CITATION: ATU Local 113 v. HMQRO, 2023 ONSC Number
COURT FILE NO.: CV-15-539132
DATE: 20230508

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
AMALGAMATED TRANSIT UNION LOCAL 113, CANADIAN UNION OF PUBLIC EMPLOYEES, CUPE LOCAL 2, and GAETANO FRANCO Applicants	*J. Birenbaum, I. Fellows, K. Allen, E. Home and A. Zichy*, for the Applicant, ATU Local 113 *D. Paul, and G. Leeb*, for the Applicants, CUPE Local 2 and Gaetano Franco
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF ONTARIO Respondents	*R. Fox, P. Ryan, and D. Huffaker*, for the Respondents
	HEARD: Orally and in person, February 9 and 10, 2023

CHALMERS, J.

REASONS FOR JUDGMENT

OVERVIEW

[1] The Toronto Transit Commission ("TTC") operates the third largest transit system in North America. The TTC collects 1.7 million fares on the average weekday, with 500 million passenger trips made annually. The transit system is an extensive and complex network consisting of four subway lines, eleven streetcar routes and about 140 bus routes. There are over 12,000 employees who work at the TTC across a wide array of job classifications.

[2] In 2011, the Government of Ontario ("Government") enacted the *Toronto Transit Commission Labour Disputes Resolution Act, 2011*, S.O. 2011, c.2 (the "*TTC Act*"). The *TTC Act* eliminates the right of all unionized TTC workers to engage in strike activity of any kind. The Amalgamated Transit Union Local 113 ("Local 113"), Marvin Alfred, Kevin Morton and the Canadian Union of Public Employees, CUPE Local 2 ("Local 2"), and Gaetano Franco

(collectively the "Applicants") bring this Application to challenge the *TTC Act*. They do so under s. 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") on the basis that prohibiting the right to strike substantially interferes with their right to meaningful collective bargaining.

[3] The Applicants argue that the right to strike is the "powerhouse" of collective bargaining that creates a necessary balance between workers and employers and allows for meaningful collective bargaining. The Applicants also argue that the right to strike promotes the dignity of workers and allows for workers to actively participate in matters that govern their working lives. The Applicants state that the prohibition on the right to strike set out in the *TTC Act* results in a "substantial interference" with the collective bargaining process and is therefore in breach of the freedom of association protected under s. 2(d) of the *Charter*. The Applicants further argue that the Government has failed to establish that the substantial interference with meaningful collective bargaining is justified under s.1.

[4] The Government argues that the *TTC Act* does not infringe s. 2(d), because the right to strike is replaced with compulsory binding interest arbitration, which maintains the balance between workers and employers, and allows for meaningful collective bargaining. The Government argues in the alternative, that any infringement of s. 2(d) is justified under s. 1 because removing the right to strike promotes the objective of preventing disruptions to public transit service and the health and safety, environmental and economic concerns that come with such a strike. The Government states that the "no strike/interest arbitration" model is minimally invasive to the workers and is a reasonable measure to balance competing objectives and societal interests. Finally, the Government argues that any deleterious effects that the legislation may have, are outweighed by the salutary effects of avoiding a public transit strike.

[5] For the reasons set out below, I find that the *TTC Act* infringes the Applicants' right to freedom of association under s. 2(d) of the *Charter* because by removing the right to strike for all TTC employees, it "substantially interferes" with meaningful collective bargaining. I also find that the *TTC Act* is not justified or saved by s. 1 of the *Charter*.

FACTUAL BACKGROUND

The Applicants

[6] Local 113 is a trade union pursuant to the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch A. (the "*LRA*"). It is the bargaining agent for approximately 11,320 TTC employees. Local 113 represents the vast majority of unionized workers at the TTC. Marvin Alfred is the current President of Local 113. Kevin Morton is the former Secretary-Treasurer of Local 113 who retired in January 2022.

[7] Local 2 is a trade union pursuant to the *LRA* and represents approximately 700 TTC employees. The majority of the employees represented by Local 2 work in signals, electrical, and communications. Gaetano Franco has been the President of Local 2 since November of 2010.

The Right to Strike Regime Prior to the TTC Act

[8] Local 113 was established in 1899 and has a 100-year history of negotiating collective agreements with the TTC. Over 40 collective agreements were negotiated between Local 113 and the TTC before the enactment of the *TTC Act*. Local 2 has represented its bargaining unit for over 50 years.

[9] Prior to the *TTC Act*, the *LRA* governed labour relations between the TTC and its unions. The *LRA* allows unions to engage in legal strike activity after the collective agreement has expired, bargaining has reached an impasse, and certain statutory prerequisites are met, including a membership vote. Strike activity under the *LRA* can include a variety of measures including a full withdrawal of labour, a partial withdrawal, refusal to work overtime, or work to rule. The *LRA* regime also entitles employers to lock-out employees or unilaterally alter their terms and conditions of employment, after the collective agreement has expired.

[10] The *LRA* regime is based on the "Wagner" model. In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, ("*SFL*"), at para. 42, the Supreme Court reviewed the history of the right to strike in Canada and had this to say about the Wagner model:

> [The Wagner model] was adopted in Canada because the federal and provincial governments "recognized the fundamental need for workers to participate in the regulation of their work environment", and, in doing so, "confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes – the right to collective bargaining with employers" (*Health Services*, at para. 62). One of the goals of the Wagner model, therefore, was to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining.

The Bargaining Relationship Between the TTC and Its Unions Prior to the TTC Act

[11] The Applicants state that the potential to strike does not necessarily result in frequent or lengthy strikes. They note that there have been seven incidents of strike activity during the 100-year history of collective bargaining between Local 113 and the TTC. From 1992 to 2008 a total of twelve days were lost to strike.

[12] The Government takes a different view. It states that TTC labour relations have been punctuated with disruption and that the frequency of strikes is greater than in other industries. In the seven bargaining cycles in the 20 years before the *TTC Act* was enacted, there were three strikes. The strikes usually only lasted a few days because the Government legislated TTC employees back to work. When ordered back to work, the legislation provided for binding interest arbitration with respect to the outstanding issues.

[13] Local 113 was on strike in 1991, 1999, 2006 and 2008. On each of those occasions, Local 2 was either locked out by management or went on strike at the same time as Local 113. There was an eight-day strike in 1991 that was settled with the involvement of the Minister of Labour; a two-day strike in 1999, and a one-day strike in 2006. The 2006 strike ended after the Labour Relations Board ruled it illegal.

[14] In 2008, Local 113 engaged in a one and a half-day legal strike. On January 7, 2008, Local 113 gave TTC its notice to bargain. The parties presented their respective comprehensive proposals on February 4, 2008. After negotiating for several weeks, the parties jointly requested the Ministry of Labour to appoint a conciliator on March 5, 2009. The conciliation/mediation was unsuccessful. Local 113 was in a legal strike position as of April 1, 2008. Local 113 and the TTC continued to bargain. On April 20, 2008, the TTC and 9 of the 16 members of the Local 113 Executive Board reached a tentative agreement. The agreement required ratification by the Local 113 membership.

[15] On April 25, 2008, the members of Local 113 voted against the tentative agreement and elected to go on strike. The strike began on Saturday, April 26, 2008, at 12:01 a.m. Local 113 gave 90 minutes notice to the public and the TTC that its members had voted to go on a legal strike. As a result, there were thousands of people stranded late at night, without transit. The union had previously agreed to provide 48 hours' notice of a full strike.

[16] Then Mayor of Toronto, David Miller requested the province introduce legislation to end the strike. During the afternoon of Sunday, April 27, 2008, the Legislature passed legislation that ordered unionized TTC employees back to work.

[17] The strike lasted approximately 36 hours. Local 113's members complied with the back-to-work legislation. The back-to-work legislation mandated that the parties resolve their remaining issues through binding interest arbitration. There were only a few matters in issue and the arbitrator imposed an agreement that included minor adjustments to the tentative agreement that had been reached before the vote to strike.

TTC and City Staff Reports on Designating the TTC as an Essential Service – 2008

[18] On May 5, 2008, shortly after the 2008 strike ended with back-to-work legislation, Mayor Miller asked for a report to inquire into designating the TTC as an essential service. The Executive Committee of the City recommended that a report be prepared by City staff with respect to the issue.

[19] On August 27, 2008, TTC staff produced a memorandum for discussion titled "Essential Service Review". The TTC staff recommended that the TTC not be designated as an essential service. The report concludes as follows:

> Based on all the above issues, we believe that the TTC, the City and its residents would be best served by not declaring the TTC as an essential service, but by leaving the situation as it is today.

[20] On September 22, 2008, City staff produced its report titled "Declaring the TTC an Essential Service in Toronto". In the preparation of the report, emergency services provided their assessment regarding the impact of a TTC strike on their services. The report provides as follows:

> The Toronto Fire Services, Toronto Emergency Medical Services and the Toronto Police Services have each provided their assessment regarding the impact of a strike at the TTC on their ability to effectively respond to emergencies. Each service has reported that there has been no noticeable effect upon their response times or ability to respond due to a strike by TTC employees and the interruption of TTC services.

[21] The City staff report states that TTC strikes result in significant negative impacts on the City's economy, on traffic and congestion, and on commuters' travel times. The report states that a TTC strike would result in a loss of approximately $50 million per day because of increased travel time for all commuters. There is no analysis in the report as to how this figure was calculated. The City staff report states that a transit strike would have negative long-term effects on the City's image as a business location and tourist destination. With respect to the impacts of a strike on public health and safety, the City staff report concludes that, "it is reasonable to predict there will be a number of potential health risks inherent in a TTC strike, including: increased air pollution from higher levels of car use; and barriers to access health services".

[22] In October 2008, the City Executive Committee and City Council defeated a motion to ask the province to designate the TTC as an essential service. The motion was defeated by one vote. City Council recommended asking the province to make Wheel-Trans an essential service. An agreement was reached between the TTC and its unions that Wheel-Trans will continue to operate in the event of a strike for dialysis patients.

City Council Requests that the TTC be Designated as an Essential Service – 2010

[23] On December 1, 2010, then Mayor of Toronto, Rob Ford asked the City Council Executive to endorse a request to the province to designate the TTC as an essential service.

[24] On December 16, 2010, City Council considered the motion to designate the TTC as an essential service in Toronto. Gary Webster, TTC General Manager, participated in the debate. He opposed the designation of the TTC as an essential service and argued that the "current model is working well". He further argued that both the union and management want control over the final result of bargaining and that is not possible under an essential services model. He also stated that the "tension" between Local 113 and the TTC, created by the right to strike, has produced effective results in the last three rounds of bargaining. In the event of work stoppage, the province was quick to act so that labour disruption was short-lived. He also noted that where the final result of bargaining is made by a third party, the parties are less likely to successfully negotiate an agreement, because it may not be in the best interests of the parties to compromise.

[25] Following the debate, the City Council passed the motion to request that the province designate public transit an essential service.

[26] The collective agreements with the TTC unions were to expire in 2011. The unions were concerned that the legislation may be rushed through without appropriate consultation before the collective agreements expired. On February 3, 2011, three TTC unions jointly and unconditionally committed that any issues not resolved in the current round of collective bargaining would be referred to interest arbitration. This commitment was followed up in correspondence to the Minister of Labour. Bob Kinnear, the president of Local 113, stated that the commitment was made so the consultation "should not be driven by an arbitrary deadline that would unnecessarily limit the time available for the thoughtful and thorough deliberation that is the hallmark of a parliamentary democracy".

[27] On February 18, 2011, Ian Fellows, counsel for Local 113, wrote to the Deputy Minister of Labour and advised that Local 113 and two other unions had offered to enter into a binding agreement to ensure that there would be no strike or lockout during the 2011 round of collective bargaining. Mr. Fellows stated that this will allow for further time to engage in meaningful consultation process about the proposed legislation without an artificial deadline being imposed.

[28] The province did not take the unions up on their offer.

The TTC Act *is Enacted – March 30, 2011*

[29] On February 20, 2011, Bill 150 (which would later become the *TTC Act*) was introduced in the Legislative Assembly. On March 8, 2011, the Bill passed second reading and was referred to the Standing Committee on General Government for public hearings. The hearings were scheduled to take place on March 9 and 21, 2011. The public hearings were scheduled for three hours. The Applicants made submissions during the hearings. The Applicants argue that the consultation with the unions by the government was *pro forma*.

[30] In answer to an undertaking, the Government stated that no other models were studied at the time the legislation was introduced. The Government argues that Bill 150 was introduced after consultations with the City, TTC, and Unions. The Applicants argue that based on the evidence, the consultations with the unions were very limited. There is no evidence that the province obtained a study or report to examine the impact of TTC strikes on the life, health or safety of the public.

[31] On March 23, 2011, the Committee debated the Bill, and it was carried without amendment. Following the third reading, the Bill was given Royal Assent on March 30, 2011. This was the day before the then collective agreement expired.

[32] The preamble to the *TTC Act* provides, in part, that:

> Work stoppages involving these parties and the resulting disruption of transit services give rise to serious public health and safety, environmental, and economic concerns.

[33] Section 15 of the *TTC Act* provides as follows:

> **Strikes and lock-outs prohibited**
>
> 15(1) Despite anything in the *Labour Relations Act, 1995,* employees to whom this Act applies shall not strike and the employer shall not lock them out.
>
> **Application of *Labour Relations Act, 1995***
>
> (2) Sections 81 and 82, subsection 83(1) and sections 84, 100, 101 and 103 of the *Labour Relations Act, 1995* apply with necessary modifications under this Act as if such sections were enacted in and form part of this Act.

[34] The *TTC Act* removes the right of all TTC employees to engage in a strike. No collective action of any kind is permitted. The right to strike applies to all TTC employees regardless of the job. For example, no distinction is made between operators and customer service agents. The *TTC Act* also removes the employer's right to lock out the employees and prohibits the employer from unilaterally changing the terms and conditions of employment.

[35] Instead of the right to strike, the *TTC Act* provides for a mandatory binding interest arbitration process. In the event of an impasse in bargaining, the parties are to proceed to mandatory interest arbitration. This is a mechanism to resolve disputes that involves making submissions to a neutral arbitrator. After receiving the submissions of the parties, the arbitrator will issue a binding award. Under the *TTC Act*, the arbitrators are to be appointed by joint agreement. If the parties are unable to agree on an arbitrator, the Minister of Labour shall appoint one. If, after the Minister of Labour chooses an arbitrator, the parties agree on a new arbitrator, the arbitration will proceed with the new arbitrator.

[36] The arbitrator has the powers of an *LRA* board of arbitration. The arbitrator is to consider all relevant factors including settlements reached in industries that permit the right to strike. The arbitrator has discretion in weighing the criteria.

***History of Bargaining After the* TTC Act**

2011 Bargaining

[37] The Applicants filed an affidavit sworn by Bob Kinnear. At the time he swore the affidavit, he was the president of Local 113 and had held that position since 2003. He deposes that following the enactment of the *TTC Act*, the behaviour and attitudes of TTC management in bargaining was "transformed". He recalls that the TTC management was less respectful and less reasonable. He states that comments were made by Gemma Piemontese, head of human resources at TTC as well as others involved in bargaining for TTC, to the effect that; "the TTC had little reason to agree to the union's positions and proposals since we could no longer strike"; and "that the union was now in a difficult (and less powerful) bargaining position because we lost the right to strike."

[38] The Applicants also filed the affidavit of Gaetano Franco, the president of Local 2. He deposes that Dave Dixon, at that time the Deputy General Manager of the TTC, made comments such as, "why would we agree to that as you cannot strike" and that "you [Local 2] are in a very different position as you have lost your right to strike and therefore you should focus on retaining what is important to your members."

[39] The Government did not file affidavits from any TTC officials involved in the 2011 negotiations. Megan Macrae, the current Executive Director of Human Resources, swore an affidavit on May 31, 2018. She addresses Mr. Kinnear's evidence about the comments Ms. Piemontese made during the 2011 negotiations. Ms. Macrae states that Ms. Piemontese informed her that she did not make those comments. Ms. Macrae did not have any personal knowledge about any other TTC management person making similar comments.

[40] Ms. Macrae was not personally involved in the 2011 negotiations. She conceded in cross-examination that she is in no position to deny that Mr. Dixon and Ms. Piemontese made these comments during this round of negotiations. Ms. Dixon is no longer with the TTC, but Ms. Piemontese is. No affidavit was filed from Ms. Piemontese and no explanation was provided to the court for why an affidavit from her was not filed. Ms. Macrae's evidence about what Ms. Piemontese told her about the negotiations is hearsay, and inadmissible.

[41] I accept the evidence of Mr. Kinnear and Mr. Franco as to the tenor of the negotiations in 2011.

[42] In 2011, the parties exchanged bargaining proposals and met between February and July 2011. Mediation occurred in December 2011. A negotiated settlement was not reached, and the parties proceeded to arbitration with arbitrator Kevin Burkett. The arbitrator was required to address ten substantive issues. One issue was wage increases. The TTC's proposal to the arbitrator was of a 0 percent wage increase over a four-year term. Ms. Macrae testified on cross-examination that this proposal was an "unusual" position to have taken.

[43] The arbitration decision was released on June 4, 2012. The arbitrator awarded wage increases of 2 percent for each of the agreement's three years. The Government states that these wage increases are comparable to increases in right-to-strike workplaces.

[44] The Applicants state that the interest arbitration process in 2011 was an "extremely expensive and protracted process". There was a total of 16 months from the first date of bargaining to the date of the arbitrator's award.

2014 Bargaining

[45] Mr. Kinnear deposed that the negotiations in 2014 reflected a similar pattern to that of 2011. Eight months before the 2011-2014 Collective Agreement expired, the TTC provided Local 113 with notice that it was considering contracting out certain positions at the TTC. According to Mr. Morton, the former Secretary-Treasurer of Local 113, bargaining started uncharacteristically late. The TTC did not table a meaningful package until the 18th day of bargaining, and only after the expiry of the previous collective agreement.

[46] Ms. Macrae was involved in the negotiations on behalf of the TTC in 2014. She states that since her involvement in 2012, there is a different organizational structure and a different management style at the TTC. Ms. Macrae states that in 2014, following the exchange of opening proposals, bargaining focused on local issues. Much progress was made on local issues by the time the more important or costly issues were reached. In 2014, the TTC reached negotiated settlements with all four of its bargaining units, without having to proceed to arbitration.

2018 Bargaining

[47] The collective agreement with Local 113 expired March 31, 2018. The parties met on January 9, 2018, to agree on process and dates. Proposals were first exchanged on February 20, 2018. The Applicants state that the initial proposal from the TTC sought a number of concessions, the most significant of which was the loss of 384 (or approximately 10 percent) maintenance positions. At conciliation in May 2018, the union rejected TTC's package and asked the conciliator to issue a no-board report.

[48] The parties could not agree on an arbitrator. The Ministry of Labour appointed Arbitrator Kaplan. Local 113 had previously stated that it would not agree to Arbitrator Kaplan. Nonetheless, the parties proceeded to an arbitration. In his award dated October 23, 2018, Arbitrator Kaplan noted that the TTC sought fundamental changes to the collective agreement through its proposals. Arbitrator Kaplan awarded 2 percent wage and benefit increases. He declined the TTC's request to remove a term restricting contracting out that was voluntarily agreed to in 2008 and freely re-negotiated in 2014.

[49] In his award, Arbitrator Kaplan cited the importance of gradualism and the need to avoid dramatic changes. He noted that the TTC has sought "fundamental changes to the collective agreement" through its proposals.

[50] In 2018, Local 2 also did not reach a negotiated settlement with the TTC. Although the negotiators reached a tentative agreement, the agreement was not ratified by the members of Local 2. The dispute was referred to Arbitrator Luborsky. The arbitrator imposed the tentative agreement that had been rejected by members of Local 2. He stated that arbitrators generally award a rejected memorandum of settlement on the general, but rebuttable presumption, that it represents the most likely outcome of free bargaining.

2021 Bargaining

[51] During 2021 bargaining, the parties met ten times between late February and March 31, 2021. Bargaining was largely unsuccessful. In cross-examination on his affidavit, Mr. Morton testified that the TTC approach was one of "take it or leave it." The parties did not reach a negotiated settlement and the matter proceeded to arbitration.

[52] Arbitrator Kaplan was appointed the arbitrator for the 2021 round of bargaining. He rejected the TTC's ability to pay arguments based on the pandemic. He remitted several matters back to the parties to be negotiated. In the award, Arbitrator Kaplan comments on the impact the *TTC Act* has had on the ability of the parties to collectively bargain. He states as follows:

> The parties have a mature bargaining relationship. In fact, the parties have been engaged in collective bargaining for approximately one hundred years and over that time have entered into 58 collective agreements. However, it is fair to say that, in general, since the passage of *The Toronto Transit Commission Labour Disputes Resolution Act, 2011* – declaring public transit in Toronto an essential service – and especially recently, collective bargaining has been singularly, serially and completely unsuccessful.

[53] Arbitrator Kaplan awarded wage increases of 2.17 percent in the first year and 2 percent in each of the following two years.

Labour Relations Between the TTC and its Unions Since the TTC Act

[54] The Government submits that under the *TTC Act* the most common collective bargaining outcome between the TTC and its five bargaining units was a negotiated collective agreement. Most of the negotiated settlements were with the smaller unions, the International Association of Machinists and Aerospace Workers (IAMAW) and CUPE Local 5089. For the largest union, Local 113, the parties reached a negotiated agreement once out of four bargaining rounds.

[55] Mr. Kinnear and Mr. Morton depose in their affidavits that since the enactment of the *TTC Act*, there has been a worsening in the relationship between the TTC and the unions. They state that the TTC has pursued aggressive strategies and have been less communicative and collaborative. Ms. Macrae states that since her involvement in 2012, the TTC has been more conscientious of its management rights. She states that the TTC recognizes issues of principle for what they are, and in the absence of a possible compromise with their labour partners will proceed to arbitration. She states that management continues to be "very interested in collaborating and consulting with their unions."

[56] Mr. Kinnear deposes in his affidavit that after the *TTC Act* came into effect, the engagement of the union membership dropped. He found a 50 percent drop in union proposals in 2014 as compared to 2008. There was a further drop of 50 percent in 2018. At the same time there was an increase in the number of grievance hearings. Before the *TTC Act*, there were approximately 100 grievance hearing days a year. In 2017, there were 142 hearing days. Mr. Morton agreed and states in his affidavit that the relationship between the unions and management seems to be getting worse. There is more conflict and more dissatisfaction on the part of the union members.

[57] Ms. Macrae confirmed that there was a "dramatic increase" in grievances filed in 2011 and 2012. However, she disagrees with the conclusion that this is evidence of more conflict. She states that TTC management is responsive to concerns from engagement surveys and she believes there has been a positive culture change at the TTC felt by most employees.

THE ISSUES

[58] This Application raises the following issues:

(a) Have the Applicants established that the prohibition on the right to strike is a "substantial interference" to meaningful collective bargaining under s. 2(d) of the *Charter*? and

(b) If so, has the Government established that the violation is justified or saved under s. 1 of the *Charter*?

ANALYSIS AND DISCUSSION

Part 1 – Is the prohibition on the right to strike a "substantial interference" to meaningful collective bargaining under s. 2(d) of the Charter*?*

The Right to Strike

[59] *Charter* rights are to be interpreted generously and purposively. Section 2(d) of the *Charter* provides that everyone has the fundamental freedom of association. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at paras. 19, and 87, the Supreme Court held that s. 2(d) provides constitutional protection for collective bargaining. The constitutional right to collective bargaining is not simply the right of workers to meet together. It guarantees the right to a meaningful process in which workers can meet with employers on more equal terms: *Ontario English Catholic Teachers Assoc. v. His Majesty*, 2022 ONSC 6658, ("*OECTA*"), at para. 7.

[60] In *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, ("*MPAO*") the Supreme Court notes that the fundamental purpose of s. 2(d) is "to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power": at para. 70. By banding together in collective bargaining associations, employees strengthen their bargaining power with their employer. The Supreme Court states that, "a process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*)": at para. 71.

[61] In *SFL*, the Supreme Court held that the right to strike is an "indispensable component" of collective bargaining:

> [3] The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. … The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. **It seems to me to be the time to give this conclusion constitutional benediction.**

…

> [24] I agree with the trial judge. Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(*d*). As the trial judge observed, **without the right to strike, "a constitutionalized right to bargain collectively is meaningless"**. [Emphasis added.]

[62] The Supreme Court states that the right to strike is an "essential safety valve" aimed at achieving "meaningful participation": *SFL*, at para. 47. And that the right to strike is a critical component of "industrial – and therefore socio-economic – peace": *SFL*, at para. 48.

[63] The Supreme Court went on to state that the right to strike is the "powerhouse" of collective bargaining and allows employees to engage in negotiations with an employer on more equal footing. And that the right to strike is "an indispensable part of the Canadian industrial relations system" and "has become a part of the whole democratic system": *SFL*, at paras. 55, and 57.

[64] The Supreme Court also held that the right to strike is a critical means of achieving the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy": *SFL*, at para. 53, citing *Health Services* at para. 81 (brackets in original). The Court stated as follows:

> [54] The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working condition and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

[65] The Supreme Court also notes that the right to strike serves other democratic ends including bringing the debate on labour conditions into the public realm: *SFL*, at para. 58.

The Substantial Interference Test

[66] The Applicants have the onus to establish that the *TTC Act* results in "substantial interference" with their members' s. 2(d) *Charter* right to a meaningful process of collective bargaining.

[67] In *SFL*, the Supreme Court found that, "a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement": at para. 75. Abella J. states:

> It should come as no surprise that the suppression of legal strike action will be seen as substantially interfering with meaningful collective bargaining. That is because it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and condition of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals.

[68] It is important to recall that in *SFL*, the legislation in issue prohibited the right to strike by designated public employees and denied access to any substitute dispute mechanism. In the context of that particular case, the Supreme Court found that the statute prohibiting the right to strike by public employees without any access to a substitute process, violated s. 2(d).

[69] The failure of the legislation to provide for an alternative dispute resolution process was a factor in concluding that the legislation was unconstitutional.

> [4] This applies too to public employees. Those public sector employees who provide essential services undoubtedly have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all. Because Saskatchewan's legislation abrogates the right to strike for a number of employees **and provides no such alternative mechanism**, it is unconstitutional: *SFL*, at para. 4. [Emphasis added.]

[70] Here, the *TTC Act* provides for an alternative mechanism for resolving disputes. The *TTC Act* provides that if the parties are unable to voluntarily come to an agreement, the parties will proceed to binding interest arbitration. At issue is whether the prohibition of the right to strike coupled with binding interest arbitration, results in a substantial interference with meaningful collective bargaining.

[71] In *Health Services*, the Supreme Court held that section 2(d) does not protect against any interference in the activity of collective bargaining. It only protects against "substantial interference": *Health Services*, at para. 90. The court goes on to state:

> Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial – so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected) but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer": at para. 91.

[72] The Supreme Court expands on the substantial interference test in *SFL*, at paras. 77-78:

> [77] This brings us to the test for an infringement of s. 2(*d*). The right to strike is protected by virtue of its unique role in the collective bargaining process. In *Health Services*, this Court established that s. 2(*d*) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining (at para. 90). And in *Mounted Police*, McLachlin C.J. and LeBel J. confirmed that:
>
> > [t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power.... Whatever the nature of the restriction, *the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.* [Emphasis added; para. 72.]
>
> [78] The test, then, is whether the legislative interference with the right to strike in a particular case, amounts to a substantial interference with collective bargaining. The *PSESA* demonstrably meets this threshold because it prevents designated employees from engaging in any work stoppage as part of the bargaining process. It must therefore be justified under s. 1 of the *Charter*. [Emphasis and brackets in original.]

[73] It is important to recall that the constitutional right protected by s. 2(d) does not protect an outcome. Instead, it protects the process of collective bargaining. To constitute "substantial interference" with the freedom of association, the legislation must "seriously" undermine the activity of workers joining together to pursue the common goals for negotiating workplace conditions and the terms of their employment with their employers. The inquiry in each case is "contextual and fact-specific": *Health Services* at para. 92. The court must look at the measure in its full context and history to determine whether it constitutes "substantial interference": *MPAO*, at paras. 47, and 93.

[74] The issue is whether, in the context and history of the relations between the TTC and its unions, the prohibition on the right to strike, combined with binding interest arbitration, is a "substantial interference" in meaningful collective bargaining.

Does the **TTC Act** *Substantially Interfere with Meaningful Collective Bargaining?*

Expert Evidence on the Right to Strike versus Compulsory Interest Arbitration

Professor Robert Hebdon

[75] Both parties filed expert reports that addressed the issue of whether compulsory interest arbitration undermines or substantially interferes with meaningful collective bargaining.

[76] The Applicants filed the report of Professor Robert Hebdon, an Emeritus Professor at McGill University. His area of expertise is industrial relations.

[77] Professor Hebdon opines that collective bargaining is effective when both labour and management can strike or lockout. He states that the possibility of the strike is what enables workers to negotiate with employers on terms of approximate equality. He further states that collective bargaining without the right to strike does not create the necessary balance between labour and management. He points out that strikes also serve a variety of other functions. The right to strike allows the workers to have a collective voice through which they can express pent-up frustrations, support or protest government policy, enhance political consciousness and show solidarity with workers' causes elsewhere.

[78] Professor Hebdon sets out, what in his opinion, are the flaws of binding interest arbitration:

(a) Interest arbitration has a "chilling effect" on future rounds of collective bargaining. Arbitrators tend to "split the difference" between the parties' final proposals. This has the effect of parties not moving closer to a settlement position while bargaining. This reluctance is called the "chilling effect" of interest arbitration. The "narcotic effect" refers to the fact that the parties become dependent upon the arbitrator and over time the parties may lose the ability to negotiate without third-party assistance. Overall, interest arbitration inhibits genuine collective bargaining by reducing the incentive to achieve voluntary settlements. He states that collective bargaining settlements that are imposed by third parties are not of the same quality as those freely negotiated. The advantage to freely negotiated settlement is that the parties accept that they have achieved the best that they can and are more likely to live contentedly, and take responsibility, for the result.

(b) Professor Hebdon provides the opinion that interest arbitration has a negative impact on union democracy. A critical element of collective bargaining is the democratic involvement of the union membership in formulating proposals, setting priorities, electing bargaining team members that represent various members' interests, resetting priorities and finally voting on the final package. In an arbitrated settlement the workers do not express themselves democratically

through ratification of the agreement. He states that member involvement in the interest arbitration process is difficult to generate. The highest member attendance at any union function is at a meeting where a vote to strike, continue a strike or end a strike may occur. He opines that interest arbitration cannot replicate the important employee voice mechanisms. He states that an unintended consequence of interest arbitration is the systemic weakening of democracy within the union with "serious implications for member involvement and the union's ability to act collectively on behalf of its members."

(c) Professor Hebdon opines that interest arbitration is "ill-suited for issues that require major changes or a restructuring of the collective agreement". He states that interest arbitration is an inherently conservative process. He argues that to successfully implement major changes to the collective agreement, the parties must "own the settlement" and this only occurs through direct negotiations. Arbitrators generally practice gradualism and are reluctant to break new ground. Also, under pressure to fashion a timely award, arbitrators may avoid the more complex issues. The Canadian study referred to in his report provides that breakthroughs on non-wage issues were "significantly" more likely in the right to strike system, than the arbitration system.

(d) According to Professor Hebdon, interest arbitration results in "conflict redirection". He states that there is good evidence that collective actions from sickouts to slowdowns may continue under compulsory interest arbitration. Instead of conflict being directed towards strikes, there are increased actions such as grievances, unfair labour practices, and job actions.

(e) Professor Hebdon notes that awards under compulsory interest arbitration systems take considerably longer than settlements under strike-based systems.

[79] Professor Hebdon concludes:

> In summary, compulsory interest arbitration bears two potential defects. It fails to produce freely negotiated settlements at a rate comparable to that of right-to-strike legal regimes and it may not produce labour peace.

Professor Joseph Rose

[80] The Government filed the report of Professor Joseph Rose, a professor of industrial relations at McMaster University. His area of expertise is collective bargaining and dispute resolution, including public sector bargaining. He is also an experienced arbitrator.

[81] Professor Rose's report examines the purpose, process and outcomes of compulsory interest arbitration. He notes that the use of interest arbitration for bargaining impasses has been a feature of public sector bargaining since the 1960s. He opines that if the parties have confidence in the system, interest arbitration can be a fair and effective way to resolve disputes

when a strike's cost to the public or the parties is too high to tolerate, or when power is so imbalanced that a party can impose its will on the other.

[82] Professor Rose identifies the potential benefits of interest arbitration which include its ability to:

(a) safeguard the public interest by preventing strikes;

(b) safeguard employee interests by producing timely settlements and awards that are broadly similar to comparable employees who have the right to strike; and

(c) regulate interest group conflict by reducing hostility and promoting compliance with awards.

[83] He identifies the following potential costs of interest arbitration:

(a) inhibits representative government by delegating authority to third party neutrals that are not accountable to the public, and

(b) inhibits genuine collective bargaining by reducing incentive to achieve voluntary settlements (the "chilling" and "narcotic" effects).

[84] Professor Rose opines that there can be meaningful collective bargaining under the interest arbitration system. The features of interest arbitration are intended to balance bargaining power by increasing the employees' bargaining strength until it is approximately equal to management. Professor Rose notes that arbitrators subscribe to the replication principle to ensure awards are fair and reasonable. This involves a comparison with awards freely negotiated in right to strike systems.

[85] Professor Rose provides the opinion that wage settlements under compulsory interest arbitration are similar to, or somewhat above, outcomes for comparable employees under right to strike systems. With respect to non-wage issues, Professor Rose states that arbitrators generally subscribe to the principle of gradualism. He states that the conservative nature of the interest arbitration process is reflected in the general reluctance to break new ground or award innovative provisions. He notes that it is "conceivable" that some important issues, such as health issues, pensions, technological change and staffing, may not be adequately addressed by compulsory interest arbitration.

[86] Professor Rose notes that "it is widely recognized that awards under compulsory interest arbitration systems take considerably longer that settlements under strike-based bargaining systems." In almost all cases arbitrated settlements took two to three times longer than non-arbitrated settlements.

[87] Professor Rose states that research shows that the suppression of public sector strikes can lead to the redirection of conflict. The suppression of public sector strikes is associated with higher levels of grievances. In some cases, no-strike laws resulted in increased grievance arbitration rates by more than 50 percent.

[88] Professor Rose agrees that there is strong evidence that interest arbitration has a "chilling" effect on future rounds of collective bargaining. He also agrees that interest arbitration can have a "narcotic" effect. He states that there is a clear consensus that interest arbitration leads to fewer voluntary agreements. Having said that, Dr. Rose provides the opinion that Professor Hebdon overstates the impact of the "chilling" and "narcotic" effects under interest arbitration systems.

[89] Professor Rose maintains that it is very uncertain that interest arbitration undermines the democratic and collective nature of the bargaining process. He states that both the right to strike and arbitration models permit employees to engage in democratic participation. In an arbitration model, the union leaders may seek mandates from members. The members may participate in events and volunteer activities, surveys and grievances.

[90] According to Professor Rose, there is no credible evidence that the *TTC Act* negatively affects union democracy. He states that he is not aware of any empirical support for this assertion. In his view, both the right to strike and arbitration models permit employees to engage in democratic participation, including seeking mandates from members and participating in events and volunteer activities.

[91] Professor Rose was cross-examined on January 25, 2022. He admitted that he had not read the *TTC Act*. He also stated that arbitration can generate approximately the same amount of wage increases as in the strike-based system. However, in both the private and public sector there has been a shift in the importance of job security and wages. He testified that people bargain for jobs now, not for wages. He noted that there has been insufficient research on the effectiveness of interest arbitration on non-wage items.

Summary – Expert Reports

[92] Professors Hebdon and Rose are well-qualified experts in the area of industrial relations. I find that the opinions expressed in their reports were fair. They did not attempt to overreach or to provide opinion evidence outside their areas of expertise.

[93] There was a great deal of common ground between the two experts. Both experts agree that interest arbitration can result in "chilling" and "narcotic" effects, which can lead to fewer voluntary settlements. Both experts agree that wage awards on interest arbitration are similar to, and in some cases greater than, wage awards in right to strike systems. Both experts also agree that for non-wage matters, arbitration can be more conservative and, as a result, important issues like health and technological change may not be addressed. They agree that arbitration awards take considerably longer than settlements under strike-based systems, and that in interest arbitration, conflict may be redirected to the grievance process.

[94] The experts diverge on the issue of union democracy. Professor Hebdon opines that an unintended consequence of interest arbitration is a weakening of union democracy and a decrease in member participation. Professor Rose notes that arbitration models permit employees to engage in democratic participation including seeking mandates from members and participating in events and volunteer activities.

Context and History of Collective Bargaining Before and After the TTC Act

[95] The determination of whether there has been "substantial interference" with s. 2(d), is to be made in the full context and history of collective bargaining between the parties. The enquiry is contextual and fact-specific.

[96] Mr. Kinnear's evidence is that bargaining with the right to strike was producing meaningful and satisfactory results, before the *TTC Act*. In the two decades prior to the enactment of the *TTC Act*, Local 113 was on strike on three occasions. The workers were on strike for a total of 12 days over the 20-year period.

[97] According to Mr. Kinnear, the right of Local 113's members to strike was "foundational" to the effectiveness of negotiations. Although negotiated settlements were reached in most bargaining rounds, the ability to strike created the "tension" and risk to the parties that resulted in agreements. He notes that the sacrifices that a strike demands of workers and the impacts of a strike on an employer, "at all times" drives meaningful and effective bargaining on both sides. In his view, the possibility of a strike gives workers a meaningful and irreplaceable response when the employer is stubborn and unwilling to engage in meaningful collective bargaining.

[98] Mr. Kinnear's view with respect to the effectiveness of the right to strike model appears to have been shared by the TTC. On December 16, 2010, Gary Webster, the TTC General Manager, participated in the debate at City Council to designate TTC as an essential service. In opposing the motion, Mr. Webster stated that the TTC has produced effective results in the previous three rounds of bargaining. He described a concern about the "chilling" effect referred to by Professors Hebdon and Rose. He believed that the parties would be less likely to negotiate an agreement because it is not in the parties' best interest to compromise when they may end up in the hands of a third party who may award them a more favourable outcome.

[99] Mr. Kinnear and Mr. Morton both depose in their affidavits that there was a fundamental shift in the TTC's approach in the negotiations that took place after the enactment of the *TTC Act*. Mr. Kinnear states that the behaviour and attitudes of TTC management was "transformed". They were "less respectful, less reasonable, and the fact the union had lost the power of the strike was constantly referred to in the negotiation discussions, both explicitly and indirectly." According to Mr. Kinnear, in the 2011 negotiations, the TTC negotiators stated that they had less incentive to be conciliatory because the union did not have the right to strike. Mr. Morton and Mr. Franco describe similar experiences.

[100] The Government's affiant, Ms. Macrae denies that the TTC negotiators were emboldened by the *TTC Act* and took a more aggressive approach to the negotiations. However, she was not involved in negotiations before 2014 and her evidence on the approach taken by negotiators in 2011 is hearsay. Ms. Macrae conceded in cross-examination that she was in no position to be able to testify on the negotiations in 2011. Although the approach may have been different after her involvement in 2014, I accept the evidence of Mr. Kinnear, Mr. Morton and Mr. Franco that the tenor and approach of the TTC negotiators was more aggressive and immutable in the first bargaining round after the introduction of the *TTC Act*.

[101] Mr. Kinnear also states that after the *TTC Act* was enacted, grievances and arbitration rates "sky-rocketed". The TTC's own surveys indicate that employee satisfaction with their jobs and TTC management has declined. At the same time, employee proposals have decreased. Mr. Kinnear states that there was a 50 percent drop in proposals in 2014 as compared to 2008. The Government argues that the data with respect to grievances is incomplete. Although grievances peaked in 2017, there was a decline to 2021. The Government also argues that there is no credible evidence that there has been any decline in democratic participation by union members.

[102] The Government states that although there has been hard bargaining, the TTC and the Applicants were successful in achieving negotiated agreements after the enactment of the *TTC Act*. In four rounds of bargaining since 2011, eight negotiated settlements were reached with the five unions, and arbitration was required on six occasions. The Applicants note that in the case of the largest union, Local 113, there was a negotiated settlement only once out of four rounds of bargaining. The Applicants argue that the negotiations since 2011 have confirmed Professor Hebdon's opinion that interest arbitration has a chilling and narcotic effect on negotiations. They argue that before 2011, the parties were able to reach a negotiated agreement without a strike or lock-out in the majority of bargaining rounds.

Analysis

[103] I am satisfied on the evidence before me that the complete prohibition of the right to strike has resulted in a substantial interference with the meaningful process of collective bargaining.

[104] The Government argues that the "no strike/compulsory arbitration" system does not result in "substantial interference" with meaningful collective bargaining such that the Applicant's s. 2(d) *Charter* right is not infringed. In support of this position, the Government refers to a decision of an arbitrator in *British Columbia Ferry Services Inc. and BCFMWU (Interpretation of Collective Agreement), Re*, 2016 CarswellBC 3724 ("*BOUA*"). The Government states that this is the only reported decision to explicitly consider whether interest arbitration provides a form of collective bargaining consistent with s. 2(d). I do not find this decision helpful. The case involves the interpretation of a collective agreement that provides for interest arbitration to resolve disputes. The interest binding arbitration process had been voluntarily bargained by the union. It did not involve the consideration of an interest arbitration system imposed on the union by the legislature.

[105] Whether there has been substantial interference with meaningful collective bargaining requires a fact-based and contextual analysis.

[106] Both Professors Rose and Hebdon agree that interest arbitration is conservative in nature and fails to address important and complex issues. This, in my view, has been borne out by experience. Mr. Kinnear notes that since 2014 fewer issues were discussed and agreed to at the bargaining table than in previous years. He also states that the posturing in interest arbitration makes resolution of complex industrial and labour relations issues very difficult.

[107] Professors Rose and Hebdon also agree that awards under interest arbitration take considerably longer. I am satisfied on the evidence that the arbitration process under the *TTC Act* has been extremely protracted. In 2011, for Local 113, there was a total of 16 months between the first date of bargaining and the date of the award.

[108] I find that the loss of the right to strike adversely affects other critical components of the relationship between the employer and employees. As noted in *SFL*, at para. 53, the right to strike is "essential" to realizing the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy". Through a strike, workers participate directly in determining their wages and working conditions. The collective action of a strike, "is an affirmation of the dignity and autonomy of employees in their working lives": *SFL*, at para. 54. According to Mr. Kinnear, there has been an increase in grievances since the introduction of the *TTC Act* and a decrease in member involvement, which indicate the impact of the infringement of the right to strike on union democracy.

[109] Most importantly, I find that the removal of the right to strike has had a negative effect on the negotiating process. The manner in which negotiations were conducted after the enactment of the *TTC Act* supports the conclusion that employees have not been on an equal footing with the TTC. Mr. Kinnear, Mr. Morton and Mr. Franco's evidence with respect to the approach taken by TTC negotiators in 2011 is particularly troubling. The negotiators were more confrontational and aggressive. The negotiators stated that they had less incentive to be conciliatory because the union did not have the right to strike. The Government did not file an affidavit from any TTC negotiators in 2011 to rebut this evidence.

[110] I also find that interest arbitration substantially interfered with the ability of the parties to reach voluntary settlements. As noted by Professor Hebdon, binding interest arbitration can result in "chilling" and "narcotic" effects. That has also been borne out by the evidence. The TTC and its largest union, Local 113 have been unable to reach voluntary agreements without assistance in three of the last four bargaining sessions.

[111] Arbitrator Kaplan was the arbitrator appointed to settle the terms of the collective agreement between the TTC and Local 113, in 2018 and 2021. In his 2021 Award, he notes that although the parties met ten times between the end of February 2021 and the end of March 2021, there were no agreed items to be incorporated in the collective agreement. He states that there was "no possibility of finding common ground about anything".

[112] The Government argues that Arbitrator Kaplan's comments should be discounted in light of the fact that the 2021 arbitration took place while this Application was pending, and the Applicants may have conducted themselves in a certain manner for the benefit of the record. I do not accept this submission. Arbitrator Kaplan's comments were not restricted to the conduct of the parties during the most recent round of negotiations. In his 2021 Award, Arbitrator Kaplan states that since the passage of the *TTC Act*, "**collective bargaining has been singularly, serially and completely unsuccessful**": *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, 2022 CanLII 9 (ON LA) (W. Kaplan), at p. 2 (emphasis added).

[113] I find Arbitrator Kaplan's comments on the lack of success of collective bargaining since the enactment of the *TTC Act* to be most persuasive.

[114] Having found that the *TTC Act* results in a "substantial interference" with meaningful collective bargaining protected under s. 2(d) of the *Charter*, it is necessary to turn to the s. 1 analysis.

Part 2 – Has the Government established that the violation is justified or saved under s. 1 of the* Charter*?

Section 1 Test

[115] If legislation is found to infringe a *Charter* provision, the legislation may be saved or justified by s. 1, if the infringement is demonstrably justified as a reasonable limit in a free and democratic society: *R v. Oakes*, [1986] 1 S.C.R. 103, at paras. 62-71. The Government has the onus of demonstrating that s. 1 applies.

[116] In *OECTA*, at paras. 247-49, Koehnen J. set out the test with respect to whether legislation can be saved or justified under s. 1 of the *Charter*:

> [247] The ultimate question under s. 1 is whether the *Charter* infringement can be demonstrably justified in a free and democratic society. That by necessity requires the court to balance the objective that the *Charter* infringement seeks to achieve against the degree of the infringement of the *Charter* right. The answer in any one case is highly context dependent. In one set of circumstances a certain degree of infringement may be quite acceptable. In another, the infringement may be entirely unacceptable.
>
> [248] A government relying on s. 1 bears the onus of demonstrating its applicability. To do so, the government must demonstrate that:
>
> A. The objective of the measure is pressing and substantial.
>
> B. There is a rational connection between the object and measures taken to achieve it.
>
> C. The measure taken minimally impairs the *Charter* right.

> D. The benefits achieved by the measure outweigh the negative impact on *Charter* rights. [Footnote omitted.]

[249] In assessing these four aspects of the s. 1 test, courts are required to show a degree of deference to the legislator in recognition of the different roles of the legislative and judicial branches of government.

A. Pressing and Substantial Objective

[117] The Government states that the objective of the *TTC Act* is to prevent disruption of TTC services that occur during work stoppages. The *TTC Act's* preamble sets out the basis for the objective as preventing the public health and safety, environmental and economic concerns that flow from a transit strike. The Government also argues that the disruption of transit services has an acute negative impact on marginalized and vulnerable groups.

[118] The first step in the analysis is to define the "pressing and substantial" objective. The objective must be "accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision to which the means have been crafted to fulfill that objective": *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 59.

Is the TTC an Essential Service?

[119] The basis for the Government's argument is that the TTC provides a "critically important service" for the City of Toronto and the Greater Toronto Area. The Government does not directly argue that the TTC is an "essential service". Whether the service provided by the TTC is "critically important" or "essential" may simply be a matter of semantics. The crucial point is that the Government must establish that the service provided by the TTC is so "critical" or "essential" that preventing the disruption caused by a strike, is a "pressing and substantial" objective that justifies the removal of the right to strike.

[120] In *SFL*, the court concluded that the maintenance of essential public services is "self-evidently" a pressing and substantial objective: at para. 79.

[121] In *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, at para. 31, Dickson C.J. considered the "essential services" justification when assessing whether the legislation met the first part of the s. 1 test set out in *R. v. Oakes*:

> In the *Alberta Labour Reference*, I accepted the "essential services" justification for the substitution of an adequate scheme of compulsory arbitration for the freedom to strike. The legislature is entitled to limit the freedom of employees to strike if the effect of a strike would be to deprive the public of essential services.

[122] As noted in the *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at paras. 103 and 106 ("*Alberta Labour Reference*"), the protection of services which are "truly essential" is a "legislative objective of sufficient importance for the purpose of s. 1 of

the *Charter*." In *SFL*, at para. 84, citing *Alberta Labour Reference*, at para. 106, the Supreme Court confirms that it is necessary to define "essential services" in a manner consistent with the justification standards set out in s. 1 of the *Charter*:

> But it is important to keep in mind Dickson C.J.'s admonition in the *Alberta Reference* that "essential services" be properly interpreted:
>
> > It is ... necessary to define "essential services" in a manner consistent with the justificatory standards set out in s. 1. The logic of s. 1 in the present circumstances requires that an essential service be one the interruption of which would threaten serious harm to the general public or to a part of the population. … These decisions have consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population". … *Mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike.* [Ellipsis added; emphasis in original; citations omitted.]

[123] In considering the definition of "essential services", the Supreme Court in *SFL* made reference to the decisions of the International Labour Organization, and the Committee on Freedom of Association ("CFA"). The Supreme Court stated that the CFA decisions are not "strictly binding", however they have "considerable persuasive weight and have been favourably cited and widely quoted by courts, tribunals and other adjudicative boards around the world, including our Court": *SFL*, at para. 69.

[124] The CFA has a body of jurisprudence which has affirms that the right to strike may only be restricted in three circumstances,

(a) in the event of an acute national emergency and for a limited time,

(b) in the public service only for public servants exercising authority in the name of the State, and

(c) essential services in the strict sense of the term, namely those services whose withdrawal would endanger the life, personal safety or health of the whole or part of the population.

[125] In its report dated March 2016, the CFA considered that "metropolitan transport does not constitute an essential service in the strict sense of the term": at para. 240.

Evidence on the Impact of TTC Strikes

[126] The Government argues that regardless of whether the TTC provides a "critical" or "essential" service, preventing the serious effects that would result from a strike is a "pressing and substantial" objective.

Traffic Congestion, Pollution and Health

[127] The Government argues that TTC strikes result in increased traffic with adverse environmental, economic and quality of life impacts. The Government filed an affidavit sworn by Dr. Eric Miller and attached his report titled, "Potential TTC Strike Impacts on Traffic Congestion in the Greater Toronto-Hamilton Area". Dr. Miller is put forward as an expert in transportation systems analysis and travel demand modeling. Dr. Miller was asked to provide his opinion on what impact a TTC strike would have on the public, how a strike would affect traffic and congestion, and what impact a strike would have on air pollution.

[128] Dr. Miller modeled travel activity impacts across various scenarios. He concludes that in a full strike scenario there is an increase in car trips by 2.3 percent. He found that the average travel time increase was between 30 seconds to one minute during a transit strike. He states that small individual increases can add up to a large impact. Higher traffic volumes and congestion would lead to an increase in air pollution. Dr. Miller states that with an increase in air pollution, diseases related to air quality would likely increase; and with more cars on the road there is the potential for more car accidents. In cross-examination, Dr. Miller conceded that he is not an expert with respect to the incidents of car accidents.

[129] In cross-examination, Dr. Miller testified that he assumed no change in behaviour in the event of a transit strike or lock-out. He did not account for the fact that many people may decide to work from home instead of going to work. Dr. Miller conceded that trip suppression in the event of a strike could make a "significant difference" in terms of the number of additional cars on the road projected by his model.

[130] The Government also relies on the expert evidence of Dr. Marianne Hatzopoulou. She is an expert in modelling road transport emissions and urban air quality. Under a full-strike scenario she estimates that more than 180,000 individuals would be exposed to increased pollutants at levels associated with more emergency room visits for asthma patients and individuals with coronary obstructive pulmonary disease and other chronic diseases.

[131] Dr. Hatzopoulou ran a hypothetical emissions model. She notes minor changes in regional areas; however, she states that there will be emissions hot spots, particularly in the core. She states that the hot spots could result in NO2 levels that exceed safe thresholds. She takes the position that the hypothetical data is more relevant than actual data because the actual data is from a fixed site monitoring station that measures the air quality at above breathing height.

[132] The Applicants argue that her evidence is of no assistance to the court. It is a hypothetical exercise based on a single calm day, and it does not support the sweeping statements made in the Government's factum. Dr. Hatzopoulou conceded on cross-examination that there was a

possibility that there was an "overestimate or systemic bias" in the model. Dr. Hatzopoulou also admitted that she is not a health expert.

[133] The Government notes that the RWDI Inc. Consulting Engineers and Scientists' report for Local 113 showed NO2 concentrations on average 13 percent higher during the eight-day TTC strike in 1991. Increased concentrations of NO2 were not noted during the two-day strikes in 1999 and 2008.

[134] The Applicants filed the expert report of Dr. Paul Villeneuve, who opines that there is "no evidence" that past TTC strikes "adversely impacted the health of residents" of Toronto. Dr. Villeneuve was the only health expert to provide a report. He relied on historical data from Toronto's four air quality monitoring stations. He reviewed the air pollution and hospitalization data during the strikes in 2006 and 2008. He found there was a decrease in hospital visits for respiratory diseases during the 2006 and 2008 strikes. Dr. Villeneuve also notes that from a health impacts analysis there may be health benefits to a strike including a shift to walking and cycling, and that during a strike, persons riding the TTC buses or waiting for TTC buses would not be exposed to exhaust pollution.

[135] In cross-examination, Dr. Villeneuve conceded that not all negative health effects from an increase in air pollution will result in hospitalizations. He also conceded that he did not examine other health effects such as a stroke, heart attack, diabetes or heart disease. Dr. Villeneuve stated that in his view, the number of hospital visits relating to respiratory diseases is the most relevant data when considering if a transit strike causes increased air pollution and associated health risks.

Economic Impact Caused by TTC Strikes

[136] The Government argues that given the TTC's importance to millions of Torontonians, it is "no surprise" that strikes have negative economic impacts. The Government did not offer an economic expert to address the economic impacts of a transit strike.

[137] In support of its position, the Government relies on the "Churley Report". In March 2008, the transit unions, published a report by Marilyn Churley. The Applicants describe the Churley report as an "advocacy document" premised on the loss of all public transit infrastructure in Toronto. The Churley Report identified the immediate impacts of the loss of the TTC including,

(a) the impact on the 25 percent of Toronto residents without cars and who depend on transit for their groceries and to commute to and from work and school;

(b) increased traffic, road accidents and road congestion; and

(c) increased air pollution.

The Curley report concluded that the TTC is one of Toronto's most important economic drivers.

[138] The Government also referred to Toronto's Economic, Development, Culture and Tourism Division 2008 report, which estimated that the short-term cost to the economy caused by a TTC strike is approximately $50 million per day. As noted earlier in these reasons, the report does not set out a detailed analysis as to how this figure was determined.

[139] The Government put forward the evidence of Dr. Miller with respect to traffic patterns in the event of a transit strike. Dr. Miller found that there is an economic cost associated with lost travel time. He stated that the average travel time will increase by 30 seconds to one minute in the event of a TTC strike. There is no economic report to tie the increased travel time to quantifiable economic losses.

Impact of TTC Strikes on Equity-Seeking Groups

[140] The Government filed the report of Dr. Steven Farber. Dr. Farber is an Assistant Professor and a transportation geographer and spatial analyst. His research focuses on social and economic outcomes of transportation.

[141] Dr. Farber's report is titled "Transit Equity Expert Evidence". He notes that the TTC plays a vital mobility role for millions of Torontonians daily. The TTC is used by almost every segment of the population. He provides the opinion that transit use is highest among low-income groups, recent immigrants, minority groups, and part-time workers.

[142] In Dr. Farber's opinion, equity-seeking groups will be disproportionately disrupted by a TTC shutdown. He concludes as follows:

> Based on these findings, it is accurate to say that there are major differences in the use of transit by levels of socioeconomic status in Toronto. Those with lower socio-economic status overall have a higher propensity to use transit than those who are more affluent and established. It is my opinion, based on this evidence, that lower-income, visible minorities, younger, immigrants, and otherwise less affluent people, will have more of their work and daily activity trips disrupted by a TTC shutdown, compared to the trips of other residents of the City. At the same time, public transportation plays a vital role in the lives of many affluent people as well, a testament to the success and essential role transit plays in millions of lives on a daily basis.

[143] Dr. Farber's research found that during the pandemic, those who had a disability, whose incomes were under $80,000, were over the age of 50 and/or were from certain racialized communities continued to ride transit during the restrictions imposed in Toronto. Those individuals were less likely to have a car. Essential workers relied more heavily on public transit.

[144] The Applicants argue that the problems faced by equity-seeking groups with respect to transit is exacerbated by Ontario's "infrastructure gap", and not strikes. Dr. Farber states in his report that transport poverty "is more of a longer-term condition that builds up over years of living in a place that might be underserved … We wouldn't consider a strike as being a source of transport poverty." In cross-examination, Dr. Farber testified that he did not consider how the

TTC ridership would be impacted by short-term work stoppages. He also conceded that he did not consider the range of activities that could constitute a strike, such as refusal to collect fares which, he conceded, could benefit equity-seeking groups.

[145] The Applicants note that there are equity seeking groups in other Ontario cities, but the province has not chosen to remove the right to strike for transit workers in those jurisdictions. The Applicants argue that there is no reason to treat equity seeking groups differently in Toronto than outside Toronto. The Applicants also state that transit workers are also members of equity seeking groups. The right to strike may have a greater impact on protecting those jobs and ensuring that equity-seeking workers at the TTC receive a fair wage, job security and reasonable working conditions.

Analysis – Pressing and Substantial Objectives

Health and Safety Concerns

[146] I find on the evidence that the Government failed to establish that the TTC is an essential service as that term has been defined in the caselaw.

[147] In *SFL*, the Supreme Court held that maintaining essential services can be a "pressing and substantial" objective, but only if the service is truly essential in the sense that its interruption "would endanger the life, personal safety or health of the whole or part of the population": at paras. 84, 86, and 92. An interruption in services that results in "mere inconvenience" would not be sufficient to meet the definition of essential services.

[148] The Government refers to the fact that the 2008 strike was on very short notice, which left passengers unexpectedly stranded, creating an obvious safety concern for minors, women travelling alone, people with disabilities and those unable to afford alternatives. The evidence put forward by the Government in support of this position is the legislative debates on February 24, 2011. There are no police or hospital records filed in evidence that supports the submission that the short notice of the 2008 strike resulted in actual harm to the public.

[149] There is also no evidence that a TTC strike affects the ability of fire, police, and EMS services from effectively responding to emergencies. In fact, the evidence is to the contrary. The September 22, 2008, City Staff Report, titled "Declaring the TTC an Essential Service in Toronto", stated that each service reported that there was no noticeable effect on their response times due to a disruption of transit services during a TTC strike.

[150] The Government argues that a transit strike results in negative health effects because of an increase in air pollution. I am not satisfied on the evidence before me that this is the case. The Government's traffic expert, Dr. Miller, provided the opinion that a transit strike would result in greater traffic congestion and an increase in air pollution. However, he conceded in cross-examination that he assumed no change in behaviour in the event of a transit strike or lock-out. He agreed that trip suppression in the event of a strike could make a "significant difference" in terms of the number of additional cars on the road projected by his model.

[151] I also do not find the evidence of Dr. Hatzopoulou to be very helpful in this regard. Her study was based on a hypothetical emissions model. She did not rely on actual data generated during previous transit shutdowns. In cross-examination, she conceded that she is not a health expert and that she did not know what health effects would flow from her emissions model.

[152] I find the evidence of the Applicants' expert, Dr. Villeneuve, to be more persuasive on this issue. He reviewed the actual air pollution and hospitalization data during the strikes in 2006 and 2008 and found that there was "no evidence" that past TTC strikes "adversely impacted the health of residents" of Toronto. Although those work stoppages were only 1-2 days in length, I note that the history of strikes involving the TTC are usually of short duration. Dr. Villeneuve also noted that there may be health benefits to a strike including a shift to walking and cycling.

[153] I am satisfied that the Government failed to establish that the TTC meets the definition of "essential services" as set out by Dickson C.J. in *Alberta Labour Reference*. An "essential service" is "one the interruption of which would threaten serious harm to the general public or to a part of the population. … [and] 'would endanger the life, personal safety or health of the whole or part of the population'": *SFL*, at para. 84, citing *Alberta Labour Reference*, at para. 106, citing *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O.*, (5th rev. ed. 2006). There is no persuasive evidence before me that a TTC strike would endanger the life, personal safety, or health of the population.

Other Impacts Caused by a Disruption in TTC Service

[154] In addition to health and safety concerns, the Government argues that a TTC strike will cause economic harms and will have an acute negative impact on marginalized and vulnerable groups. The Government argues that avoiding the economic impacts and the impacts on marginalized individuals caused by a TTC strike, is a "pressing and substantial" objective.

Effect of a TTC Strike on Economic Interests

[155] The economic concerns must be more than mere inconvenience. To support the pressing and substantial objective test, the economic harm must be "serious" and "especially injurious to the economic interests of third parties": *RWDSU*, at para. 31. As noted by Koehnen J. in *OECTA*, economic concerns will only be pressing and substantial if they involve "financial emergency and urgency": at paras. 262-271.

[156] The Government relies on the report of Dr. Miller. His expertise is with respect to road transportation. He is not tendered as an expert in economics. He concludes that a transit strike would result in additional congestion which has "potential" economic impacts. Dr. Miller bases his opinion on a theoretical modeling. The modeling does not consider the effects on traffic of a short-term disruption of transit services. In addition, it does not take into account the fact that some commuters could choose to work from home during a strike.

[157] The Government also relies on the City's Economic, Development, Culture and Tourism Division which estimated the short-term cost to the economy caused by a TTC strike to be approximately $50 million a day. The estimate was based on a reduction of the total output of goods and services by almost 10 percent. There is no analysis in this report as to whether the decrease in output on the days of the strike would be made up by increased output when the strike was over. Although there is reference to some commuters working from home, there is no analysis as to the number of workers who could be expected to work at home. I also note that this report was prepared 15 years ago, in 2008. The Government has not put forward more current information, including work from home statistics during and following the pandemic.

[158] Finally, the Government refers to the Churley report that was prepared by Local 113 in March 2008. The Applicants describe the report as an advocacy document. It explores the impacts of the potential disappearance of the TTC. The report concluded that the TTC is one of Toronto's most important economic drivers. The Churley report does not set out a detailed analysis of the economic effects of a TTC strike.

[159] I find the evidence put forward by the Government to support its position that there are serious economic consequences of a TTC strike to be lacking. There is no current report that sets out a detailed analysis of the economic consequences of a strike. It relies on two reports prepared in 2008; one by the City of Toronto, and one on behalf of the union. The reports were prepared 15 years ago and provide only broad estimates of the economic consequences of a TTC strike, without any detailed analysis.

[160] I do not find, on the evidence before me, that the effect of a TTC strike will result in "serious" and "especially injurious" economic consequences: *RWDSU*, at para. 31.

Effect of a TTC Strike on Equity-Seeking Groups

[161] The Government also argues that TTC strikes have disproportionate negative impacts on equity-seeking groups. The Government relies on the expert report of Dr. Farber. He provides the opinion that "lower-income, visible minorities, younger, immigrants, and otherwise less affluent people, will have more of their work and daily activity trips disrupted by a TTC shutdown, compared to the trips of other residents of the City".

[162] I accept that a TTC strike may have a disproportionate effect on equity-seeking groups. Persons working in lower income jobs may not have the option of working from home. Persons who cannot access vehicles will have fewer transit options.

[163] The equity issue is not mentioned in the broad preamble of the *TTC Act*. The preamble refers to "serious public health and safety, environmental, and economic concerns", but does not reference equity concerns. I am of the view that a *post-facto* objective that did not cause the law to be enacted cannot form the basis for a s. 1 justification: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at paras. 89-91.

[164] I am also of the view that equity concerns go both ways. Many of the most vulnerable TTC employees are in equity-seeking groups. The loss of the right to strike may expose those employees to a greater risk of job loss or wage inequity. In the 2018 round of bargaining, the TTC proposal involved the loss of about 10 percent of the maintenance workers. Ms. Macrae testified in cross-examination that the workers whose jobs would be lost were the most vulnerable.

[165] I also note that there are equity seeking groups in other areas of the province who would be disproportionately affected by a transit strike in their cities, but the province has not designated those transit systems as essential or removed the right to strike from those employees.

Summary

[166] I conclude that the Government failed to establish that there is a "pressing and substantial" objective that justifies the *TTC Act's* infringement of s. 2(d) of the *Charter*. I am not satisfied that the TTC is an essential service as that term has been defined in the caselaw. I find that a TTC strike would not "threaten serious harm" or "endanger the life, personal safety or health" of the whole or part of the population: *SFL*, at para. 843, citing *Alberta Labour Reference*, at para. 106, citing *Freedom of Association: Digest*.

[167] I also conclude that the Government has not established that there are "serious" and "especially injurious" economic consequences from a TTC strike: *RWDSU*, at para. 31. In reaching this conclusion, I acknowledge that there are millions of TTC users each day. I also acknowledge that many of the people who rely on the TTC are from equity seeking groups. However, the evidence before me on this Application with respect to the economic consequences of a TTC strike is not persuasive. The Government did not offer an economic expert. Instead, it relies on the Churley report and the City Staff reports prepared in 2008, which did not set out a detailed analysis of how a strike would affect the economy.

[168] Given that I have found that the legislation does not have a pressing and substantial objective, the legislation cannot be justified under s. 1. Despite that, I will go on to consider the remaining factors under the *Oakes* test.

B. Is there a Rational Connection Between the Object and the Means?

Causal Connection

[169] The Government has the onus of establishing that the prohibition on the right to strike is rationally connected to its objective. The Government must demonstrate that there is a causal connection between the limit on the right and the intended objective. Scientific proof is not required. It is sufficient if "it is reasonable to suppose that" the measure may further the objective, not that it will actually do so. The rational connection step requires the measure not be arbitrary, unfair or based on irrational considerations: *OECTA*, at para. 299.

[170] As stated in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48:

> At this stage, the Province must show that the universal photo requirement is rationally connected to the goal of preserving the integrity of the driver's licensing system by minimizing the risk of identity theft through the illicit use of driver's licences. To establish a rational connection, the government, "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.

[171] How the "pressing and substantial" objective is defined is important in determining whether the rational connection of the test has been satisfied. If the objective is preventing a transit strike in Toronto, prohibiting TTC employees from striking would be a clear connection between the measure and the objective. However, if the objective is defined as preventing the health and safety, economic and pollution effects of a TTC disruption, the connection between the removal of the right to strike and the objective is less clear.

[172] Although the Government is not required to provide scientific proof that the impugned measure will achieve the objective, there must be evidence that the measure will further the objective. As set out earlier in these reasons, I have concerns about the evidence put forward by the Government with respect to whether transit strikes will impact on traffic, pollution or health and safety.

Care of Design

[173] As noted in *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*, 2016 ONSC 418, 130 O.R. (3d) 175, at para. 202: "[t]he second component of the *Oakes* test -- the rational connection test -- is more straightforward on the facts of this case. Plainly, the prohibition on the right to strike in the Act is rationally connected to the pressing and substantial objective of securing a 'vital' service to vulnerable and rural Canadians."

[174] Although the rational connection test may be more "straightforward" and "less onerous", it is not non-existent. In *OPSEU v. Ontario*, 2016 ONSC 2197, 354 C.R.R. (2d) 158, at para. 249, the court states as follows:

> These words demonstrate that there is a limit to the circumstances where inferences based on reason and logic can be accepted as demonstrating the requisite rational connection. The measures which limit the right (in this case, to freedom of association) should not be arbitrary and should be based on care of design. In this case, they were not. The process was arbitrary because it was unilateral. Even though, as the Minister noted at the outset, it was "very different"

> from past sector-wide negotiations, the process was put in place by the government without consultation or discussion. [Reference omitted.]

[175] The "hallmarks" of rational connection in an impugned measure are "care of design" and a "lack of arbitrariness": *OECTA*, at para. 300. I am of the view that the evidence supports the conclusion that there was a lack of care taken by the Government when the *TTC Act* was enacted.

[176] The *TTC Act* was introduced on February 20, 2011 and was enacted less than six weeks later on March 30, 2011. There is no evidence that the Government conducted extensive consultations or meaningful discussions with the TTC unions before the legislation was introduced. The legislative hearings were limited to three hours. In answer to an undertaking, the Government confirmed that it did not consider or study any other legislative models for achieving its objectives. The Applicants argue that the *TTC Act* was rushed through the legislature to ensure that it was in place before the collective agreement expired on March 31, 2011.

[177] It is my view that the lack of care is evident in the way in which the legislation prohibits the right to strike of all TTC employees regardless of whether the employee's job has any connection with the "pressing and substantial" objective. For example, it is difficult to see how a strike by customer service agents or painters would affect the health and safety of the public.

[178] I conclude that the Government has failed to satisfy its onus that there is a rational connection between the object and the means.

C. Is the Restriction Minimally Impairing?

[179] The Government must establish that its measures impair the *Charter* right "as little as possible" and are "carefully tailored so that rights are impaired no more than necessary": *MPAO*, at para. 149; *SFL*, at para. 80, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. The court must ask whether the Government took the "least damaging approach within a range of reasonable alternatives": *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, 71 B.C.L.R. (5th) 223, at para. 386 (emphasis in original). See also *Health Services*, at paras. 150-161.

[180] As stated in *Hutterian Brethren*, at paras. 53 and 55:

> [53] The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.
>
> …

> [55] While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.

[181] As noted in *Hutterian Brethren*, the government is entitled to deference in formulating its objective and the manner in which it seeks to achieve the objective. However, as noted by Abella J. in *SFL*, deference is a "conclusion not an analysis". She states that deference, "certainly plays a role in s. 1 where, if a law is justified as proportionate the legislative choice is maintained. But the whole purpose of *Charter* review is to assess a law for constitutional compliance. If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?": at para. 76.

[182] The Government argues that the measures the government chose to achieve the objective was a "no strike/compulsory arbitration" model. The issue is whether this measure falls within a range of reasonable alternatives; not whether the least intrusive choice imaginable was selected. The Government states that only the "no strike/compulsory arbitration" model will achieve the objective of avoiding transit disruptions and prevent the adverse effects of a strike on the public.

[183] For public services, including those understood to be essential, the Government states that there are three basic categories or models:

(a) The right to strike/lockout model: this is the Wagner model and provides for no strikes or lockouts during the term of the collective agreement. If a strike takes place after the expiry of the agreement, back-to-work legislation could be introduced.

(b) The no strike/compulsory arbitration model: this model prevents any strike or lockout including after the term of the collective agreement has expired. If there are disputes between the parties, the matter proceeds to a binding arbitration.

(c) The hybrid model: a model by which all employees could technically strike when the agreement expires but in advance the parties have negotiated an essential services agreement which identifies those persons required to remain on the job during a work stoppage.

[184] The Government argues that the Wagner model of allowing the right to strike and lock-out fails to achieve the objective of avoiding service disruptions. Where a TTC strike is followed by *ad hoc* back-to-work legislation, the objective is not achieved because there has already been a service disruption. The Government also states that the model of allowing strikes and lock-outs followed by back-to-work legislation that includes interest arbitration is arguably the worst of both worlds. It results in uncertainty and service disruption and includes all the "chilling" and "narcotic" effects that apply to interest arbitration.

[185] The Government further argues that the hybrid model would not achieve the objective of avoiding service disruptions. It would not prevent increased pollution and consequent health risks. Also, because it allows some workers to continue to work and for the system to operate in a reduced capacity, there would not be sufficient leverage to bring the parties to an agreement in the event of an impasse.

[186] The Government points to the Montreal model as an example of a hybrid model that would not achieve the objectives. Under Montreal's hybrid model, subway service ended at 6:30 p.m. on weekdays during a transit strike. The TTC has ridership throughout the day and night, not solely on subways. The Government argues that to restrict operations to only subways and to limit the hours of operation of the subways will result in a greater number of subway riders within fewer hours, leading to safety risks due to overcrowding. The Applicants note that for the Montreal transit system, if the Minister of Labour is of the opinion that the strike may endanger public health and safety, the Minister may order the parties to negotiate an essential services agreement. The parties must submit a list of essential services to the Labour tribunal. The tribunal has found that public transit is not essential, but it has ordered minimum service in Montreal, while maintaining the right to strike.

[187] The Applicants argue that rather than being "carefully tailored", the *TTC Act* simply removes the right to strike for all TTC employees, regardless of how those jobs may affect the "pressing and substantial" objective. As noted earlier, the *TTC Act* removes the right to strike for customer service and audit clerks, vending machine attendants, janitors and other workers not directly involved in providing transit services. There is no evidence from the Government that these individuals are essential for the operation of the transit service. The Applicants argue that this represents the lack of care, rendering the *TTC Act* neither rationally connected nor minimally impairing: *OECTA*, at paras. 334-335.

[188] By determining that every TTC worker is effectively essential and unable to strike regardless of the job performed by the worker, the *TTC Act* is similar to the over broad legislation deemed unconstitutional in *SFL*. There, the legislation designated all public employees to be essential. There was no mechanism in the legislation to allow workers to challenge the unilateral determination of being essential. The Supreme Court found that such a broad designation without a dispute mechanism was fatal: *SFL*, at paras. 88-92:

> [91] And even where an employee has been prohibited from participating in strike activity, the *PSESA* does not tailor his or her responsibilities to the performance of essential services alone. Section 18(1)(a) of the *PSESA* requires that in the event of a work stoppage, all essential services employees must continue "the duties of [their] employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement" and must not fail to continue those duties "without lawful excuse" (s. 18(2)). Requiring those affected employees to perform both essential *and* non-essential work during a strike action undercuts their ability to participate meaningfully in and influence the process of pursuing collective workplace goals. [Emphasis in original.]

[189] Here, the *TTC Act* prohibits all TTC workers from striking. The Applicants argue that the unilateral designation of all workers to be essential, without any mechanism to dispute this designation, is effectively the same authority that was found to be overbroad in *SFL*. I agree.

[190] The Applicants also argue that there are many examples of public sector workers in Ontario with the right to strike, including transit workers in other cities. The *TTC Act* is an outlier. A review of all federal, provincial and territorial legislation shows that the only public transit workers with a complete prohibition of the right to strike is the TTC. All other transit systems in Canada allow for some form of strike action on the part of the transit workers. Moreover, the areas surrounding Toronto have a similar ethnic makeup and have many of the same equity-seeking groups that the Government argues would be most affected by a transit strike. However, the province did not ban strike action for transit workers in those communities.

[191] Transit workers in the employ of Metrolinx are governed by the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38 ("*CECBA*"), which requires all employer/unions subject to the *CECBA* to come to an essential service agreement while still maintaining the right to strike. Metrolinx operates the GO trains which provide public transit into the city of Toronto. In the case of Metrolinx, the province did not ban all strike action, but instead adopted a tailored approach to preserve the right to strike as much as possible while protecting legitimate public health and safety interests.

[192] The TTC is the only municipal public transit service in Canada whose workers are completely prohibited from engaging in all forms of strike action at any time, and regardless of the job performed by the employee. I find the fact that the other transit systems do not have a complete ban on the right to strike to be most persuasive. I appreciate that the TTC is the largest and most complex transit system in the country, but transit disruptions in other cities would also impact the local economies, and likely affect equity-seeking groups disproportionately. The province has not removed the right to strike of transit workers in those jurisdictions but has developed other means to achieve their objectives.

[193] In considering the historical context, it seems to me that the failure to provide sufficient notice of the strike in 2008 was an important factor in enacting the *TTC Act*. It was after that strike the motions were brought to consider whether the TTC was an essential service. The legislation was enacted on the day before the first round of bargaining following the 2008 strike. If the lack of notice was a concern, the legislature could have passed legislation that allowed the right to strike but required transit unions to provide 48 hours' notice of any strike activity. Nuclear power plant workers in Ontario have the right to strike but must give reasonable notice before doing so. Such a requirement could have been effectively utilized here.

[194] I am of the view that the Government failed to establish that the removal of the right to strike for all TTC employees is "minimally impairing". There is no evidence that there was consultation or study to identify other methods to achieve the objectives without completely removing the right to strike. I find that the legislation is a blunt instrument and does not provide a tailored and nuanced approach to the issue.

D. Proportionality Between Salutary and Deleterious Effects

[195] The fourth branch of the analysis focuses on the effects of the legislation. The court must weigh the benefits of the measure, with its negative effects. The fourth branch of the test is where, "most of the heavy conceptual lifting and balancing" is done: *Hutterian Brethern*, at para. 149.

[196] With respect to the issue of proportionality, Dickson C.J. in *RWDSU*, at paras. 31-32 states:

> [L]egislatures are justified in abrogating the right to strike and substituting a fair arbitration scheme, in circumstances when a strike or lock-out would be especially injurious to the economic interests of third parties.
>
> [T]he relevant question [on proportionality], therefore, is whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focused in its intensity as to justify the limitation of a constitutionally guaranteed freedom in respect of those employees.

[197] As Dickson C.J. makes clear, if a guaranteed right or freedom that is protected by the *Charter* is to be limited, the harm to be prevented must be "massive and immediate" and "focused in its intensity". The Government has the onus of showing that the salutary effects of the *TTC Act* outweigh its deleterious effects: *R. v. Oakes*, at para. 71. The balancing required under this stage must be fact-based and contextual, because an infringement of a *Charter* right may be justified in one context, but not another: *Health Services*, at para. 139, and *OEPTC*, at para. 340.

[198] The Government argues that the deleterious impact of the TTC strike on people who have no other means of transportation is "massive and immediate". The Government states that a strike's impact on innocent members of the public is felt immediately and acutely. The legislation ensures that TTC service is not disrupted, allowing the people who rely on the TTC to get to work, go to school, and make essential trips. The Government argues that because the legislation provides for an interest arbitration mechanism to resolve disputes, the effect on s. 2(d) rights is minimal.

[199] The Applicants' position is that the deleterious effects of the *TTC Act* are significant. The removal of the right to strike adversely affects the bargaining power between the workers and management. It compromises "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" and limits the empowerment of vulnerable groups working to "right the imbalances in society": *SFL*, at para. 53. The Applicants state that the history of strike action for the TTC shows that strikes are generally short lived. Although members of the public will be inconvenienced during work stoppages, the Applicants argue that the relatively minor deleterious effects of a brief work stoppage, do not justify removing the right to strike by all TTC employees, at all times.

[200] In support of its proportionality argument, the Government relies on the various expert reports that set out the social and economic cost of a TTC strike. As I stated earlier in these reasons when considering the "pressing and substantial" objective, I am of the view that the evidence does not support a finding that a TTC strike would "threaten serious harm" or "endanger the life, personal safety or health" of the whole or part of the population.

[201] With respect to the purported economic costs of a TTC strike, I find that the evidence relied on by the Government to be inadequate. As noted earlier, the Government did not put forward an expert to provide an opinion on the economic consequences of a strike. Instead, it relied on two reports prepared in 2008. Both reports provide broad statements about the economic effects of a strike, without any rigorous analysis. For example, there is no analysis as to whether the loss would be made up when the strike was over.

[202] The reports are now 15 years old. More importantly, there is no report that deals with the options workers now have in the event of a TTC strike. I am prepared to take judicial notice of the fact that many office workers were able to work remotely during the pandemic.

[203] The Government argues that a strike has a greater deleterious effect on equity-seeking groups. Dr. Farber provides the opinion that ridership is higher among equity-seeking groups, including visible minorities and women. The Applicants did not put forward a responding report. I agree with the submissions of the Government that equity-seeking groups will experience a TTC strike more keenly. However, I am also of the view that the measure proposed of eliminating the right to strike will have a negative effect on equity-seeking groups within the TTC. TTC workers also reflect the ethnic and gender makeup of Toronto. Those individuals may be at greater risk if the transit unions do not have a right to strike.

[204] In *SFL*, the Supreme Court notes that the right to strike is essential to promoting the rights of marginalized groups:

> [53] And, most recently, drawing on these same values, in *Mounted Police* it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(d) aims.
>
> > To protect the individual from "state-enforced isolation in the pursuit of his or her ends" …. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes a more equal society. [para. 58]

> [54] The right to strike is essential to realizing these values and objectives through collective bargaining …. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

[205] When balancing interests, it is important to consider the equity seeking groups in the public who may be affected, as well as the equity-seeking groups within the union. Although a strike will adversely affect equity seeking groups who tend to be greater consumers of public transit, the removal of the right to strike will result in a loss of protection to marginalized or equity-seeking groups within the union and may have a negative impact on their ability to right imbalances in the workplace.

[206] It is also important to consider historical context when conducting the balancing exercise. The history of TTC strikes reveal that strikes are infrequent and of short duration. As noted above, over the 20-year period before the enactment of the *TTC Act*, TTC employees were on strike for a total of 12 days. The deleterious effect of a transit shutdown is disruptive, particularly to equity seeking groups, but in the historical context, transit shutdowns are generally short lived. It is my view that the deleterious effects of relatively brief transit shutdowns do not outweigh the harm caused to meaningful collective bargaining.

[207] I have weighed the benefits of the removal of the right to strike with the corresponding negative effects. I conclude, on the evidence, that the benefits that may be achieved by removing the right of TTC employees to strike do not outweigh the harm caused by the loss of the right to meaningful collective bargaining. The right to meaningful collective bargaining is to be interfered with only in the "clearest of cases" and when the harm to third parties is "massive and immediate". I do not find on the evidence before me that this is the "clearest of cases". I conclude that in the circumstances of this case, the balancing exercise results in a finding that the legislation is not demonstrably justified as a reasonable limit in a free and democratic society.

DISPOSITION

[208] I conclude that the *TTC Act*, which eliminates the right to strike for all TTC employees and replaces it with binding interest arbitration, is in breach of s. 2(d) of the *Charter*. In *SFL*, the right to strike was found to be not merely derivative of collective bargaining but instead was an "indispensable component of that right". I find that in the factual context of this case, the *TTC Act*, is a "substantial interference" with the constitutionally protected right to meaningful collective bargaining.

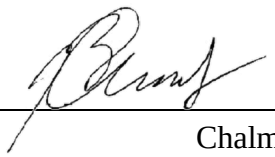
[209] I also conclude that the *TTC Act* is not saved or justified by s. 1 of the *Charter*. I am not satisfied that the Government has established "pressing and substantial" objectives that would justify eliminating a *Charter* right. I find that the TTC does not provide "essential services", as that term has been defined in the caselaw. The evidence does not support the Government's position that the disruption of transit services in Toronto would "threaten serious harm" or "endanger the life, personal safety or health" of the whole, or part of the population. I also find that the economic and equity concerns advanced by the Government are insufficient to justify a

prohibition of the right to strike. The Government also failed to establish that the prohibition on the right to strike is rationally connected or minimally impairing.

[210] I grant the relief sought by the Applicants. I order and declare that the *TTC Act* substantially interferes with the rights of the Applicants to engage in a meaningful process of collective bargaining protected under s. 2 (d) of the *Charter*, and that the *TTC Act* is not saved or justified under s. 1 of the *Charter*. I also declare that the *TTC Act* is unconstitutional and of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*.

[211] The Government seeks an order suspending my order for twelve months to allow it to respond. This relief is opposed by the Applicants. The Applicants argue that the Government has failed to justify a need to delay the implementation of my order. I note that the current collective agreement expires on March 31, 2024. If I were to suspend implementation for one year, the parties would be required to negotiate the next collective agreement under the current system. That, in my view, would be unreasonable. Under the *LRA*, the Applicants are not permitted to strike during the term of the collective agreement. Therefore, the Government has effectively until March 31, 2024 to respond to this decision before the Applicants will be in a legal position to strike. I conclude that there is no justification to delay implementation of my order and I decline to do so.

[212] The Applicants are successful on this Application and are presumptively entitled to their costs. If the parties are unable to agree with respect to costs, the Applicants may file written cost submissions of no more than five pages in length, excluding caselaw, offers to settle, and bills of costs, within 20 days of the date of this endorsement. The Respondents may deliver written cost submissions in response, on the same basis, within 20 days of receiving the Applicants' cost submissions.



Chalmers J

Released: May 8, 2023

CITATION: ATU Local 113 v. HMQRO, 2023 ONSC Number
COURT FILE NO.: CV-15-539132
DATE: 20230508

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AMALGAMATED TRANSIT UNION LOCAL 113, CANADINA UNION OF PUBLIC EMPLOYEES, CUPE LOCAL 2, and GAETANO FRANCO

Applicants

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF ONTARIO

Respondents

REASONS FOR JUDGMENT

Chalmers J

Released: May 8, 2023