a position of approximate equality with employees. This Court should not be "indifferent to power imbalances in the labour relations context": MPAO at para 80. It is the ability of the courts to monitor and restrain government action that militates against this power imbalance. To use another constitutional right as an example, even though the Charter may not compel the distribution of locks, it still prohibits unreasonable searches by the state. Similarly, the Charter prohibits an abuse of any power imbalance by the government during the consultation process." (At paragraph 292. See also paragraphs 279 and 287); and

    c. "There is less of a need to inquire into the rationality of internal logic of substantive positions in the context of private parties because Wagner-style collective bargaining imagines resolution of impasse through mediation, arbitration, or the

> economic pressure of strikes. However, in the constitutional context, the government always has the power to unilaterally resolve impasse through legislation, or force workers to end a strike through constitutionally compliant back-to-work legislation. This is a huge power imbalance that fundamentally alters the calculus of how negotiations unfold" (At paragraph 339).

[50] A practical but complicated question arises: How does the Court distinguish between legislation which represents an "abuse of any power imbalance" or otherwise violates the employees' section 2(d) rights from legislation which respects section 2(d) rights while ultimately imposing a solution that more closely aligns to the government-employer's preferred outcome? Under what circumstances might a government-employer engage in "hard bargaining" which culminates in a constitutionally valid statute that may not exactly mirror but certainly reflects the employer's key demands? The answers to these questions are relevant here because Bill 75 imposes a collective agreement which is certainly much closer to the Province's bargaining position than that of NSTU.

[51] In my view, the following judicial comments and principles guide the Court's response:

1. It is clear that the freedom of associated protections under section 2(d) of the Charter are violated "if government legislation or actions substantially interfere with collective bargaining in purpose or effect in such a way that does not respect a process of good faith consultation: *Health Services & Support-Facilities Subsector Bargaining Assn* at para. 129." [*BCTF* at paragraph 283];
2. "Substantial interference" occurs where employees are denied the good faith opportunity to associate and effectively pursue workplace goals (*BCTF* at paragraph 287. See also paragraph 288);
3. Throughout *BCTF*, Donald, J.A. repeatedly equates "substantial interference" and the denial of an opportunity to good faith collective bargaining with the notion that collective bargaining was rendered essentially futile (*BCTF* at paragraphs 284 - 287, 285, 298, 311, 321, 351 and 385);
4. In assessing whether the government's actions rendered the process of collective bargaining essentially futile, "…courts must inquire into the

existence of good faith on the part of the government" (*BCTF* at paragraph 298). In doing so, the Courts equally examine the "substantive reasonableness" of the government's positions. Indeed, this was a critical point of departure which motivated Donald, J.A.'s dissent in *BCTF*:

> I note here that, as already discussed, a key component of my colleagues' reasons is their conclusion that it is inappropriate for a trial judge to consider the substantive reasonableness of the government's position. My colleagues then use that conclusion to disregard large portions of the foundations for the trial judge's finding of bad faith, including the findings I have just discussed. As I have explained, I believe that conclusion is in error. The trial judge was correct to analyze the substantive reasonableness of the Province's position.
>
> (*BCTF* at paragraph 358)

5. In terms of the evidentiary burden, "…failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record" (*Health Services*, at paragraph 107). Thus, the Court will scrutinize the substantive reasonableness of the government's positions from an objective standard. Superficial statements that are "easily self-serving and insincere" will not suffice (*BCTF* at paragraph 364);

6. In *BCTF*, Donald, J.A. offers the following more concrete examples:

    a. The following circumstances reflect the absence of good faith:

        i. "[I]f the government were permitted to hold out all of its positions as "final offers" and "skip" rounds of bargaining at its own whim through temporary prohibitions on collective bargaining, this would have the effect of making the act of associating essentially futile. But a sufficiently probing analysis of a government's good faith while engaged in consultation would ameliorate this threat to a large degree." (*BCTF* at paragraph 298); and

        ii. Closing one's mind to alternatives and failing to listen in good faith to the employees which "requires consideration and understanding of the position of the other side…In fact, consideration of the representations from the other

side is the absolute *minimum* that is required from the employer." (*BCTF* at paragraph 362. See also paragraph 375)

b. Conversely, in terms of actions which reveal the presence of good faith:

> If the government, prior to unilaterally changing the terms of employment, gives a union the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees' attempts at associating to pursue workplace goals were not pointless or futile."
>
> (BCTF at paragraph 287)

[52] In terms of applying these principles, it is also helpful to bear in mind the unique facts of *BCTF*. Very briefly, the British Columbia legislature enacted Bill 28 in 2002. It declared void certain items in an expired collective agreement between the government's representative and the teachers' union. The deleted terms were collectively defined in *BCTF* as "Working Conditions". Bill 28 also prohibited the inclusion of similar terms in all future collective agreements between the union and the government's representative. That is, it permanently prohibited collective bargaining on these issues. The union was not consulted before Bill 28 was enacted. In 2011, Bill 28 was declared unconstitutional. In 2012, the government responded to this declaration of unconstitutionality with Bill 22. In many respects, Bill 22 was duplicative. It declared void the very same "Working Conditions" provisions as Bill 28. In addition, like Bill 28, Bill 22 also included a ban on collective bargaining. However, unlike Bill 28, the ban in Bill 22 was temporary and expired about fourteen months later on June 30, 2013. In these circumstances, Donald, J.A.'s summary conclusions are unsurprising:

> First, the Province did not give the [union] a meaningful opportunity to make representations. To be a meaningful opportunity, the Province must have considered the [union's] representations in good faith, which it did not do. Second, the trial judge gave full consideration to the Province's policy objectives in her infringement analysis: see e.g., Bill 22 Decision at paras. 243, 244, 250, 308, 347, 349, 361, 394, 417. As I explained, I am confident that the Province is able to pursue its policy goals while respecting the fundamental freedoms protected by the Charter. Third, the Province cannot rely on a claim that the parties were at an impasse when Bill 22 was passed, because as I explained, a legitimate impasse can only occur if the Province had been negotiating in good faith. Fourth, as I will

> explain in greater detail below in my s. 1 analysis, the temporally limited prohibition on collective bargaining did not mitigate, but in fact entrenched, the substantial infringement resulting from the deletion of the Working Conditions. Fifth, as I explained above, the associated regulations passed by the Province do not mitigate the Province's substantial interference with the [union's] freedom of association.
>
> In summary, I agree with the trial judge that the Province did not consult in good faith. Since the Province did not consult in good faith, it did not retain a meaningful process that protected the [union's] s. 2(d) right to collectively bargain toward important workplace goals. The unilateral deletion of the Working Conditions, which were of significant importance to the teachers, was therefore a substantial interference with [union's] associational activity and a breach of s. 2(d).

FACTS

[53] Having explained the governing law, I turn now to the factual context within which this legal framework is applied.

[54] In 2015, a series of collective agreements between the Province and various public service unions were set to expire. The Province expressed alarm that the escalating costs of maintaining the public sector were simply unaffordable. It declared an urgent need for fiscal restraint and girded itself for difficult labour negotiations. It also began contemplating wage restraint legislation applicable to all public service unions if necessary to achieve its financial goals.

[55] The Province's strategy for upcoming negotiations with public service unions generally (and including the possible of wage restraint legislation) was laid bare in Cabinet documents disclosed by decision of Campbell, J. released May 4, 2019. The Province's appeal of Campbell, J.'s decision was dismissed on March 10, 2020 (2020 NSCA 17)

[56] These Cabinet documents reveal:

1. By as early as January 15, 2015, the Province was contemplating legislation applicable to all public service unions that would freeze wages. It would also phase out public service awards and related benefits. A presentation to Cabinet on January 15, 2015, began by confirming that "Almost all public sector agreements expire between October 2014 and July 2015." It also confirmed that the Province's key priorities around wage restraint would be difficult to achieve and "Decisions will need to be made in the whether to attempt to achieve

through job action or to legislate". Finally, Cabinet was warned as to the risk of a court challenge to wage restraint legislation. To mitigate this risk, the Cabinet was advised "legislating same wage pattern as offered";

2. A subsequent Cabinet meeting on June 18, 2015, identified three potential approaches to upcoming negotiations, all of which mentioned the likely difficulties with unions and the possibility of legislation. It also recommended a consistent, uniform approach with all public service unions because "The more changes made to individual agreements, the greater the risk of a Charter loss…" Finally, if legislation became necessary, the statute should "impose a pattern slightly more generous than the tabled patterns."

[57] The stage was set for what became a contentious and confrontational period of time for the provincial government and labour unions. The first major engagement occurred between the Province and NSTU.

[58] On June 18, 2015 (the same day as the Cabinet presentation discussed above), NSTU gave the Province notice to bargain a new collective agreement pursuant to section 18 of the *Teachers Collective Bargaining Act*, RSNS 1989, c. 460, as amended. The existing collective agreement dated May 14, 2013, between Nova Scotia's Minister of Education and Early Childhood Development and NSTU expired about 6 weeks later, on July 31, 2015.

[59] During the course of ensuing labour negotiations, the Province made two key monetary demands:

1. A temporary wage freeze; and
2. Terminating the ongoing accrual of a Service Award/Death Benefit. Some form of service award was a long-standing fixture in the teachers' collective agreements dating back to the early 1970s. The Service Award/Death Benefit contained in the 2012 collective agreement which expired July 31, 2015, can be traced back through each preceding agreement from January 1, 2002, to July 31, 2005.

[60] The parties managed to negotiate a tentative agreement ("**Tentative Agreement 1**"), with this risk in mind. Consistent with the Province's demands, Tentative Agreement 1 included a wage freeze for the first two years. Thereafter, wages would increase a total of 3% over 4 years:

- 1% as of August 1, 2017, the beginning of Year 3
- 1.5% as of August 1, 2018, the beginning of Year 4;
- 0.5% on July 31, 2019, the last day of Year 4.

[61] The Province points out that Tentative Agreement 1 included wage increases which were greater than its original "asking package". In that "asking package", the Province proposed a total wage increase of 2% over the 4 years as follows:

- 0% increase in each of Years 1 – 3;
- 1% as of August 1, 2018, the beginning of Year 4;
- 1% on July 31, 2019, the last day of Year 4.

Thus, the Province did soften its position somewhat on wages.

[62] Tentative Agreement 1 also terminated or froze ongoing accrual of the Service Award/Death Benefit as of July 31, 2015. However, here again, the Province points out that Tentative Agreement 1 contains concessions by the Province when compared against its original "asking package". In particular, the Province originally proposed that any Service Award be calculated based on the teachers' salary as of July 14, 2015. The calculation formula in Tentative Agreement 1 provided that Service Awards would be calculated based on the teacher's salary on the last day of employment (not July 14, 2015). In addition, the Province originally proposed that Service Awards only be paid to those teachers with 10+ years of service. Tentative Agreement 1 softened that requirement by allowing all years of service up to the last day of employment be taken into account in determining whether a teacher meets the minimum service eligibility criterion.

[63] NSTU states that Tentative Agreement 1 was reached under the "threat" of legislation. It refers to a discussion in October 2015 between the Deputy Minister of Finance and Treasury Board, George McLellan, and NSTU's Chief Negotiator and Legal Counsel, Ron Pink, Q.C. NSTU states that Mr. McLellan told Mr. Pink that the Province intended to introduce the legislation in the House of Assembly when the legislature opened on November 12, 2015, unless the parties could reach an agreement before then.

[64] Neither Mr. McLellan nor Mr. Pink testified. Instead, NSTU's representative Jack MacLeod, referred to this exchange in an affidavit filed June 22, 2022.

[65] The Province says that Jack MacLeod attests to information received from Mr. Pink who is said to have received it from Mr. McLellan. The Province also points out that the possibility of enacting legislation in October 2015 was not acted upon. Indeed, the *Public Services Sustainability (2015) Act*, S.N.S. 2015, c. 34 (referred to by the parties as "**Bill 148**"), would not be passed in the legislature until December 14, 2015 – after Tentative Agreement 1 was reached.

[66] At the same time, the Province "does not deny that Mr. McLellan spoke with Mr. Pink in October 2015, and relayed information that the Province had contemplated legislation if it was unable to achieve its wage pattern through collective bargaining" (Province written submissions filed January 22, 2021, at paragraph 75).

[67] NSTU says that the affidavit evidence of Mr. MacLeod referencing a discussion between Mr. MacLellan and Mr. Pink is admissible as an admission against a party.

[68] In addition, both sides say that the Court should draw an adverse inference against the other for the failure to file evidence from their respective representatives who were actually involved in this discussion: Ron Pink for NSTU and George McLellan for the Province. (NSTU Reply Written Submissions filed February 12, 2021, paragraphs 61 – 62; and Province Written Submissions filed January 22, 2021, at paragraph 76)

[69] In *Davison* v *NSGEU*, 2005 NSCA 51, Cromwell, J.A. (as he then was) wrote at paragraph 73:

> In civil cases, "... an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away": see J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at para. 6.321. The rationale of this rule is that the failure to call the evidence in these circumstances is an implied admission by the party "... that the evidence of the absent witness would be contrary to the party's case, or at least would not support it": *Ibid*. But, as with all implied admissions, one must remember that conduct may be equivocal. It follows that the failure to call evidence may reasonably be open to different interpretations. An adverse inference should only be drawn when it is warranted in all of the surrounding circumstances: see, e.g. Sopinka, Lederman and Bryant at para 6.315 - 6.320; *Kaytor v. Lion's Driving Range Ltd.* (1962), 40 W.W.R. 173 (B.C. S.C.) at 176.

[70] The failure of either side to call the persons directly involved in these discussions is open to different interpretations and the evidence is not sufficient strong to draw an adverse inference. In light of all the surrounding circumstances, I am not prepared to draw an adverse inference against either party.

[71] I do note certain additional evidence sheds some light into the Province's approach to potential legislation, but this evidence post-dates the October 2015 discussion:

1. A presentation to Cabinet on October 29, 2015, refers to an existing direction from Cabinet to table legislation. However, no such legislation had been introduced as of that date. As indicated, Bill 148 would not be passed in the legislature until December 14, 2015. Moreover, the constitutionality of Bill 148 is not before this Court. And Bill 75 would not be passed until much later, on February 14, 2017; and

2. On December 10, 2015, members of Cabinet confirmed the Province's resolve to legislate fiscal restraint, if necessary. Minutes taken from this Cabinet meeting contain the following observation: "Without some pressure, achieving wage mandate at the tables is in jeopardy". These Minutes conclude with the recommendation that legislation be introduced but not proclaimed "to enable pending tentative agreements to be addressed by [union] members".

[72] I accept Mr. MacLeod's statement as an admission against interest (*R. v. Evans,* [1993] 3 S.C.R. 653, at 664). However, as to weight, "The more precise the details of what was said, and the more detail concerning the surrounding circumstances, the more weight will be afforded the evidence" (*Prince Edward Island (Director of Child Protection)* v *P. (C.)*, 2014 PECA 18, at paragraph 57).

[73] The details around which the statement was made were relatively spare, and the fact that the admission is third hand through Mr. Pink and then through Mr. MacLeod creates additional concerns. In the circumstances, the weight which I attach to Mr. MacLeod's statement is minimal, beyond revealing an indication that the risk of legislation was in play and an active concern for NSTU when considering Tentative Agreement 1.

[74] Tentative Agreement 1 was approved by both NSTU negotiating committee and NSTU executive; however, it was conditional upon an affirmative vote by NSTU members.

[75] On November 18, 2015, Shelly Morse, President of NSTU and member of NSTU bargaining team, wrote to NSTU members as follows in "A Brief Word":

> Our lead negotiator was made aware that Government had prepared legislation that would impose the already highly publicized public sector wage settlement on

> teachers with a five-year deal – 0%, 0%, 0%, 1% and 1%. There were other significant clawbacks outlined in the legislation as referenced in the Minister's Action Plan for Education: The 3 Rs: Renew, Refocus, Rebuild, namely those that appear on page 17 under Cooperation or Negotiation with the Nova Scotia Teachers Union.
>
> …
>
> The threat of legislation to settle our agreement was real, and we have seen this government use its legislative power to resolve other labour disputes over the last two years.
>
> …
>
> **In the face of impending draconian legislation it was decided to recommend acceptance of this offer. Your provincial executive believes that while the process to reach this negotiated tentative agreement was not optimal, it is necessary under the current circumstances, and we urge you to vote in favour of this agreement.**
>
> (Emphasis in original)

[76] In Ronald Pink's letter to NSTU membership dated November 24, 2015, he wrote at page 3:

> If you vote to reject the tentative agreement ("no") in this round of bargaining the future is very much in doubt. These are the following possibilities:
>
> 1. Continue bargaining – Who can say if we will get a better deal. It is doubtful.
> 2. Conciliation – Why would anything change as a result of conciliation when the provincial executive and negotiating committee already agreed on an earlier deal.
> 3. A strike vote – Each member will have to decide whether to go on strike.
> 4. Legislation – Our sources advised us that legislation was always an option for the government and if they were to legislate, they may well impose by legislation their unilateral plan to change the Teachers' Provincial Agreement to fall in line with the Action Plan. This would be a serious setback for teachers.
>
> (Emphasis added)

[77] On December 1, 2015, NSTU members declined to follow their executive's recommendation. 61% of the teachers who cast ballots voted to reject Tentative Agreement 1.

[78] After Tentative Agreement 1, NSTU believed that the Service Award/Death Benefit would have to be preserved in order for the teachers to vote in favour of a tentative agreement.

[79] Immediately after the teachers voted against Tentative Agreement 1, the government initiated legislative action. On December 2, 2015, the Province confirmed that it was in the process of drafting legislation which would impose financial terms no better than Tentative Agreement 1.

[80] On December 10, 2015, as mentioned in paragraph 68 above, members of Cabinet confirmed the Province's resolve to legislate fiscal restraint, if necessary. Minutes taken from this Cabinet meeting contain the following observation: "Without some pressure, achieving wage mandate at the tables is in jeopardy". These Minutes conclude with the recommendation that legislation be introduced but not proclaimed "to enable pending tentative agreements to be addressed by members."

[81] On December 14, 2015, and consistent with Cabinet's recommendation, the Province passed Bill 148. Bill 148 received Royal Assent on December 18, 2015, but it was not proclaimed in force at that time – again consistent with the December 10, 2015 Cabinet recommendation. Bill 148 would not be proclaimed in force until August 22, 2017, after the labour dispute between the Province and NSTU was ended with the enactment of Bill 75 on February 14, 2017.

[82] Although conceived in the midst of negotiations with NSTU, Bill 148 was broader in scope and applied to a variety of public service unions. Nevertheless, the timing was specific to NSTU negotiations, and it formed a very significant part of the context within which negotiations between NSTU and the Province would continue. At a minimum, it reflected the government's determination to achieve certain wage restraint goals it considered critical.

[83] I note the following provisions of Bill 148:

1. Wages would be frozen for the first two years immediately following the expiry of the prior collective agreement. Wages would increase by 1% for Year 3, another 1% for Year 4 and 0.5% on the last day of Year 4. These increases were identical to the terms which were contained in Tentative Agreement 1 and already rejected by the NSTU members (sections 13 and 14);
2. Accrual of the Service Award/Death benefit would terminate or be frozen as of March 31, 2015 – worse than the July 31, 2015, deadline contained in Tentative Agreement 1. Furthermore, the Service Award/Death Benefit would be calculated based on the teacher's salary as of March 31, 2015 – again, worse than Tentative Agreement 1 which

calculated the benefit based on the last day of employment (sections 20 – 22); and

3. The Legislative Assembly delegated the authority to make regulations to the Executive Council. Section 29 stated, *inter alia*:

> (1) The Governor in Council may make regulations:
>
> (a) designating a person as a public-sector employee;
>
> (b) prescribing a person as not being a public-sector employee;
>
> …
>
> (o) defining any word or expression used but not defined in this Act;
>
> (p) further defining any word or expression defined in this Act;
>
> (q) respecting any matter or thing the Governor in Council considers necessary or advisable to effectively carry out the intent and purpose of this Act.
>
> (2) A regulation made under subsection (1) may, if it so provides, be made retroactive in its operation to the date specified in the regulation.

[84] Again, Bill 148 was not proclaimed in force until more than 6 months after negotiations with NSTU ended and Bill 75 was in place. Nevertheless, the Province says that Bill 148 drew "lines in the sand" that could not be crossed in ongoing negotiations with NSTU. According to the Province, "it is a fact that Bill 148 placed restrictions on what concessions the Province could make with respect to wages and the Service Award."

[85] The Province further notes that Bill 148 did not preclude ongoing collective bargaining, including strike action. In addition, section 17 of Bill 148 allowed for the possibility that a portion of any savings achieved through collective bargaining may be used to fund compensation or benefits, subject to the approval of the Treasury and Policy Board. Thus, collective bargaining could continue after Bill 148 was passed but, the Province qualifies, within the parameters of Bill 148.

[86] It is a fact, as will be seen below, that negotiations continued after Bill 148 was passed. As well, NSTU was able to achieve additional, albeit modest, gains at the bargaining table.

[87] The Province further insists that Bill 148 is presumed to be constitutional at law and that its ability to make further concessions within the constraints established by Bill 148 negotiations must equally be presumed "to be constitutional and serve a

valid public purpose." (Province Written Submissions filed January 22, 2021, at paragraph 95)

[88] The impact of Bill 148 on collective bargaining was significant. In its original written submissions, NSTU explains: "Because of the ability of the government to proclaim [Bill 148], the NSTU did not have any leverage to negotiate more favourable wage or Service Award provisions than those contained in Tentative Agreement 1" (NSTU Written Submissions filed December 18, 2020, at paragraph 107). In addition, "The NSTU Negotiating Committee was aware that the Province of Nova Scotia could proclaim Bill 148 into force at any time…" NSTU Written Submissions filed December 18, 2020, at paragraph 112).

[89] I also note that the NSTU Executive and members perceived Bill 148 to be a bully tactic and a threat hanging over negotiations. NSTU felt that "…because of Bill 148, the NSTU Negotiating Committee had no ability in bargaining to persuade the [Province] to change its position on salary or the elimination of the Service Award."

[90] In subsequent written reply submissions, NSTU responded to the law which presumes validly enacted statutes are presumed constitutional and passed for a valid purpose. NSTU adopted a more nuanced approach to Bill 148. It argues that while Bill 148 impacted collective bargaining, it was also not formally proclaimed in force until well after Bill 75 terminated any further collective bargaining and that, therefore, it was not "operative" during the relevant period of time. Moreover, Bill 148 was not retrospective in nature and, therefore, could not be used to retroactively absolve the Province of its misconduct during collective bargaining. The NSTU argued that Bill 148 "did not operate during the contentious period and cannot retroactively "wipe clean" the actions and conduct of the government" (NSTU Written Reply Submissions filed February 12, 2021, at paragraph 52). The Province disagrees and states that the presumption of constitutionality applies in this case.

[91] I consider below the interplay between the NSTU's concerns around Bill 148 during collective bargaining and the law which presumes that validly enacted statutes are constitutional and passed for a public purpose. For present purposes, suffice it to say that negotiations did proceed. However, pausing here, it is important to emphasize that to the extent ongoing process of negotiations continue under the shadow of any legislation, it was Bill 148 - not Bill 75, which is the subject of this proceeding. Bill 75 would not be conceived or enacted until Tentative Agreement 3. Again, I return to the significance of this issue below.

[92] Between January and May, 2016, the Province's chief negotiator, Ron MacLeod, told Jack MacLeod, a member of NSTU's negotiating committee, that he had no mandate to preserve the Service Award/Death Benefit because of Bill 148. The Province does not dispute this evidence but points out that it is consistent with the constitutional limits created when Bill 148 was passed, although not in force. That is, the Province argues, Bill 148 established statutory boundaries which the Province's negotiating team could not cross, and they included clear restrictions regarding wages and the Service Award/Death Benefit. Furthermore, as just indicated, the Province maintains that Bill 148 is deemed to be constitutional and passed for a valid public purpose. Again, I return to this issue below.

[93] On September 2, 2016, the parties reached a second tentative agreement ("**Tentative Agreement 2**"). Again, it was approved by both NSTU negotiating committee and NSTU executive. And again, it was conditional upon approval by NSTU members.

[94] Tentative Agreement 2 did not include any improvements to Tentative Agreement 1 in terms of the wage freeze. In addition, and although NSTU executive believed teacher approval hinged on preserving the Service Award/Death Benefit, Tentative Agreement 2 again terminated accrual of that benefit.

[95] That said, NSTU did achieve some gains. For example:

1. NSTU was able to negotiate a "me too" clause meaning that if any other public sector union was able to obtain better wage increases or a latter accrual date for any service award, NSTU had an option to accept the greater benefit;
2. The Province agreed to a new Partnership on Systemic Working Conditions in which a committee including three (3) members from each of the NSTU and the Province and one school board member. This Partnership would address systemic demands on teachers that may limit the teachers' ability to facilitate student learning and success.

[96] NSTU negotiating committee and NSTU executive reluctantly recommended approval of the tentative agreement, having regard to the threat posed by Bill 148.

[97] On October 4, 2016, NSTU members again declined to accept that recommendation. 70% of the teachers who cast ballots voted to reject Tentative Agreement 2.

[98] On October 25, 2016, 96% of NSTU members voted in favour of a strike.

[99] On October 27, 2016, NSTU asked that the Province agree to the appointment of a conciliation board as a vehicle for trying to resolve their differences. The Province agreed to conciliation but conditional upon the provisions of Tentative Agreement 1 and Tentative Agreement 2 regarding wages and the elimination of the Service Award/Death Benefit be untouched.

[100] On October 29, 2015, a presentation to Cabinet confirmed "SCC decisions make clear demonstrating effort to consult is critical" but also recommend tabling legislation early in the next sitting of the Legislative Assembly.

[101] On November 28, 2016, NSTU issued a notice of its intention to strike as of December 5, 2016. In a press release issued that same day, NSTU announced its anticipated strike action. They called the plan "Work to Rule". The title was somewhat of a misnomer in that the plan did not fully and strictly adhere to all statutory work requirements for teachers. NSTU acknowledges that teachers did withdraw services that they would normally be obliged to perform under the *Education Act*, S.N.S. 1995-96, c.1. Thus, strictly speaking, it was not "work to rule".

[102] In any event, the Province decided to close schools on December 5, 2016, but re-opened them the next day, December 6, 2016. NSTU members returned to school but implemented its "Work to Rule" plan.

[103] On December 13, 2016, and at the Province's request, the parties returned to the negotiating table. In response to NSTU's job action, additional gains followed. For example:

1. While there would still be a wage freeze for the first two years of the contract, the terms under which wages would increase in the last two years improved. There would still be a 3% wage increase over the term of the contract, but the timing of that increase was accelerated as follows:

    - 2% as of April 1, 2017 – as opposed to 1% as of August 1, 2017;
    - 1% as of April 1, 2018 – as opposed to 1.5% as of August 1, 2018. Having achieved the 3% increase as of April 1, 2018, the final 0.5% increase on July 31, 2019, was removed

2. The Province agreed to provide teachers with one day of leave with pay in the current year and two days of leave with pay in each subsequent year subject to certain terms regarding the purpose of the leave and advance notice;

3. The Partnership on Systemic Working Conditions remained but was strengthened to include an arbitration provision.

[104] On January 20, 2017, the negotiating teams reached a third Tentative Agreement ("**Tentative Agreement 3**"). On January 25, 2017, NSTU President wrote to members saying, in part, that: "The dark shadow of Bill 148 and the threat of an imposed contract have loomed heavily over the process." However, once again, the tentative agreement was approved by NSTU's negotiating committee and NSTU's executive and recommended to NSTU members.

[105] Immediately following Tentative Agreement 3, on January 23, 2017, NSTU members suspended their "Work to Rule" protest. However, they quickly resumed their protest a week later citing comments attributed to Premier Stephen MacNeil which they saw as unfair and unnecessarily inflammatory.

[106] On February 8, 2017, NSTU members voted on Tentative Agreement 3. For a third time, the membership declined to accept their executive's recommendation. This time, 78% of the teachers who cast ballots voted to reject Tentative Agreement 1 – up from 61% rejection for Tentative Agreement 1 and 70% rejection for Tentative Agreement 2.

[107] The Province reacted with haste by introducing new legislation which dealt specifically with teachers: Bill 75, the constitutionality of which is challenged in this proceeding.

[108] Under section 3 of Bill 75, the prior collective agreement dated May 14, 2013, between the Minister of Education and Early Childhood Development and NSTU was amended in accordance with new terms imposed under Schedule A of the Act.

[109] On February 21, 2017, the Nova Scotia legislature passed Bill 75 and, unlike Bill 148, proclaimed it in force immediately. Thus, a new collective agreement was created by statute, and not collective bargaining. NSTU members were legally required to return to the classroom and fulfill their statutory duties as described in the *Education Act*, S.N.S. 1995 – 1996, c. 1 as amended (the "**Education Act**"). They did so, reserving their right to challenge the constitutionality of the government's actions.

Bill 75

[110] Bill 75 brought to an end NSTU's ongoing job action. It also terminated the process of collective bargaining. Thus, section 13 of the Act addresses the right of teachers to engage in ongoing "work to rule" strike action. It confirmed a teacher's legal obligation to comply with certain statutory requirements enumerated in sections 26 and 31 of the *Education Act*, S.N.S. 1995 – 1996, as amended, regardless of any rights conferred under the *Teachers Collective Bargaining Act*, R.S.N.S. 1989, c. 460, as amended. The statutory duties listed in section 26 and 31 of the *Education Act* included obligations to diligently teach prescribed courses as may be assigned to a teacher; conduct necessary assessments to track student progress; maintain order in the classroom; etc. In effect, these specific teaching duties were to be fulfilled regardless of any labour action that might otherwise be authorized under the *Teachers Collective Bargaining Act*.

[111] In addition, section 3 of Bill 75 imposed a new collective agreement on NSTU and the teachers, the terms of which were established under Schedule A. Section 3 states:

> 3 (1) The Teachers' Provincial Agreement made on May 14, 2013, between the parties, is amended in accordance with Schedule A to this Act.
>
> (2) The Teachers' Provincial Agreement referred to in subsection (1), as amended in accordance with Schedule A to this Act, is deemed to constitute a professional agreement entered into by the Minister as an employer and the Union as the bargaining agent.

[112] Schedule A of Bill 75 contained numerous new terms but, for present purposes, the following are particularly germane:

1. New four-year term: Section 23 of Schedule A amends Article 69.01 to the Teachers' Provincial Agreement to impose a four-year term from August 1, 2015 to July 31, 2019.
2. Wage Freezes and Reduced Wage Increases: Section 16 of Schedule A, and the wage schedules and supervisory allowances (Schedules E1-E5) set out therein, imposes wage freezes in the first two years (0% on August 1, 2015 and 0% on August 1, 2016). Thereafter, the wage increases were the same as Tentative Agreement 1 and Tentative Agreement 2 (not Tentative Agreement 3):
    - 1% as of August 1, 2017, the beginning of Year 3;

- 1.5% as of August 1, 2018, the beginning of Year 4; and
- 0.5% on July 31, 2019, the last day of Year 4.

3. Service Award and Death Benefit: Section 21 of Schedule A adds language to the Service Award article in the Teachers' Provincial Agreement to freeze accrual of service on July 31, 2015, for purposes of calculation of the Award. This provision effectively capped the Service Award/Death Benefit at whatever amounts had accrued for an existing teacher as of July 31, 2015, and eliminated the Service Award/Death Benefit for any new teachers hired after that date. This was consistent with Tentative Agreement 3.

4. New Council to Improve Classroom Conditions: Section 22 of Schedule A created a Council to Improve Classroom Conditions comprised of 14 members, 1 of whom would be appointed by NSTU. Moreover, matters could be forwarded to an arbitrator by majority vote. These provisions eroded the NSTU's position from the Partnership on Systemic Working Conditions provisions in Tentative Agreement 3.

[113] At the time Bill 75 was enacted and proclaimed in forced, Bill 148 remained in place but had not yet been proclaimed in force. Notwithstanding the fact that Bill 148 as passed by the Legislative Assembly applied to teachers, Bill 148 was never amended. Rather, on August 22, 2017, the Executive Council:

1. Proclaimed Bill 148 in force; and

2. Passed a regulation which exempted teachers, among others, from the operation of Bill 148.[4] The regulation was not retrospective in operation. These regulations were passed in accordance with section 29(1) of Bill 148 quoted in paragraph 80, above.

APPLICATION OF THE FACTS TO THE LAW

[114] Regarding the first inquiry under the *Health Services* test, I agree that monetary issues like wages and phasing out the Service Award/Death Benefit were of significant importance to the process of collective bargaining. Wages and benefits lie at the heart of the employment relationship. They pay for the necessities of life; instill a sense of worth and self-respect; and serve as a measure of the value we place

[4] Section 3(b) of N.S. Reg. 128/2017 states a "teacher" is not a "public-sector employee" for the purposes of defining "public-sector employees" under section 3(n) of Bill 148.

on a person's labour. The words of Dickson, CJ wrote in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 echo strongly:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.
>
> (At page 368. Dickson, CJ wrote this passage in dissent but it was subsequently quoted with approval in *Dunmore* v *Ontario (Attorney General)*, 2001 SCC 94 at paragraph 118)

[115] The controversy in this case revolves around the second inquiry in *Health Services*: whether the legislative measure or government conduct in issue respects the fundamental precept of collective bargaining.

[116] At a minimum, Bill 75 failed to respect the fundamental precept of collective bargaining by failing to adopt and codify the terms contained in Tentative Agreement 3. Even accepting for present purposes, the Province's argument that the parties finally reached a legitimate impasse following good faith collective bargaining, the Province was wrong to then assume that it could do whatever it deemed appropriate. Recall the words of Donald, J.A. in *BCTF:*

> …if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process.
>
> (at paragraph 293, emphasis added)

[117] Donald, J.A. provided the following additional guidance as to what is meant by legislation which is "consistent with that consultation process" when discussing the earlier Supreme Court of Canada decision in *Meredith v. Canada (Attorney General)*, 2015 SCC 2. He wrote:

> The majority in *Meredith* found that this did not constitute substantial interference with freedom of association, partly because the new wage rate was "consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes": *Meredith* at para. 28. The Federal Government had negotiated and consulted with various collective representatives, and had

> unilaterally imposed an outcome consistent with that process. It was clear that the Federal Government had listened to and incorporated the priorities and interests of the public employees.
>
> (at paragraph 290)

[118] When Donald J.A. stated that a government, having negotiated in good faith and still reaching an impasse, it may unilaterally pass section 2(d) compliant legislation "consistent with that consultation process", he meant that the legislation must reflect the outcome reached *through that process*. In other words, a Province may unilaterally pass legislation but it must be consistent with (and not erode) the good faith negotiating process that preceded.

[119] To be clear, this is not to suggest that section 2(d) protects or guarantees a specific outcome. No party entering negotiations can claim a constitutional expectation to any particular outcome. Rather, section 2(d) protects a party's right to an outcome arrived at through a *good faith process* of collective bargaining.

[120] Had the Province legislated Tentative Agreement 3, its arguments around the constitutionality of Bill 75 would resonate with greater force. At least the Province could argue that its legislative powers were used to duplicate (not undercut) the by-product of a collective process that the Province insists unfolded in good faith. On this, recall that on January 15, 2020 (months before collective bargaining), the risk of a court challenge to wage restraint legislation was identified. To mitigate that risk, the recommendation received was "…legislating same wage pattern as offered" (see paragraph 53 above). Yet, the Province did not even do that.

[121] Instead, the Province legislated a collective agreement which was much less favourable to teachers that Tentative Agreement 2. As a result, in my view, Bill 75 was inconsistent with the process of good faith bargaining and did not demonstrate that the Province "listened to and incorporated the priorities and interests" of teachers. Bill 75 was disrespected (and was not consistent with) the process which preceded it. In my view, Bill 75 did not respect any of the values that inspire section 2(d) of the Charter.

[122] At best, Bill 75 was an over-zealous but misguided attempt at fiscal responsibility or perhaps triggered by a realization that Tentative Agreement 3 was different from agreements being discussed with other unions and an after-the-fact attempt to follow the advice given to Cabinet on June 18, 2015 that all public service unions should be treated equally to mitigate litigation risk (see paragraph 119 above). At worst, Bill 75 was punitive or a vengeful attempt to gain some unrelated,

collateral benefit with other public service unions at the expense of NSTU. Whatever the motivation, by selectively dismantling Tentative Agreement 3, Bill 75 failed to fully respect the process of good faith collective bargaining and was terribly wrong.

[123] The changes which adversely affected the priorities and interests of teachers included:

1. Bill 75 removed the early payment of wage increases in Tentative Agreement 3 were removed and the reverted back to the terms set out in Tentative Agreement 1 and Tentative Agreement 2;
2. Bill 75 removed the provisions in Tentative Agreement 3 that granted teachers two additional days off for "self-directed preparation/development"; and
3. Bill 75 removed the Partnership on Systemic Working Conditions included in Tentative Agreement 3 was replaced with a Council to Improve Classroom Conditions. NSTU's representation on this Council was greatly reduced and the arbitration provisions were significantly weakened.

[124] The Province broadly defends the unilateral changes in Bill 75 by declaring that: "With some exceptions flagged by the NSTU, [the new collective agreement imposed by Bill 75] largely replicates the core agreements three times by the parties during collective bargaining" (NSTU Reply Written Submissions filed January 22, 2021, at paragraph 119)

[125] The Province justifies certain more specific provisions in Bill 75 that unilaterally altered the terms of Tentative Agreement 3 as follows:

1. The unilateral decision to reduce wages increases below what had been negotiated in Tentative Agreement 3 and roll them back to the increases permitted under Tentative Agreements 1 and 2 "does not make the bargaining process unmeaningful; section 2(d) does not guarantee any particular outcome to negotiations, just a meaningful process" (NSTU Reply Written Brief filed January 22, 2021, at paragraph 120);
2. The unilateral decision to create a new "Council to Improve Classroom Conditions": "…largely replicates [the] partnership arrangement negotiated with the NSTU as part of Tentative [Agreements] 2 and 3" (NSTU Reply Written Brief filed January 22, 2021, at paragraph 122)

> – even though NSTU's influence and representation on this new "Council" was dramatically reduced.

[126] The Province does not specifically address removing the additional leave with pay provisions included in Tentative Agreement 3.

[127] In my view, these rationalizations obfuscate the facts and are an exercise in sophistry. My reasons include:

1. The Province cannot, when discussing Tentative Agreement 3, highlight and claim credit for such things as wage or additional paid leave or the Partnership on Systemic Working Conditions as concrete proof of its willingness to listen and engage in good faith negotiations but then, when discussing Bill 75, reverse course and use words such as "largely replicates" to somehow diminish their importance or obscure the unilateral nature of the Province's conduct;
2. The Province says that it was constrained by Bill 148 and suggests that the wage increases contained within Tentative Agreement 3 were possible because, consistent with Bill 148, the parties were able to find offsetting cost saving through good faith negotiations. Yet, Bill 75 ignored any of the cost savings developed in discussions with NSTU to justify the additional benefits secured in Tentative Agreement 3. Instead of recognizing those good faith efforts at finding cost savings and the related improvements on monetary matters, the basic monetary terms were simply rolled back to Tentative Agreements 1 and 2. Moreover, the two additional days of leave with pay were removed altogether without any reciprocating benefit to teachers;
3. I disagree the new Council to Improve Classroom Conditions "largely replicates" the Partnership on Systemic Working Conditions in Tentative Agreement 3. The NSTU's representation on the new "Council" was severely reduced and the arbitration provisions weakened. These unilateral changes served to compromise (not incorporate) the priorities and interests of teachers;

[128] The exceedingly obvious fact is that Bill 75 did not "largely replicate" Tentative Agreement 3. On the contrary, it selectively dismantled Tentative Agreement 3 and debased the process that preceded it.

[129] Based on these reasons alone, Bill 75 violates section 2(d) of the Charter.

[130] That said, NSTU neither focusses on Tentative Agreement 3 nor seeks to have it recognized and enforced as a reflection of good faith collective bargaining. NSTU complaint is broader. It argues that the legislative measure in question (Bill 75) reflected a bad faith process of collective bargaining that was contaminated from the very beginning. NSTU asks that Bill 75 be condemned as unconstitutional but goes further and insists that a simple declaration invalidating Bill 75 results only in a pyrrhic victory, leaving teachers without an effective remedy. NSTU's arguments around remedy reveal its primary goal: restoration of the Service Award/Death Benefit that was eliminated through Bill 75. Indeed, in terms of a substantive damages award under section 24(1) of the Charter, NSTU requests only that the Service Award/Death Benefit be immediately reinstated into the existing collective agreement together with other related relief for teachers who resigned or retired after Bill 75 and whose entitlement to the Service Award/Death Benefit was reduced. (NSTU Written Submissions filed December 18, 2020, at paragraph 520)

[131] NSTU supports this request by referring back to the process of collective bargaining that preceded Bill 75 and argues that the Province acted in bad faith by:

> …approaching collective bargaining with a closed mind on wages and the Service Award, having a plan in place well before the commencement of negotiations to enact legislation to impose its position on wages and the Service Award if it could not be achieved in bargaining, and then by passing [Bill 148], which took wages and the Service Award off the bargaining table.
>
> (NSTU Written Submission filed December 18, 2020 at paragraph 6)

[132] Respectfully, in the circumstances of this case, I am unable to agree that the entire process of collective bargaining that yielded three successive tentative agreements violated the rights guaranteed in section 2(d) of the Charter.

[133] I deal first with NSTU's argument that Bill 148 hovered over negotiations as a looming threat and constant reminder that, if NSTU refused to bend to the Province's will on wages and the Service Award/Death Benefits, the Province came to the table with a legislated solution locked, loaded and ready to fire. NSTU maintains that Bill 148 clearly demonstrates that:

1. The Province used its improperly used its legislative powers to upset the equilibrium between negotiating parties - a prerequisite for good faith collective bargaining; and
2. The Province came to the table with a closed mind on the key monetary issues of wages and the Service Award/Death Benefit. Indeed, after

> Bill 148 was passed, NSTU points to evidence in which the Province relied upon Bill 148 as a justification for maintaining a tough and rigid position on these monetary issues. The Province's negotiators confirmed that they did not have a mandate to negotiated outside the provisions of Bill 148.

[134] NSTU identifies Bill 148 as the instrument or legislative measure which rendered collective bargaining futile or meaningless. However, NSTU does not challenge the constitutionality of Bill 148 in this proceeding. It focusses on Bill 75 as the legislative measure that ultimately ended collective bargaining and unilaterally forced NSTU to accept a new collective agreement. In response, the Province points out that Courts must presume legislation is constitutional and serves a valid public purpose unless it is being directly challenged which, again, is not the case here. (*Harper* v *Canada (Attorney General)*, 2000 SCC 57 at paragraph 9) Even where a party directly challenges the constitutionality of specific legislation (which is not occurring here in so far as Bill 148 is concerned), a stay temporary of the statutory power is an exceptional remedy. In *Alberta Union of Provincial Employees* v *Alberta*, 2019 ABCA 320, the union sought an injunction temporarily staying legislation which unilateral imposed new collective agreement terms on the union members. The Alberta Court of Appeal concluded that the presumption of constitutionality could only be temporarily accepted in the "clearest of cases". (at paragraphs 14 – 17)

[135] Neither side has presented any law (and I am not aware of any law) conferring extraordinary judicial discretion to excuse or avoid the presumption of constitutionality. Even if such law exists, it is difficult to see how it might be applied here where the constitutionality of the impugned legislative measure which the employee criticizes (Bill 148) is not put in issue in the proceeding.

[136] NSTU acknowledged that it is not challenging the constitutionality of Bill 148 in this proceeding and insists that it is not attempting to launch a collateral attack on Bill 148. Rather, NSTU states that the issue of whether Bill 148 benefits from the presumption of constitutional validity is irrelevant because:

1. Bill 75, not Bill 148, ended collective bargaining between the Province and NSTU;
2. Bill 148 received Royal Assent on December 18, 2015, after Tentative Agreement 1 but before Tentative Agreement 2 and Tentative Agreement 3. However, Bill 148 only began to operate and produce

effects on August 22, 2017, when it was proclaimed in force. Importantly, from NSTU's perspective, this was *after* Bill 75 was already in place. Put differently, in so far as the constitutionality of Bill 75 is concerned, the dye was already cast *before* Bill 148 was operative. (*Sullivan on the Construction of Statutes*, 6th ed., 2014, §24.3); and

3. The only way the presumption of constitutionality afforded Bill 148 might be relevant was if it had retroactive effect and therefore would be deemed operative during the period of collective bargaining between NSTU and the Province. However, NSTU states and I agree, the language of Bill 148 clearly does not support retroactivity. (Halsbury's Laws of Canada (online), *Legislation*, "Retroactivity", (V.1(2)(a), HLG-31) could begin to operate and produce effects during the period of collective bargain NSTU argues that because Bill 148 did not "operate" during the relevant period of time, it is irrelevant.

[137] NSTU concludes that:

> Bill 148 has no legal effect on the Employer's conduct during bargaining with the NSTU. Bill 148 did not operate during the contentious period and cannot retroactively "wipe clean" the actions and conduct of the government. The presumption of constitutionality cannot and does not have any bearing on the section 2(d) analysis in relation to Bill 75.
>
> (NSTU Reply Written Submission filed February 12, 2021, at paragraph 6)

[138] In short, NSTU argues that the presumed constitutionality of a legislated measure which is validly enacted but, as yet, inoperative is irrelevant to the question of whether the government's conduct in collective bargaining violated section 2(d).

[139] Respectfully, I disagree. In my view, the presumed constitutionality of a validly enacted but as yet inoperative legislated measure is relevant to the section 2(d) analysis and the corresponding examination of the government employer's conduct during collective bargaining process.

[140] I begin by noting that even though NSTU says the issue of Bill 148 presumed constitutionality is irrelevant, it does not say Bill 148 itself is irrelevant. Quite the contrary, as mentioned, Bill 148 is central to NSTU's argument regarding the Province's alleged bad faith in collective bargaining. For example:

1. The reality is that the legislative measure which influence the parties during the course of collective bargaining was Bill 148, not Bill 75. To

the extent the government began to consider a global legislative measure regarding wage restraint and service awards for all public service unions with whom collective bargaining was imminent, Bill 148 (not Bill 75) reflected that approach. Indeed, the idea of Bill 75 would not be conceived until after the parties had already been negotiating for many months and reached three tentative agreements.

2. As negotiations began with NSTU, the Province's fiscal mandate was a global strategy applicable to approaching collective bargaining with many public service unions including NSTU. To the extent possible wage restraint legislation was part of that global strategy, it was Bill 148, not Bill 75. The evidence that the Province's global strategy did not target NSTU but was applicable to all public service unions is summarized in paragraphs 52-53;

3. NSTU says that the spectre of legislation (which became Bill 148) cast a dark shadow over negotiations with NSTU. Thus, Shelly Morse, President of NSTU and member of NSTU bargaining team, wrote to teachers on November 18, 2015, and warned:

> Our lead negotiator was made aware that Government had prepared legislation that would impose the already highly publicized public sector wage settlement on teachers with a five-year deal – 0%, 0%, 0%, 1% and 1%.
>
> …
>
> The threat of legislation to settle our agreement was real, and we have seen this government use its legislative power to resolve other labour disputes over the last two years.
>
> …
>
> **In the face of impending draconian legislation it was decided to recommend acceptance of this offer. Your provincial executive believes that while the process to reach this negotiated tentative agreement was not optimal, it is necessary under the current circumstances, and we urge you to vote in favour of this agreement.**
>
> (Emphasis in original)

Similarly, NSTU's Chief Negotiator and legal counsel, Ron Pink, Q.C. wrote a letter to teachers on November 24, 2015, and which said, in part:

> Legislation – Our sources advised us that legislation was always an option for the government and if they were to legislate, they may well impose by legislation their unilateral plan to change the Teachers' Provincial Agreement to fall in line with the Action Plan. This would be a serious setback for teachers.
>
> (Emphasis added)

4. Based on the evidence, Bill 148 was very clearly passed as response to the teachers' rejection of Tentative Agreement 1. NSTU members voted to reject Tentative Agreement 1 on December 1, 2015. Within 2 weeks, on December 15, 2015, the Legislative Assembly introduced and passed Bill 148. It received Royal Assent two days later on December 18, 2015. Bill 148 was clearly created to establish a new context within which subsequent collective bargaining would occur;

5. The passage of Bill 148 after Tentative Agreement 1 was rejected clearly sparked great concern within NSTU and ignited heated debate which would continue throughout collective bargaining. The submissions and evidence relied upon by NSTU in this proceeding includes:

    a. Evidence that consultation between the NSTU and its members, "[teachers] again expressed the view that the NSUT was being bullied by the Province of Nova Scotia because of the threat to proclaim Bill 148" (NSTU Written Submissions filed December 18, 2020, at paragraph 112);

    b. A communication from the NSTU President to teachers dated September 23, 2016 and entitled "A Brief Word". It describes Bill 148 as "hanging over us [i.e., teachers] as a restriction and a threat".

    c. Evidence from the NSTU affiants in this proceeding (Jack MacLeod and Wally Fiander)[5] whose discussions with the Province's representative confirmed to them that "because of Bill 148, the NSTU Negotiating Committee had no ability in bargaining to persuade the Employer [Province] to change its position on salary or the elimination of the Service Award." (NSTU Written Submissions filed December 18, 2020, at

[5] Jack MacLeod is an Executive Staff Officer with NSTU and, at all material times, was on the NSTU Negotiating Committee. Wally Fiander is also an Executive Staff Officer with NSTU and, at all material times, was an elected member of NSTU's Provincial Executive.

paragraph 119) This evidence was not contested by the Province and, indeed, agrees that "it is a fact that Bill 148 placed restrictions on what concessions the Province could make with respect to wages and the Service Award." (Province's Reply Submissions filed January 22, 2021, at paragraph 95)

d. On January 25, 2017, as teachers were contemplated Tentative Agreement 3, NSTU President wrote to members saying, in part, that: "The dark shadow of Bill 148 and the threat of an imposed contract have loomed heavily over the process."

6. NSTU does not suggest that anybody misinterpreted Bill 148. Rather, it is the actual accepted terms of Bill 148 that NSTU states compromised collective bargaining. To the extent any legislative measure impacted the actual negotiations between NSTU and the Province, it was Bill 148. Bill 75 was only conceived, passed and proclaimed in force after Tentative Agreement 3. Bill 75 is obviously important because it definitively terminated collective bargaining and imposed a collective agreement on teachers. But the legislative measure that influenced collective bargaining and cast a shadow over ongoing negotiations was Bill 148, not Bill 75. In short, addressing the context of collective bargaining and the Province's conduct leading up to Bill 75 cannot occur without also engaging in a deeper examination of Bill 148.

[141] Although passed in the midst of contentious negotiations with NSTU, Bill 148 reflected a unified, global strategy which the government hoped to bring to bear when entering the process of collective bargaining with numerous public service unions, particularly on the issue of wage restraint. To that extent, Bill 148 did not represent some distant, currently inoperative and only potentially binding legislative measure that might possibly affect collective bargaining. On the contrary, Bill 148 was a live and controversial law that hovered over the parties during the course of collective bargaining. The idea of a legislative measure specific to teachers (Bill 75) only arose after Tentative Agreement 3 was concluded; after collective bargaining had ended; and as a last-minute effort by Province to end a perceived impasse.

[142] Bill 148 is not only relevant but an essential to NSTU's criticisms of the Province's conduct during collective bargaining. Thus, Bill 148 is relevant because:

1. The only legislative measure that was in play and influenced the government's conduct during the period of collective bargaining; and

2. The only legislative measure that NSTU viewed as a present threat and concrete proof that the Province intended to impose its will on the process by agreement is possible but certainly by legislation if necessary;

[143] The status of Bill 75 as a validly enacted legislative measure gives it evidentiary value and weight in this proceeding. Indeed, it is precisely because Bill 148 was deemed sufficiently important to be introduced in the Legislative Assembly and then passed by the Legislative Assembly that it became relevant and considered by NSTU to be especially powerful evidence.

[144] This conclusion is consistent with the legal status of an enacted statute – regardless of whether it is proclaimed in force. In *Sullivan on the Construction of Statutes*, 6th ed., 2014, the authors state at §24.3:

> When legislation is enacted, it becomes part of the official statute book of the jurisdiction. As such, it is part of the body of rules recognized as law. However, it is only when legislation commences or comes into force that it begins to operate and produce effects. At this point it becomes binding on those to whom it applies. There are thus two senses in which legislation "becomes law": (1) upon enactment, it declares new legal rules and (2) upon commencement those rules become binding on persons and capable of producing legal effects.
>
> (Emphasis added)

[145] Legislation which is enacted but not proclaimed in force (like Bill 148 during the relevant period of time) is still recognized as law and declares new rules. This helps explains why Bill 148 understandably attracted significant attention during negotiations. The democratically elected members of the Legislative Assembly do not engage the rigorous legislative process for frivolous or trivial reasons. And the consequences which attach to the ultimate by-product of that process (a validly enacted legislative measure) are serious, and not frivolous or trivial.

[146] Respectfully, NSTU's argument that the presumption regarding the constitutionality of Bill 148 only become relevant after it is proclaimed in force runs contrary to the manner in which our democratic system of government operates. In our system of government, the members of the Legislative Assembly that introduce statutes, determine the underlying public purpose and ultimately vote on whether the statute passes or fails. It is also the Legislative Assembly that determines how a statute might be declared in force. In the case of Bill 148, the Executive Council's power to proclaim the bill in force is not inherent but based upon an express grant

by the predominant authority of the Legislative Assembly. Thus, section 30 of Bill 148 states: This Act comes into force on such day as the Governor in Council order and declares by proclamation."

[147] In sum, the issues which inspire the presumption of constitutionality arise during (and are legitimized by) the process which begins in the Legislative Assembly and culminates when the members of that assembly vote. By contrast, in the case of Bill 148, the Executive Council only determines when to proclaim a statute in force and it can only do so with the Legislative Assembly's prior, express approval. Respectfully, the notion that statutes passed by the Legislative Assembly might not be presumed constitutional or passed for a valid purpose until proclaimed in force by the Executive Council grossly overstates the Executive Council's role in the legislative process.

[148] In my view, based on the facts and the significance of Bill 148 during the course of collective bargaining, NSTU has not offered a viable path of legal reasoning which would allow the Court to safely conclude that the presumption of constitutionality is irrelevant and does not apply.

[149] Given my conclusion that Bill 148 is relevant and that the presumption of constitutionality is also relevant and applicable, an important but troubling question arises: how can a statute presumed to be constitutional and passed for a valid public purpose also somehow facilitate a serious violation of NSTU's Charter rights?

[150] NSTU's arguments are ultimately founded upon the proposition that only law which has "become binding on persons and capable of producing legal effects" is relevant to collective bargaining and the corresponding Charter guarantees in section 2(d). Respectfully, for the reasons given, I cannot accept that proposition.

[151] The presumption of constitutionality is a rule of law. And persons engaged in collective bargaining are obviously and justifiably influenced by relevant statutes which, although not proclaimed in force, are nevertheless deemed to be part of the body of rules recognizes as law. As mentioned, NSTU relies upon the same sense of seriousness and importance which attaches to enacted legislation that NSTU when discussing what it describes as the acutely corrosive impact of Bill 148 on the collective bargaining process. However, NSTU's argument contradicts that pressing concern and undermines the overriding and well-established legal presumption that Bill 148 is constitutional and passed for a valid (not invalid) purpose.

[152] NSTU asks the Court to find that Bill 75 is unconstitutional because it reflects a process of bad faith collective bargaining on the part of the Province. However, in my view, Bill 75 cannot be viewed in isolation when examining the employer-government's alleged misconduct in collective bargaining. In reality, the alleged misconduct which supports the NSTU's arguments regarding bad faith is clearly associated with and largely attributed to a different, preceding legislative measure (Bill 148). To determine or infer that a legislative measure (Bill 148) was also passed for an unconstitutional and invalid purpose (i.e., exposes employer misconduct designed to undermine section 2(d) Charter rights) is untenable because:

1. The constitutionality of Bill 148 was not placed in issue in this proceeding. For the Court to now comment on the constitutionality of Bill 148 would require me to venture into areas that are not properly before the Court, without giving the parties a fair opportunity to address that specific issue. I am not prepared to do that; and

2. NSTU's argument that Bill 148 represents powerful evidence of government misconduct contradicts Bill 148 entitlement to the legal presumption of constitutionality. Again, I was neither given nor could I find any law that might enable the Court to waive or ignore this well-established legal presumption. In my view, the legal presumption that Bill 148 is constitutional and passed for a valid purpose is both relevant is the controlling law.

[153] In the end, I am unable to conclude or draw the factual inference that Bill 148 supports NSTU's arguments regarding the Province's alleged misconduct during collective bargaining. On the contrary, for the purposes of this proceeding, I am compelled to presume that Bill 148 was constitutional and passed for a valid public purpose. The necessary corollary is that Bill 148 was <u>not</u> passed for the invalid purpose of destroying the collective bargaining process, threatening NSTU or otherwise violating NSTU's section 2(d) Charter rights. Drawing that type of conclusion or inference would contravene the presumption of constitutionality.

[154] I am sensitive to the fact the legal presumption Bill 148 is constitutional and passed for a valid public purpose significantly diminishes central aspects of NSTU's arguments regarding the Province's conduct during collective bargaining process that led to Bill 75.

[155] I am also live to the concern that governments might:

1. Begin the collective bargaining process by passing legislation which severely limits what might be achieved through negotiations on important monetary issues such as wages and benefits;
2. Rather than proclaiming it in force, have this legislation serve as the ongoing statutory backdrop for collective bargaining, constraining the government's negotiating positions on key monetary issues;
3. Failing agreement which accords with the enacted legislation, create and pass a different, new statute which imposes similar restrictions on wages and benefits; and then
4. Expect that the only legislative measure which will attract judicial scrutiny in a subsequent Charter challenge under section 2(d) is the new statute and not the original, "backdrop" statute.

[156] In my view, in so far as the process of collective bargaining is concerned, the constitutionality of Bill 75 is tied to the constitutionality of Bill 148, which is not in issue here. However, in fairness, the Province neither launched this proceeding nor demanded that the scope of issues in this proceeding be narrowed to Bill 75 only; allowing Bill 148 to escape constitutional scrutiny in this proceeding. It appears that the parties asked that the Nova Scotia Court of Appeal give legal advice regarding the constitutionality of Bill 148 in a separate proceeding (*Reference re Bill 148*). As indicated above, the Court of Appeal exercised its discretion and declined to provide the requested legal advice in the absence of better, admissible evidence. In any event, the Province cannot be held solely responsible for the fact that the constitutionality of Bill 148 is not raised in this proceeding.

[157] In any event, I wish to be clear that:

1. I have not determined (and was not asked to determine) whether Bill 148 was constitutional and respected NSTU's Charter rights based on the facts of this case;
2. I have not determined (and was not asked to determine) whether Bill 148 was unconstitutional and disrespected NSTU's Charter rights based on the facts of this case.
3. Bill 148 was never amended to exclude teachers. Rather, on August 22, 2017, the Executive Council proclaimed Bill 148 in force and also relied upon its authority under section to make a regulation exempting teachers, among others from the operation of Bill 148. This was more than 6 months after Bill 75 was proclaimed in force. The regulation

> was not made retroactive in its operation. I have not determined (nor was asked to determine) the constitutionality of these regulations or how they might impact on NSTU's Charter rights.

Rather, I have applied the presumption of constitutionality in this proceeding as a rule of law as opposed to a more fulsome and contextual analysis as to the constitutionality of Bill 148.

[158] Given the predominant role Bill 148 played in collective bargaining and presuming that Bill 148 is constitutional and passed for a valid purpose, NSTU's arguments that the Province's conduct did not fully respect section 2(d) Charter rights begins to disintegrate. In my view, the remaining evidence is insufficient to satisfy NSTU's burden of demonstrating a further section 2(d) breach regarding Bill 75. My reasons include:

1. Bill 75 did not suddenly materialize out of thin air. It followed a process of collective bargaining which was heavily influenced by a presumptively constitutional measure passed for a valid purpose;

2. There is no doubt that the monetary issues are of vital importance to the parties engaged in collective bargaining. In *Professional Institute of the Public Service of Canada*, Lauwers, J.A. of the Ontario Court of Appeal stated:

> 53 As I read the case law, while protection is not afforded to the "fruits" of bargaining, but only to the process by which they are to be negotiated, employer actions unilaterally undermining the ability of unions to bargain about significant matters are constitutionally suspect. Certain matters are, by nature of their importance to the unionized employment relationships, "matters central to the freedom of association": *BC Health Services*, at para. 25. Adversely affecting these in a material way may be constitutionally suspect, depending on the context. These matters include: salary (*Meredith*, at paras. 27-28; *Alberta Reference*, at p. 335); hours of work (*Alberta Reference*, at p. 335); job security and seniority (*BC Health Services*, at para. 130); equitable and humane working conditions (*Alberta Reference*, at p. 368); and health and safety protections (*Alberta Reference*, at p. 368).
>
> 54 The Supreme Court has also identified a number of employer actions as being constitutionally suspect for the purposes of s. 2(d), again depending on the context, including the following: taking important matters off the table or restricting the matters that may be discussed (*BC Health Services*, at paras. 111 and 113; *MPAO*, at para. 72); imposing "arbitrary outcomes" (*MPAO*, at para. 72);

> unilaterally nullifying negotiated terms (*BC Health Services*, at paras. 11 and 113); removing the right to strike (*SFL*, at para. 54); and imposing limits on future bargaining (*BC Health Services*, at para. 113).
>
> (Emphasis added)

Similarly, at paragraph 152 of *Ontario Public Service Employees Union* v. *Ontario (Minister of Education)*, 2016 ONSC 2197, Lederer, J. observed:

> The narrowing of the areas available for negotiations can represent substantial interference with the process of collective bargaining.

However, in this case, the restraints which restricted discussions on these important issues was driven by Bill 148, a legislative measure that is presumed constitutional and passed for a valid (not invalid) purpose in the context of this proceeding. To the extent any negotiating equilibrium was disrupted during the course of negotiations, it was due to Bill 148 (not Bill 75). However, in my view, where one party's negotiating position simply recognizes the terms of a presumptively constitutional statute, that position cannot then be either characterized as substantively unreasonable or condemned as demonstrative of a party that is so inflexible and intransigent to the point of endangering the very existence of collective bargaining;

3. With the presumption of constitutionality in place, the evidence does not support a finding that the Province substantially interfered with collective bargaining in purpose or effect in a way that did not fully respect the process. Nor could Bill 148 be deemed to have unconstitutionally upset the equilibrium which permits good faith bargaining to occur.

4. Similarly, the goals of good faith collective bargaining were not rendered essentially futile. To that extent, it is relevant that:

    a. The parties were able to reach three tentative agreements which suggested a measure of success in terms of collective bargaining;

    b. The tentative agreements which were reached reveal modest gains for the NSTU on wages and paid leave, very modest concessions on the Service Award/Death Benefit and other non-monetary matters including, most notably, the

"Partnership on Systemic Working Conditions. It is difficult to distinguish between concessions that are legitimate albeit modest and those that are negligible and represent a feigned interest in good faith negotiations belying a desire to see negotiations fail. On this, it is equally difficult for the Court to wade through the weeds of proposed percentage increases in wages and try to separate those which are genuine and legitimate from those illegitimate – particularly without fully knowing the competing operational, policy and financial pressures which arise when governments and public sector unions face off in collective bargaining. I note the following statement by Chartier, J.A. in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85 ("***Manitoba Federation***"):

> 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 in decision)

In any event, for present purposes and in light of the presumed constitutionality of Bill 148, the gains which NSTU was able to secure through collective bargaining suggest a degree of willingness on the part of the Province to listen and remain open to change. Admittedly, these agreements were reached within the context of restricted limits to the scope of bargaining on

> important monetary matters but, again, those limits were the product of enacted legislation that enjoys the presumption of constitutionality in these proceedings.

5. By the time NSTU members were asked to vote on Tentative Agreement 3, the teachers had engaged in legitimate although limited forms of strike action. The limitations on strike action were based on the NSTU's own decision as to what was strategically appropriate, and not based on any restrictions placed by the Province.

6. In my view and accepting the presumption of constitutionality for the purposes of this proceeding, the parties reached a legitimate impasse. In BCTF, Donald, J.A. stated:

> > An impasse created by the Province through the adoption of unwavering, unreasonable positions and a lack of good faith is not a legitimate impasse. (at paragraph 340)
>
> What separated NSTU and the Province in 2015 was an irreconcilable dispute between the restrictions in Bill 148, especially with respect to the Service Award, and NSTU's demands that those restrictions be relaxed, especially with respect to the Service Award/Death Benefit. Given the presumption of constitutionality, the Province's adherence to the restrictions set out in Bill 148 cannot fairly be characterized as lacking in good faith such that a presumptive constitutional statute becomes unconstitutional and supportive of an invalid public purpose or Charter violation. To that extent, the impasse was legitimate and irreconcilable.

[159] In the end, I am satisfied that Bill 75 violated NSTU's section 2(d) Charter rights but for the reasons given in paragraphs 111 - 126 above.

Section 1 Analysis

[160] Having found a breach of section 2(d) of the Charter, I move to section 1 of the Charter which states:

[161] The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[162] The test for determining whether an impugned statute contains such "reasonable limits … as can be demonstrably justified in a free and democratic society" was well-established more than 35 years ago in *R* v *Oakes*, [1986] 1 S.C.R. 103 and summarized in *Health Services* as follows:

> First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law.
>
> (at paragraph 138)

[163] I agree with the Province that the purposes of the legislation ending the teacher's partial strike and its resulting effect on education was pressing and substantial, having regard to the fact that three successive tentative agreements were achieved and then rejected by the teachers.

[164] I further agree with the Province that the rational connection between the Bill 75's purpose and statutory means adopted to achieve that purpose is obvious.

[165] I disagree with the Province that Bill 75 was minimally impairing.

[166] In MPAO, the majority states that the impugned law must impair the Charter right "as little as possible" and that the law "must be carefully tailored so that rights are impaired no more than is necessary" (at paragraph 149).

[167] The Province cites *Health Services* at paragraph 150 for the proposition that a law is minimally impairing if it falls within a range of reasonable alternatives.

[168] Bill 75 fails under either test. The option of simply legislating Tentative Agreement 3 was within the Province's authority and would have served to minimally impair NSTU's section 2(d) Charter rights based on the law and facts before me. It chose not to do so, and it did not address this possibility in its submissions beyond, perhaps, indirectly with the submission that Bill 75 effectively "replicated" Tentative Agreement 3 – a submissions which I rejected above.

[169] According to the Province, Tentative Agreement 3 was the by-product of good faith negotiations. In my view and in the circumstances, the decision to unilaterally legislate an entirely new collective agreement which was worst than Tentative Agreement 3 was not within a reasonable range of circumstances and was not minimally impairing.

[170] Bill 75 violated NSTU's section 2(d) rights and is not saved by section 1.

REMEDY

[171] I declare that Bill 75 and all sections of that Act together with the Schedule to that Act:

1. Violate section 2(d) of the Charter and those violations are not justified under section 1 of the Charter; and
2. Are unconstitutional and of no force or effect.

[172] There is an issue as to whether the declaration striking the Bill 75 as unconstitutional should take effect immediately or be suspended.

[173] If the declaration is suspended, a proven Charter breach will continue through the period of suspension. To avoid unnecessarily permitting an ongoing Charter breach, the Court requires that the government identify the specific and compelling interest that outweighs the continued breach and, as well, and the manner in which an immediate declaration would endanger that interest - supported by evidence, if necessary. Moreover, any suspensions of declarations of invalidity should be rare. (*Ontario (A.G.)* v *G*, 2020 SCC 38 at paragraph 118)

[174] In my view, the government has not met this burden. The Province refers obliquely to providing the government with some leeway to consider a response but does not offer any compelling reason or evidence to suspend the declaratory relief granted. The declaration of invalidity shall have immediate effect.

[175] NSTU asked that I also reinstate the Service Award/Death Benefit and related damages as a remedy under section 24(1) of the Charter. I am not prepared to grant that remedy given my findings regarding the nature of the Charter breach in this proceeding and the presumption of constitutionality regarding Bill 148.

COSTS

[176] NSTU is entitled to its costs in this matter.

[177] I will accept written submissions from the parties as to quantum, to be filed within 30 days from the date of this decision.

Keith, J.