SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Teachers Union v. Nova Scotia (Attorney General)*
2020 NSSC 358

Date: 20201208
Docket: Hfx. No. 469869
Registry: Halifax

Between:

Nova Scotia Teachers Union

Applicant

v.

Attorney General of Nova Scotia

Respondent

Judge: The Honourable Justice Ann E. Smith

Heard: November 12, 2020 in Halifax, Nova Scotia

Decision: December 8, 2020

Counsel: Gail L. Gatchalian, Q.C. and Jillian K. Houlihan, for the Applicant
Dorianne M. Mullin and Kevin A. Kindred, for the Respondent

By the Court:

Introduction

[1] The Nova Scotia Teachers Union (the "NSTU") and the Province are engaged in a dispute about the constitutionality of the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, S.N.S 2017, c. 1 (the "*TPA*"), formerly Bill 75, that imposed a four-year collective agreement on teachers.

[2] The NSTU filed a Notice of Application in Court on October 31, 2017 alleging that the *TPA* violates sections 2(b) (freedom of expression) and 2(d) (freedom of association) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The NSTU seeks to have the *TSA* declared unconstitutional and of no force or effect.

[3] In Appendix "A" to the NSTU's Notice, "The Grounds for the Order", the NSTU alleges that due to the government's actions during and within the collective bargaining process, it bargained in bad faith and failed to respect the process of meaningful collective bargaining and good faith consultation as required by s. 2(d) and instead bargained in bad faith and substantially interfered with the collective bargaining process.

[4] The Attorney General of Nova Scotia (the "AGNS" or "the Employer") filed a Notice of Contest on December 8, 2017 in which it seeks to have the Application dismissed on the basis that the *TSA* does not violate the *Charter*. In the schedule appended to its Notice of Contest, the AGNS states that the Application should be dismissed because, *inter alia*, the parties engaged in 27 days of collective bargaining, participated in a number of phone calls, exchanged email messages and concluded three tentative collective agreements prior to the introduction of the *TPA*. The AGNS says that therefore, the ability of the NSTU to make representations on the conditions of employment was met.

[5] In support of its Application, the NSTU filed the expert report of Dr. Robert Hebdon. The NSTU offers Dr. Hebdon as an expert in public sector collective bargaining and labour relations. The NSTU also offers Professor Patrick Macklem as an expert on the right to strike at international law. The NSTU also filed affidavits of several lay witnesses which contain evidence which it says directly relates to the factual issues raised in the Notice of Application.

[6] The reports of Dr. Hebdon and Professor Macklem were filed (in the form of affidavits) with the court on June 1, 2018. On December 20, 2018 the AGNS filed a motion seeking to have both expert reports excluded on the basis that they are neither relevant nor necessary to the determination of the issues raised in the Application.

The qualifications and expertise of Dr. Hebdon and Professor Macklem are not disputed by the AGNS. Rather, the AGNS says, *inter alia*, that their evidence is neither relevant or necessary.

[7] Dr. Hebdon was cross-examined out of court on October 8, 2019. Professor Mecklem was cross-examined out of court on October 11, 2019.

[8] The within motion was heard on November 12, 2020. The Application is scheduled for hearing for five days beginning February 24, 2021.

Issues

1. What is the test for the threshold admissibility of expert evidence?
2. Should Dr. Hebdon's expert report be excluded?
3. Should Professor Macklem's expert report be excluded?

Issue 1: What is the test for the threshold admissibility of expert evidence?

A. <u>The Test for Admissibility of Expert Opinion Evidence</u>

[9] The NSTU and the AGNS agree that the test for threshold admissibility of expert evidence is the common law test recently clarified by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (SCC) ("*White Burgess*").

[10] The *White Burgess* framework includes two steps. The first step establishes whether the expert evidence meets threshold admissibility, and includes a consideration of four factors established by the Supreme Court of Canada in *R. v. Mohan*, [1994] S.C.R. 9 (S.C.C.) ("*Mohan*"):

> (a) Logical relevance.
> (b) Necessary to the trier of fact.
> (c) Absence of an exclusionary rule.
> (d) A properly qualified expert which includes the requirement that the expert be willing and able to fulfill the expert's duty to provide evidence that it:
> (i) Impartial.
> (ii) Independent.
> (iii) Unbiased.

[11] The second step focuses on the trial judge's role as gatekeeper. As stated by Cromwell J. in *White Burgess*, here "the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks." (paras 23 and 24).

[12] In *White Burgess*, Cromwell J. outlined the dangers of expert opinion:

> 1. An expert's lack of independence and impartiality can result in miscarriages of justice.
> 2. The risk is that the jury will be unable to make an effective and critical assessment of the evidence.
> 3. Expert evidence is resistant to effective cross-examination by counsel who are not experts in that field.

4. Potential prejudice created by the expert's reliance on unproven material might not be subject to cross-examination.
5. The risk of admitting "junk science".
6. The risk that a "contest of experts" distracts rather than assists the trier of fact.
7. Expert evidence may lead to an inordinate expenditure of time and money. (para. 18)

[13] In *White Burgess*, Cromwell J. referred to the following comments of Binnie, J. in *R. v. J.-L.J.*, 2000 SCC 51 (SCC) as summing up the Canadian approach:

> … The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allow too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility. (para 28)

[14] Before turning to the scope and context of the reports of Dr. Hebdon and Professor Macklem and applying the *White Burgess* framework to their evidence, I will review the argument of the NSTU that social science and legislative fact evidence has frequently been admitted by Canadian courts in interpreting the *Charter*, and the argument of the Employer that on the facts of this case, why such evidence is neither relevant or necessary.

B. Legislative Facts and *Charter* Interpretation

[15] I will start with the decision of the Supreme Court of Canada in *MacKay v. Manitoba,* [1989] 2 S.C.R. 357 (SCC). In *MacKay v. Manitoba,* the Appellants

alleged that the *Charter* guarantee to freedom of expression (s. 2b) was infringed by the *Manitoba Elections Financing Act* which provided for payment from the consolidated fund of the Province of Manitoba of a portion of the finance expense of those candidates and parties who received a fixed portion of the votes in the provincial election.

[16] Cory J. delivered the decision of the Court, noting that the facts necessary to determine if the impugned legislation was unconstitutional were not actually before the Court. In the absence of facts, the Court could not decide an allegation of a *Charter* breach. Under the heading, "The Essential Need to Establish the Factual Basis in *Charter* Cases" Cory J. writes:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
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> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions

> cannot be based upon the unsupported hypotheses of enthusiastic counsel. (pgs. 361-362)
>
> [Emphasis added]

[17] Justice Cory goes on to refer to the Supreme Court's previous decision in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (SCC) and states that "this Court has stressed the importance of a factual basis in *Charter* cases". Cory J. quotes from the decision of Dickson C.J. in *Edwards Books* at p. 762:

> Accordingly, there is no evidentiary foundation to substantiate the contention of some of the retailers that their freedom from conforming to religious doctrine has been abridged. The second form of coercion allegedly flowing from the *Retail Business Holidays Act* has not been established in these appeals.

[18] Justice Cory also refers to the following statements of Dickson C.J. in *Edward Books* (at pp. 767-768):

> In the absence of cogent evidence regarding the nature of Hindu observance of Wednesdays or Moslem observance of Fridays, I am unwilling, and indeed, unable to assess the effects of the Act on members of those religious groups.

[19] The Court in *Edwards Books* was clearly looking for general information about the nature of Hindu observance, i.e. the social context.

[20] The comments of Justice Cory in *MacKay v. Manitoba* were repeated by the Supreme Court of Canada in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R.

1086 (SCC). Sopinka J., writing for the Court refers, to the distinction between adjudicative and legislative facts under the heading "The Need for Facts" (p.1099):

> …This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack.
>
> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para, 15.03, p. 353, (See also Morgan, "Proof of Facts in *Charter* Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how and with what motive or intent…". Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 *per* Laskin C.J., at para 391; *Re Residential Tenancies Act 1979*, [1981] 1 S.C.R. 714 per Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p. 318. (p. 1099)
>
> [Emphasis added]

[21] In *Danson*, Sopinka J. went on to state:

> The present case is, for these purposes, indistinguishable from *MacKay*, and I would respectfully adopt and apply Cory J.'s comments to these circumstances. The appellant here seeks to attack the impugned rules on the basis of their alleged effects upon the legal profession in Ontario. It would be, in my view, difficult if not impossible for a motions judge to assess the merits of the appellant's application under Rule … without evidence of those effects, by way of adjudicative facts (i.e., actual instances of the use or threatened use of the impugned rules) and legislative facts (i.e., the purpose, history and perceptions among the profession of the impugned rules).
>
> [Emphasis added]

[22] The Court in *Danson* was clearly looking for more than merely adjudicative facts, but also facts grounded in the social context.

[23] *R. v. Spence*, 2005 SCC 71 (SCC) concerned judicial notice of racism in the context of a jury challenge. In *Spence,* Binnie J., speaking for the Supreme Court, observed that "social fact evidence has been defined as social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case". (para 57)

[24] Binnie J. went on to refer to the Supreme Court's decision in *R. v. Malmo-Levine*, 2003 SCC 74 (SCC) where the majority of the Court expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports. (para. 68)

[25] In *Trinity Western University v. Nova Scotia Barristers' Society*, 2014 NSSC 395 (NSSC) ("*TWU*") the University objected to two affidavits proposed by the Barristers' Society that contained opinion evidence. *TWU* was a *Charter* case. The affidavit of Dr. Elise Chernier set out the history of discrimination against gay and lesbian persons, the effect of exclusion on such persons and the role that the state has taken in combatting that discrimination.

[26] The affidavit of Dr. Mary Bryson addressed the effects of the University's covenant on sexual minorities and set out research which demonstrates the impact of such policies on lesbian, gay and bisexual community members.

[27] The University objected to the admissibility of these expert opinions on various bases.

[28] Justice Campbell, relying upon *MacKay v. Manitoba* and *Danson v. Ontario*, noted:

> [10] Technically, a report of an expert would contain a statement of assumed facts that would have to be proven in court. The expert would then offer an opinion or a theory relevant to the case, using training, knowledge and expertise of a kind not possessed by the judge. That opinion would be based on those assumed and to be proven facts. That opinion would be testable or verifiable.
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> [11] *Charter* litigation has changed that.
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> [12] Social science evidence is critical in making decisions on the interpretation of the *Charter* especially when those matters involve public policy. Reports from experts in those areas convey a kind of information that may be quite different. The way in which those reports are used by courts can also be quite different. Adjudicative facts are those that are proven by evidence and relate directly to the subject matter of the proceeding. Judges can take judicial notice of facts that are widely known and beyond dispute. Social science evidence or legislative facts fall between those more traditional categories.
>
> [13] *Charter* decisions can't be made in a "factual vacuum". A proper factual foundation has to exist for example when measuring legislation against the provisions of the *Charter*. Legislative facts provide a social, economic and cultural context. They are subject to less stringent requirements of admissibility. The Supreme Court of Canada has continued to make use of social science evidence in a wide range of matters.
>
> [Emphasis added]
>
> …

> [15] Social science evidence is presented through expert witnesses. The assessment of that evidence relies heavily on the trial judge. …

[29] In discussing the gatekeeper function of the admissibility framework, Justice Campbell states:

> [19] Trial judges have to be careful in *Charter* matters when exercising their discretion under the second part of the test. That part is sometimes called the "gatekeeper function". Chief Justice Bauman of the British Columbia Supreme Court, in Reference Re: Criminal Code of Canada (B.C.) the Polygamy Reference, adopted Justice Doherty's approach in R. v. Abbey and called it an "innovation". He went on to say that relevant expert evidence will help to ground any meaningful analysis in reference questions and the same presumably applies in *Charter* litigation generally.
>
> > The benefits of a trial reference in enabling the creation of this evidentiary foundation would be lost by the application of an unnecessarily restrictive approach to the admissibility of expert evidence.

[30] Justice Campbell admitted both affidavits into evidence, stating:

> [60] Taken as a whole, both affidavits do comply with the basic requirements of expert opinion. The elements of argument contained in both involve the kind of prejudice that can be minimized by acknowledging them for what they are. They are not a subtle attempt to slip an argument past the gatekeeper, hidden in an expert opinion. In the context of an expert report on legislative or social facts latitude can be given to allow the entire report to become a part of the record. Editing of the reports, in the absence of some more significant prejudicial effects being shown, could result in a loss of some of the full context that may be required both for understanding of the report as a whole and assessing the weight to be given to its conclusions.
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> [Emphasis added]

[31] In *Grabher v. Nova Scotia (Registrar of Motor Vehicles)*, 2018 NSSC 87 (NSSC), following a complaint, the Registrar cancelled Mr. Grabher's personalized

license plate which read “GRABHER”. Mr. Grabher brought an Application alleging the cancellation of his license plate was unconstitutional.

[32] The Registrar submitted an expert report from Dr. Carrie Rentschler. The Registrar proffered Dr. Rentschler as an “expert in representations of gendered violence across media platforms” to provide opinion evidence explaining “how language that supports gendered violence plays a contributing role in promoting violence against women”; and “that such speech is, in addition to being offensive, harming”.

[33] Dr. Rentschler’s evidence was presented to provide “social and cultural context for the court’s *Charter* analysis, particularly s. 1”.

[34] The report prepared by Dr. Rentschler provided opinion evidence specifically in relation to whether “GRABHER”, appearing on a personalized license plate was offensive and harmful and whether it supported gendered violence and contributed to the promotion of violence against women, as well as how social and cultural context affects interpretation of the expression.

[35] Justice Muise determined that the benefits of Dr. Rentschler’s report were outweighed by its prejudicial impact on the trial process. Justice Muise noted many points detracted from Dr. Rentschler’s opinion evidence including that the evidence

did not establish whether the approach she used in arriving at her opinion was accepted by those working in her field and that the conclusions Dr. Rentschler expressed in her opinion exceeded the questions put to her by the Registrar.

[36] Muise J determined that for the benefits of Dr. Rentschler's evidence to outweigh the potential risks, its format would have to be revised so that it answered certain questions, which he set for in his decision.

C. Section 2(d) *Charter* Cases (s.2(d)) and Social Science Evidence

[37] The NSTU argues that the determination of the admissibility of the NSTU's proposed experts' reports requires an understanding of the legal test for a violation of the right to collective bargaining under s.2(d) of the *Charter*, as well an understanding of the factors considered in the s.1 *Charter* analysis. With respect to the s.1 analysis, NSTU says that the Court must focus on whether there is proportionality between the legislation's benefits and its deleterious effects.

[38] The cases reviewed by this Court demonstrate that the analysis required in a Court's determination of whether there has been a breach of s.2(d) is contextual and fact-specific.

[39] This principle comes from the decision of the Supreme Court of Canada in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (SCC) ("*B.C. Health Services*") where McLachlin C.J. and LeBel J., writing for the majority, confirmed that s.2(d) protects the right to collective bargaining.

[40] The majority in *B.C. Health Services* concluded that s.2(d) protects against substantial interference with collective bargaining. The intent to interfere with collective bargaining is not essential. It is enough if the effect of the legislation is to substantially interfere with collective bargaining. (para.90)

[41] The Chief Justice, as she then was, and LeBel J. stated that the "inquiry in every case is contextual and fact-specific." (para 92)

[42] The majority in *BC Health Sciences* said that, generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries:

> [93] …The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> [94] Both inquiries are necessary. If the matters affected so not substantially impact on the process of collective bargaining, the measure does not violate s.2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be

> no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s.2(*d*) if they preserve a process of consultation and good faith negotiation.

[43] This Court's review of the s.2(d) case law in the context of labour relations leads to the conclusion that Canadian courts often admit and rely upon expert evidence from labour relations experts as well as experts in international law.

[44] It is noted that *B.C. Health Services (SCC)* started in the B.C. Supreme Court as a *Charter* challenge brought by health care sector unions (2003 BCSC 1379 (BCSC)).

[45] The health care unions alleged that legislation enacted by the government of British Columbia, the *Health and Social Services Delivery Improvement Act* ("Bill 29") violated sections 2(d), 7 and 15 of the *Charter*. Garson J. referred to expert evidence from two of the plaintiffs' experts who testified that "contracting out (a component of Bill 29) is associated with a decline in wages and benefits, lower union density, fewer jobs, a diminution in employment conditions, a decline in workers' bargaining power and a shift of jobs from the union to the non-union sector." (para. 105)

[46] One of the plaintiffs' experts stated in his affidavit that in his opinion "Bill 29 emasculated the very role and purpose of a union and their right to carry out such

role and purpose…a primary reason why employees join unions is…job security." (para. 109)

[47] Another plaintiffs' expert, a retired labour negotiator and organizer, gave evidence concerning the history of labour negotiations and collective agreements for nurses in long-term care facilities. (para. 110) The BC government also led expert evidence. (para 122)

[48] Thomas J. in *Alberta Union of Provincial Employees v. Alberta*, 2014 ABQB 97 (AQB) granted an injunction to the applicants to stay the operation of the *Alberta Public Service Salary Restraint Act* (*PSSRA*) which directly affected the collective bargaining process then taking place between the government of Alberta and the Alberta Union of Provincial Employees ("AUPE").

[49] AUPE had initiated an action against the government challenging the constitutionality of the *PSSRA.*

[50] At the hearing, AUPE filed the affidavit of Professor John Fryer who it presented as an expert in labour relations. Thomas J. qualified Professor Fryer as an expert in the areas of public sector collective bargaining and labour relations and capable of giving opinion evidence on the subject of collective bargaining in the public sector, in particular, and the effect of legislation such as the *PSSRA* on

collective bargaining processes, on members of bargaining units, including individual members of a union. (para. 18) The evidence in Professor Fryer's affidavit focused on the effect of unilateral action by a government which interfered with, or negated collective bargaining processes (para 21).

[51] Thomas, J. noted (para. 20) in his decision that, given Professor Fryer's extensive experience in labour relations, he considered his evidence to be reliable, and he gave "great weight to this body of evidence which was not contradicted by any witness for Alberta or the Minister". (para. 20).

[52] In *Saskatchewan Federation of Labour*, 2015 SCC 4 (SCC) ("SFL, SCC"). The majority of the Court, adopting the language of the trial judge, Kleisinger J. at para 24 (SCC) stated that, without the right to strike, "a constitutionalized right to bargain is meaningless." SFL, SCC, began as a *Charter* challenge to the *Public Service Essential Services Act* of Saskatchewan which imposed essential services on public sector employees. Ball J. of the Saskatchewan Court of Queen's Bench (2012 SKQB 62) referred to, and relied on the expert opinion of Professor Michael Lynk who provided a summary of international jurisprudence of the "Committee of Freedom of Association" and the Governing Body of the International Labour Organization.

[53] Ball J. also referred to the expert opinion on international law of Professor Patrick Macklem proffered by a union intervenor.

[54] Abella J., writing for the majority in SFL, SCC referred to the expert report of Professor Macklem, as well as the jurisprudence, in stating that "…Canada's international obligations clearly argue for the recognition of a right to strike within s.2(*d*). Canada is a party to two instruments which explicitly protect the right to strike (para.65)

[55] Canadian courts have also frequently relied on international law sources to assist in determining the cope and content of *Charter* rights. In that regard, Dickson C.J. as he then was, in dissent, in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*") stated at p. 348:

> International law provides a fertile source of insight into the nature and scope of the freedom of association of workers. Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law--declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms--must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.
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> …

> The content of Canada's international human rights obligations is, in my view, are an important indicia of the meaning of "the full benefit of the *Charter's* protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.
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> …
>
> In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.
>
> [Emphasis added]

[56] In *Manitoba Federation of Labour et al v. The Government of Manitoba,* 2020 MBQB 92 ("*Manitoba Federation*"), McKelvey J. was tasked with determining whether *The Public Services Sustainability Act*, S.M. 2017, c. 24 ("PPSA") violated the Plaintiff's right to freedom of association under s. 2(*d*) of the *Charter*, and if so, whether such an infringement was justified under s. 1. The action was commenced by the Manitoba Federation of Labour "(MFL") and 28 Plaintiff unions.

[57] McKelvey J. noted at para. 28 that the *PPSA* was fiscal restraint legislation, similar in content to the Nova Scotia *Public Services Sustainability (2015) Act*, S.N.S. 2015, c. 34 (formerly Bill 148).

[58] Dr. Robert Hebdon gave trial evidence in *Manitoba Federation* with respect to two reports he prepared for the plaintiffs. From the decision of McKelvey J. there

appears to have been no objection to Dr. Hebdon's qualifications as an expert witness or to the content of his reports.

[59] In *Manitoba Federation*, the Government retained Dr. Richard Chaykowski of Queen's University to prepare an expert report titled "The Role of the *PPSA* in Relation to the Process and Outcome of Collective Bargaining in the Manitoba Public Section", dated October 11, 2019.

[60] There appears to have been no dispute as to Dr. Chaykowski's ability to give expert evidence or to the content of his report.

[61] McKelvey J. accepted Dr. Hebdon's evidence that "most strikes (77 percent) relate to wage issues" and that while a right to strike is maintained under the *PPSA*, "such a right is futile". (para. 322)

[62] McKelvey J. accepted the evidence of Dr. Hebdon over that of Dr. Chaykowski when their evidence significantly differed. (para. 326)

[63] McKelvey J. noted that Dr. Hebdon's evidence "was of particular importance in evaluating the constitutionality of the *PPSA*". (para. 328)

[64] McKelvey J. accepted Dr. Hebdon's evidence that "with monetary issues already predetermined meaningful bargaining is unworkable and almost impossible". (para. 333)

[65] Professor Patrick Macklem also filed an expert report in *Manitoba Federation* which documented what he considered to be violations by the Manitoba Government based upon the right to bargain collectively under international law. Professor Macklem's qualifications to provide expert opinion evidence to the court, and to the contents of his report, appear not to have been challenged by the Manitoba Government.

[66] In *OPSEU v. Ontario (Minister of Education)* 2016 ONSC 2197 (Ont. S.C.J.) Lederer J. determined that the "*Putting Students First Act"* violated s.2(*d*) of the *Charter*.

> The Ontario government in *OPSEU* enacted legislation governing unionized education workers, governed by a collective agreement that was soon to expire. During bargaining, the government was seeking cost saving measures related to salary, retirement, sick leave and pension contributions. A consensus on a new agreement was not reached. The government then passed legislation to govern the resolution of the unresolved contract issues.

[67] Lederer J. found that the government's actions substantially interfered with the meaningful process of collective bargaining, breached s.2(*d*) of the *Charter* and that the breach was not justified under s.1.

[68] The government produced and relied upon the affidavit of David Dodge, a former governor of the Bank of Canada, former federal Deputy Minister of Finance and Professor of Economics. His expertise and the contents of his affidavit were not challenged.

[69] Lederer J. also refers in his decision to the expert opinion of Professor Sara Slinn who opined, *inter alia*, that the impugned legislation effectively eliminated parties' access to…strikes, lockouts and post-freeze unilateral change of terms and conditions as bargaining mechanisms. Professor Slinn opined that the removal of these "essential bargaining mechanisms from the bargaining process seriously undermines meaningful and effective collective bargaining on all issues". (para 187).

[70] Firestone J. in *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*, 2016 ONSC 418 (Ont. S.C.J.) found that the *Restoring Mail Delivery for Canadians Act*, S.C. 2011, c.17 ("Bill c-6) unjustifiably violated ss.2(*d*) and (*b*) of the *Charter* and struck it down in its entirety.

[71] In so finding Federer J. referred to the expert opinion of the applicant's expert, Professor Robert Hebdon, then Chair of the Faculty Program in Industrial Relations at McGill University. (para.20)

[72] Federer J. also referred to the expert evidence of Professor Patrick Macklem whose evidence detailed Canada's obligations under international law.

[73] Finally, reference is made to the decision of the Supreme Court of Canada in *Canada (Attorney General v. Bedford*, 2013 SCC 72 (SCC) at paragraph 126, where McLachlin C.J., described the use of social science and expert evidence in the s.1 analysis as follows:

> Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.
>
> [Emphasis added]

[74] The AGNS says, in essence, that on the facts before the Court, social fact evidence is neither necessary or relevant.

Issue 2: Should Professor Hebdon's Expert Report be Excluded?

Step 1: Does Dr. Hebdon's Report meet the threshold requirements of admissibility?

A. Is the Evidence Logically Relevant?

[75] The *White Burgess* framework has been reviewed earlier in this decision. Neither its components nor its application is in dispute. However, the effect of its application is disputed.

[76] The AGNS argues that the reports of Dr. Hebdon and Professor Macklem do not meet the *White Burgess* threshold requirements of relevance and necessity. The AGNS also argues that the opinions do not meet the second step of *White Burgess* upon an assessment of the costs and benefits of the proffered evidence.

[77] NSTU filed the expert report of Dr. Hebdon to opine on:

> …free, fair, meaningful and good faith collective bargaining; the impact of government action and legislation, including the imposition of a collective agreement and removal of the right to strike, on collective bargaining; the impact of Respondent's actions and Bill 75 on collective bargaining; and the significance of the lack in Bill 75 of any alternative method to resolve the matters in dispute.

[78] NSTU also filed the report of Professor Macklem to opine on:

> …the significance of international and regional labour law and human rights law on the interpretation of s.2(d) of the *Charter*, the scope and content of the right to bargain collectively and the right to strike in international law, and whether Bill 75 violates freedom of association guaranteed by international and regional labour law and human rights law.

[79] Professor Macklem and Dr. Hebdon were cross-examined out of court on their affidavits and the transcripts of those examinations were attached to the affidavit of Ms. Fiona Mirtle, a paralegal with the legal services department of the Nova Scotia Department of Justice.

[80] The NSTU and the AGNS agree that relevance at the threshold stage is logical, rather than legal relevance (*White Burgess* at para.23). Evidence is logically relevant if the evidence has "a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely that it would without that evidence (*R. v. Abbey*, 2009 ONCA 624, para.82).

[81] This is a low threshold that "reflects the inclusionary bias of [the Court's] evidentiary rules." (*R. v. Abbey* at para. 82).

[82] Although the AGNS focused both its written and oral submissions primarily on the necessity (lack thereof) of Dr. Hebdon's evidence, it also argues that several sections of Dr. Hebdon's report lack logical relevance.

[83] In his report, Dr. Hebdon was asked a series of questions by the NSTU:

1. Provide a general description of the process of collective bargaining, including how parties typically deal with wages and other significant monetary issues.
2. Generally speaking, what impact, if any, does the threat to impose or budgetary restraint by legislation have on:

i. The process of meaningful and good faith bargaining,

ii. Equality in the bargaining process between the union and the employer,

iii. The level of trust or faith that union members have in their union or collective bargaining process,

iv. Future rounds of collective bargaining?

3. Generally speaking, what impact, if any, does the threat of legislative concessions on matters of importance to union members (for example, a threat to remove certain members of the bargaining unit by legislation) have on:

i. The process of meaningful and good faith bargaining,

ii. Equality in the bargaining process between the union and the employer,

iii. The level of trust or faith that union members have in their union or the collective bargaining process,

iv. Future rounds of collective bargaining?

4. Based on the information provided to you, and in light of your opinion on the questions above, please provide your assessment of *The Public Services Sustainability (2015) Act* (Bill 148), which was passed on December 14, 2015 (but not proclaimed into force until August 22, 2017), and in particular the wage restraint and service award/retirement allowance provisions. Please include in your answer, if relevant, a discussion of the following:

i. The process of meaningful and good faith bargaining,

ii. Equality in the bargaining process between the union and the employer,

iii. The level of trust or faith that union members have in their union or the collective bargaining process, and

iv. Future rounds of collective bargaining.

5. What impact, if any, does legislation imposing a collective agreement, ending the right to strike, and failing to provide for a neutral dispute-resolution process (such as interest arbitration) for settling the bargaining dispute have on:

i. The process of meaningful and good faith bargaining,

ii. The level of trust or faith that union members have in their union or the collective bargaining process,

iii. Equality in the bargaining process between the union and the employer,

iv. Future rounds of collective bargaining?

6. Based on the information provided to you, and in light of your opinion on the questions above, please provide your assessment of the following features of the *Teachers' professional Agreement and Classroom Improvements (2017) Act* (Bill 75):

i. The imposition of a collective agreement,

ii. The ending of the right to strike,

iii. The lack of a neutral dispute-resolution process to settle the bargaining dispute (such as interest arbitration),

iv. The imposition of less favourable terms than the third tentative agreement.

7. Please include in your answer, if relevant, a discussion of the following:

i. The process of meaningful and good faith bargaining,

ii. The level of trust or faith that union members have in their union or the collective bargaining process,

iii. Equality in the bargaining process between the union and the employer, and

iv. Future rounds of collective bargaining.

[84] Part I of Dr. Hebdon's report is titled, "*Bill 75 Context*". While the Employer argues the Dr. Hebon's report does not meet the *White Burgess* threshold admissibility requirements, it does not take particular issue with the contents of Part I, as it does with the contents of Parts III and IV. This Court views Part I as a kind

of "executive summary" of the rest of Dr. Hebdon's report, so that if other Parts fail the threshold admissibility test, then so will Part I.

[85] Part II of Dr. Hebdon's report is titled "*Introduction to Collective Bargaining*." Dr. Hebdon notes that the information in Part II is drawn from the academic literature on the subject as well as his experience both as a practitioner and a neutral in the field of industrial relations.

[86] In Part II of his report, Dr. Hebdon answers the first question posed to him by the NSTU which was to provide a general description of the process of collective bargaining, including how parties typically deal with wages and other significant monetary issues.

[87] In this Part II, Dr. Hebdon discusses, *inter alia*, the importance of collective bargaining, how the restriction of collective bargaining is likely to lead to disillusionment and frustration of union members and their leaders, the difference between collective bargaining and bargaining between individuals and that collective bargaining works when labour and management can strike or lockout. Dr. Hebdon also discusses the evolution of public sector bargaining in Canada and the various distinct steps or stages involved in collective bargaining. Dr. Hebdon

concludes Part II by describing collective bargaining as an exercise of both union power and democracy.

[88] The AGNS says that the first question posed by the NSTU, i.e. to "provide a general description of the process of collective bargaining, including how parties typically deal with wages and other significant monetary issues, is problematic because what occurs typically in collective bargaining is not relevant. What is relevant, says the AGNS, is what actually occurred between these parties, and whether, as alleged by the NSTU, the government's actions violated the *Charter*. The AGNS says that this view is reinforced by Dr. Hebdon himself, who acknowledged during his out of Court cross-examination that one cannot say that what "typically" happens in collective bargaining will always occur in a particular manner, as there can always be exceptions.

[89] It is clear that the Application raises, among other matters, facts in issue concerning the effects of the legislation, the importance of wages and service awards to the NSTU and its members, the impact of the threat of legislation on the process of meaningful and good faith bargaining, on bargaining power and balance between the government and the NSTU negotiations, and the alleged deleterious effects of the legislation under s.1.

[90] This Court finds that the information in Dr. Hebdon's report which address questions posed to him in this regard is logically relevant to the facts in issue. His evidence does have a tendency, as a matter of human experience and logic, to make the existence of these facts in issue more likely that it would be without the evidence.

[91] As noted previously in this decision, the Supreme Court of Canada has stated that legislative facts must be proved by admissible evidence and that admissibility is subject to "less stringent requirements". (*Danson v. Ontario* at para. 28).

[92] Part III of Dr. Hebdon's report is titled, ("*Legislative Intervention in Collective Bargaining*"). This Part III appears to answer Union questions 2 and 3 dealing with the impact, if any, the threat of budgetary restraint by legislation has on the process of meaningful and good faith bargaining. However, Dr. Hebdon deals directly with questions 2 and 3 in Part IV of his report. The Employer says that the contents of Part III appear to have been provided gratuitously and are not relevant to any of the questions posed. In that regard, the Employer says that Dr. Hebdon's report provides opinion evidence beyond the questions posed by the Union.

[93] This Court finds that Part III generally provides background information for the opinions which Dr. Hebdon expresses in Part IV. Part IV clearly provides responses to the Union's questions.

[94] The Employer also says that the first two paragraphs in Part III are speculative in nature, and therefore cannot be applied to prove a material fact in issue. In that regard, the Employer points to Dr. Hebdon's statement in the first paragraph, that "An imposed settlement by a third party or government may lack the ownership of the parties causing a lack of clarity in implementation, producing frustration and grievances". The Employer notes that in his cross examination out of Court, Dr. Hebdon acknowledged that an imposed settlement may, or may not, lack the ownership of the parties.

[95] The Employer also says that in the second paragraph of Part III, Dr. Hebdon provides information on imposed settlements and the effect they may have in subsequent rounds of bargaining. The Employer says that there is no allegation that the government breached the *Charter* in subsequent rounds of bargaining so that this information is not relevant.

[96] In response, the NSTU says that Dr. Hebdon's assertions in the first two paragraphs of Part III inform the ultimate opinions he arrives at in Part IV of his report. Further, the NSTU says that the impact of an imposed settlement of future rounds of bargaining relates to material facts at issue in the s. 1 analysis, in particular, the final balancing stage of the *Oakes* test and deleterious effects of the legislation.

[97] In *Manitoba Federation of Labour* (*supra*), the Manitoba Federation of Labour and the other plaintiff unions argued that fiscal restraint legislation violated freedom of association which could not be demonstrably justified under s. 1 of the *Charter*. McKelvey J. agreed with that position. He relied upon the Dr. Hebdon's evidence that the imposition of the legislation would have a long-term effect and a chilling of relationships for future rounds of bargaining. This evidence was relevant to the s. 1 proportionality analysis:

> The legislation has, in accordance with the affidavit evidence and testimony provided by many of the union witnesses, affected the relationships between the unions and its memberships, as well as the unions with the employers. Further, the memberships' negotiating priorities could not be addressed. As Dr. Hebdon has said, this Government's actions will have a long-term effect and, perhaps, create a chilling of relationships for future rounds of bargaining. The evidence has shown that the PPSA has substantially interfered with a meaningful process of collective bargaining for over 110,000 Manitobans. The Government is facilitating popular tax revenue reduction measures on the backs of public sector works. Proportionality does not exist.
>
> [Emphasis added]
>
> (para. 422)

[98] The Employer's arguments with respect to Part IV of Dr. Hebdon's report focus on necessity and will be addressed under the topic.

[99] This Court concludes that the information in Parts II and III of Dr. Hebdon's report are logically relevant to facts in issue. The evidence in Parts II and III is logically relevant to establishing the facts necessary to demonstrate whether there

has been substantial inference under s. 2(d) of the *Charter*. The evidence in Part III is logically relevant to the s. 1 *Charter* analysis

B. Is the Evidence Necessary?

[100] Necessity is a pre-condition for the admissibility of expert evidence. The opinion must be necessary "in the sense that it provide[s] information "which is likely to be outside the experience and knowledge of a judge or jury". The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. "[T]he subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". See *R.* v. *Mohan*, [1994] 2 SCR 9 (SCC) at para 22, citing *Kelliher (Village)* v. *Smith*, [1931] S.C.R. 672 (SCC) at 684.

[101] NSTU argues that Dr. Hebdon's report is necessary because it provides evidence with respect to collective bargaining that falls outside the normal knowledge and understanding of the trier of fact on these issues.

[102] The Employer says that the subject matter of the Application "is not particularly complex" and the facts are not "outside the realm of understanding or experience of a reasonable trier of fact".

[103] The Employer's argument flies in the face of the considerable volume of case law, including Supreme Court of Canada decisions, where courts have held that the preferred route for introducing social science and legislative fact evidence is through an expert witness rather than by way of judicial notice. For example, in *Bedford* (*supra*) McLachlin C.J. noted at para. 53, "…this Court has expressed a preference for social science evidence to be presented through an expert witness (*R. v. Malmo-Levine*, 2003 SCC 74 at paras. 26-28 and *R. v. Spence*, 2005 SCC 71 (SCC) at para. 68").

[104] It is clear from a review of his *curriculum vitae* that Dr. Hebdon has specialized knowledge in the area of labour relations beyond that of the ordinary, reasonable trier of fact.

[105] The Employer raises the issue of Dr. Hebdon's role. It says that concerns related to whether an expert has usurped the role of the trier of fact, are properly determined within the analysis of the necessity of an opinion, referring to the decision of the British Columbia Supreme Court in *Murray v. Galuska*, 2002 BCS 1532:

> 14. Inherent in the application of the criterion of necessity is the concern that experts not be permitted to usurp the function of the court. In *R. v. D. (D.)* (2000), [2000] S.C.R. 275 (S.C.C.), Major J. set out the requirements of the tests of necessity at p. 298:

> The second requirement of the Mohan analysis [necessity] exists to ensure that the dangers associated with expert evidence are not lightly tolerated. Mere relevance or "helpfulness" is not enough. The evidence must also be necessary. (emphasis in original)

> 15. The exclusionary rules which have been found to apply to an expert's report are as follows:
>
> (a) An expert is not permitted to make findings of fact or rulings of law, rather that is the role of the trial judge.
>
> (b) The expert cannot make findings of law as that is also within the role of the trial judge.
>
> (c) Experts should not make arguments in the guise of opinions. *Sengbush v. Priest* (1987) 14 B.C.L.R. (2d) 26 (B.C.S.C.); *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1988), 29 B.C.L.R. (2d) 127 (B.C.S.C.).

[106] The Employer argues that in his report, the NSTU has asked Dr. Hebdon to appropriate the role of decision-maker and to opine on matters that touch on the ultimate issues in the Application. It argues that "Dr. Hebdon's report is little more than argument, dressed up as an expert's opinion". The Employer says that the result is that the NSTU has proffered an expert report that simply echoes its allegations to bolster its claims of bad-faith bargaining. That, it says, is a determination to be made by the trier of fact, and Dr. Hebdon's report ought to be excluded on that basis alone.

[107] The Employer says that Part IV of the report is the most problematic in this regard. It says that the NSTU has asked Dr. Hebdon in this Part to effectively assume the role of trier of fact and to opine on the very issues that the court must decide.

[108] In Part IV of his report, Dr. Hebdon responds to the Union's questions 2 through 6. The Employer argues that Dr. Hebdon's responses are essentially identical to the allegations set out in the Union's Grounds for the Order.

[109] The NSTU disagrees, saying that Dr. Hebdon's responses to questions 2 to 6 do not provide legal conclusions, but rather are evidence of social facts related to the allegations set out in the Grounds for the Order.

[110] In *Grabher, supra,* Justice Muise referred to an expert's findings that an expression on a license plate was offensive and caused harm was in fact evidence of social facts rather than legal conclusions (paras. 69-71).

[111] In terms of the "ultimate issue" rule, as noted by the Alberta Court of Appeal in *Dalla Lana v. University of Alberta*, 2013 CarswellAlta 1793 the "ultimate issue" rule, is no longer a complete bar to the acceptance of evidence approaching the very issue that the court must decide:

> 53 The ultimate issue rule referred to by the Board was a common law rule that experts could not provide an opinion on the ultimate issue in a case, thereby usurping the trier of fact's role. There is no longer a firm general exclusion for expert opinion evidence on the ultimate issue: *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) at para 25, (1994), 114 D.L.R. (4th) 419 (S.C.C.). The test for admitting expert evidence as to the ultimate issue is now more nuanced: *R. v. Juneja*, 2010 ABCA 262, 490 A.R. 127 (Alta. C.A.) at para 12. Whether expert evidence goes to the ultimate issue remains a relevant consideration within the context of assessing the necessity of proposed expert evidence: *Mohan* at para 25.
>
> [Emphasis added]

[112] The Employer argues that Dr. Hebdon provides opinion evidence on the very allegations the NSTU sets forth on its Notice of Application and that this evidence is led to bolster NSTU's claims.

[113] It strikes this Court, however, that as a matter of advocacy, that is why both adjudicative and legislative fact evidence is called by a party advancing claims of a *Charter* breach.

[114] The ultimate issue in the application is whether Bill 75, in purpose and effect, breached teachers' rights under s. 2(d) of the *Charter* to collectively bargain and strike, and if so, whether Bill 75 is saved under s. 1. There is a distinction between expert evidence properly offered to enhance the trier of fact's knowledge, including by way of social fact evidence, and an expert opinion which directly opines on whether the *Charter* has been breached. This may appear to be a distinction without difference, but as is stated by the learned authors in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th 3d at 12.182 and 12:184:

> 12.182 The caselaw illustrates that there are certain subjects matters which go to the very heart of judicial decision-making and courts remain wary of expert witnesses providing advice as to how they should decide issues such as whether a witness is telling the truth or the meaning of English words. Perhaps it is just a matter of sensitivity over the way in which the expert gives his or her evidence. For example, a court would be loath to receive explicit evidence from an expert that an accused is guilty or innocent or that a defendant was negligent or not, or that an individual was insane or not. However, it will readily receive evidence which is not so direct but which, if accepted, inescapably leads to that conclusion…

> …
>
> 12.184 In the final analysis, the closer the expert's testimony approaches an opinion on the ultimate issue, the stricter the courts will apply the requirement of reliability and necessity before admitting such evidence (citing *Mohan*). This is so because the evidence then begins to overlap not only the fact-finding function of the court but the legal analysis that must be applied to the facts in rendering the ultimate decision.

[115] Dr. Hebdon does not undertake a section 2(d) or section 1 *Charter* analysis. Nor does he articulate the legal tests applicable to such *Charter* analyses.

[116] This Court finds that Dr. Hebdon's report, including Parts IV and I are necessary. Dr. Hebdon's report does not, as alleged by the Employer, wrongfully stray into the area of opining on the ultimate issue before the Court on the Application. Rather, Dr. Hebdon provides expert evidence on social facts which, along with the adjudicative fact evidence, will assist this Court in determining whether Bill 75 breached the *Charter*.

[117] Nor does Dr. Hebdon's report usurp the role of the trier of fact when he uses the term "interference". The Employer takes issue with Dr. Hebdon's reference to, "government interference in the collective bargaining process", saying that this is "a small step" from the legal test under s. 2(d) as to whether the government has engaged in "substantial interference" with collective bargaining.

[118] This Court finds that Dr. Hebdon's use of the word "interference" does not usurp the Court's role in making the legal determination as to whether there was "substantial interference". I find that Dr. Hebdon's use of the word "interference" is of the same ilk as the expert historian's use of the word "discrimination" in *TWU* (*supra*). Campbell, J. held that the historian's use of the word "discrimination" was not a legal conclusion when used in the sense it was used in the historian's report.

[119] Similarly, I do not find that Dr. Hebdon's report is argument in the guise of expert opinion. Given his qualifications and practical experience, of course Dr. Hebdon's understands that concept of "good faith and meaningful bargaining". Referring to that concept in his report does not transform his reference to social science facts into the application of facts to a legal standard. Dr. Hebdon does not apply the facts known to him in the within matter to the legal standard for good faith in collective bargaining; nor does Dr. Hebdon's evidence draw legal conclusions.

[120] I find that there is no exclusionary rule under the *White Burgess* framework which applies to Dr. Hebdon's evidence.

[121] Finally, Dr. Hebdon is qualified to give opinion evidence on issues related to public sector collective bargaining and labour relations. Nor does the Employer directly attack Dr. Hebdon's qualifications.

[122] Dr. Hebdon states in his Affidavit which appends his report that he will "provide an objective, fair and non-partisan opinion for the assistance of the court" and that this duty "prevails over any obligation which [he] may owe to any party by whom or on behalf of whom [he is] engaged".

[123] This Court finds that all of the requirements of threshold admissibility as per the *White Burgess* framework have been met.

[124] The Step 2 gatekeeping step will now be addressed.

Step 2: Is Dr. Hebdon's Report Admissible at the Gatekeeping Stage?

[125] The Court at this stage must assess whether the benefits of admitting Dr. Hebdon's report outweigh the risks of relying upon his evidence.

[126] The Employer argues that Dr. Hebdon "has taken on the role of an advocate in this matter" and says that it "has concerns related to impartiality", referring to "Dr. Hebdon's history of work for public sector unions" and the nature of his opinion evidence. The Employer submits that, "There are clear indications that he has 'assumed the role of an advocate for a party."

[127] As noted previously in this decision, Dr. Hebdon has stated in his Affidavit that he understands his duty to the Court to provide non-partisan evidence for the

assistance of the Court. There is no evidentiary basis for the Employer's assertion that Dr. Hebdon is biased in favour of the NSTU or for the Employer's assertion that there is a realistic concern that Dr. Hebdon's evidence should not be received because he is unable and/or unwilling to comply with the duty he owes to the Court.

[128] In terms of the costs associated with Dr. Hebdon's evidence, the Employer had the opportunity to test his opinions in cross-examination. It could have, but did not, file its own expert evidence in response to that of Dr. Hebdon's.

[129] This Court finds that the benefits of the admission of Dr. Hebdon's evidence outweigh any costs associated with it.

Conclusion on Admissibility of Dr. Hebdon's Report

[130] In conclusion, this Court finds that Dr. Hebdon's report is admissible in its entirety.

Issue 3: Should Professor Macklem's Report be Excluded?

Step 1: <u>Does Professor Macklem's Report meet the threshold requirements of admissibility?</u>

A. <u>Is the Evidence Logically Relevant?</u>

[131] The Employer argues that "any violations at international law are not relevant to, nor affect, the extent of the government's obligations under the *Charter*".

[132] As noted earlier in this decision, Professor Macklem gave expert opinion evidence in *Manitoba Federation of Labour* (2020). In his report, Professor Macklem documented what he considered to be violations by the Manitoba Government based upon the right to bargain collectively under international law.

[133] McKelvey J in *Manitoba Federation of Labour* held that obligations under international law are not determinative of a breach of the *Charter*, and a breach of international law does not necessarily result in a violation of the *Charter*. The "role of international law is important as an interpretive tool" (para 339).

[134] The Employer says that one concern with the conclusions drawn by Professor Macklem is that he does not articulate the standard upon which government's actions and legislation were judged at international law. The Employer refers to that part of his report where Professor Macklem references the International Labour Organization and its adoption of the Freedom of Association and Protection of the Right to Organize Convention, which, includes the right to bargain collective at Article three. The Employer notes that on cross examination, Professor Macklem acknowledged that Article three, which prohibits public authorities from "any

interference" that could restrict the rights set out in that section, sets a lower standard than the test of "substantial interference" as developed in the *Charter* jurisprudence.

[135] The Employer says that this example serves to illustrate that a breach of a party's international law obligations is irrelevant in determining whether it breached its *Charter* obligations.

[136] This Court finds that international law is not irrelevant to an alleged *Charter* breach just because a breach of international law is not determinative of a *Charter* breach.

[137] I find that the jurisprudence establishes that international law may be properly used as an interpretative aid in *Charter* litigation.

[138] As such, Dr. Macklem's report is logically relevant to the s.2(d) analysis.

B. Is Professor Macklem's Report Necessary?

[139] This Court finds that courts have regularly admitted and relied upon expert opinion evidence on international law in s. 2(d) right to strike and collective bargaining cases.

[140] For example, the Supreme Court of Canada in *SFL v. Saskatchewan*, (*supra*) explicitly endorsed the use of expert evidence on international law in s. 2(d) right to

strike and collective bargaining cases. Indeed, in *SFL, SCC*, Abella J., writing for the majority referred with approval to the opinion of Professor Macklem:

> 64 LeBel J. confirmed in *R. v. Hape*, [2007] 2 S.C.R. 292 (S.C.C.), that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157 (S.C.C.), at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".
>
> 65 Given this presumption, Canada's international obligations clearly argue for the recognition of a right to strike within s. 2(*d*). Canada is a party to two instruments which explicitly protect the right to strike. Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 to which Canada acceded in May 1976, provides that the "States Parties to the present Covenant undertake to ensure... (*d*) *the right to strike, provided that it is exercised in conformity with the laws of the particular country*". (See also affidavit of Prof. Patrick Macklem (Expert Report), sworn December 21, 2010). In Dickson C.J.'s view, the qualification that the right had to be exercised in conformity with domestic law appeared to allow for the regulation of the right, but not its legislative abrogation (*Alberta Reference*, at p. 351, citing *A.U.P.E. v. R.* (1980), 120 D.L.R. (3d) 590 (Alta. Q.B.), at p. 597; see also Hepple, at p. 138).
>
> 66 In addition, in 1990, just over two years after the *Alberta Reference* was decided, Canada signed and ratified the *Charter of the Organization of American States*, Can. T.S. 1990 No. 23. Article 45(c) states:
>
> > employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, *including the right to collective bargaining and the workers' right to strike*, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;
>
> 67 Besides these explicit commitments, other sources tend to confirm the protection of the right to strike recognized in international law. Canada is a party to the International Labour Organization (ILO) *Convention (No. 87) concerning freedom of association and protection of the right to organize*, ratified in 1972.

> Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention: see Pierre Verge and Dominic Roux, "L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien: deux solitudes?", in Pierre Verge, ed., *Droit international du travail: Perspectives canadiennes* (2010), 437, at p. 460; Janice R. Bellace, "The ILO and the right to strike" (2014), 153 *Int'l Lab. Rev.* 29, at p. 30. Striking, according to the Committee of Experts, is "one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests": *Freedom of Association and Collective Bargaining* (1994), at para. 147; Jean-Michel Servais, "ILO Law and the Right To Strike," (2009-2010), 15 *C.L.E.L.J.* 147, at p. 150.
>
> [Emphasis added]

[141] The Employer responds that when a court does consider international law as a relevant interpretive aid, the court may take judicial notice of international law because it is a matter of law, not fact, and therefore expert evidence is not necessary.

[142] The Employer refers to the text, “Using International Law in Canadian Court (The Hague: Kluwer Law International, 2002) by Givran Van Ert for the proposition that international law may be judicially noticed, and therefore need not be proved by way of evidence (p. 34). In response to this argument, the NSTU notes that the Employer cites the 2002 edition of “Using of International Law in Canadian Courts”, but of significance, in the 2008 edition of Van Ert’s publication, Van Ert tempers his comments made in 2002 by stating that “judicial notice is also taken of international law, though the general rule and its application in particular cases are not without some uncertainty”.

[143] The Employer also refers to the decision of the Supreme Court of Canada in *Nevsun Resources Ltd. v. Araya,* 2020 SCC 5 where Abella J writing the majority judgement stated:

> 96. In other words, "Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact" (Gib van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, Canada in International Law at 150 and Beyond, Pater No. 2 (2018), at p. 6; see also van Ert, Using International Law in Canadian Courts, at pp. 62-69).
>
> 97. Unlike foreign law in conflict of laws jurisprudence, therefore, which is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed (van Ert, "The Reception of International Law", at p. 6; van Ert, Using International Law in Canadian Courts, pp. 62-69). Professor Higgins explains this as follows: "There is not a legal system in the world where international law is treated as 'foreign law'. It is everywhere part of the law of the land; as much as contracts, labour law or administrative law" (p. 1268; see also James Crawford, Brownlie's Principles of Public International Law (9th ed. 2019),t p. 52; Robert Jennings and Arthur Watts, Oppenheim's International Law (9th ed. 2008), vol. 1, at p. 57; van Ert, Using International Law in Canadian Courts, at p. 64).

[144] The NSTU argues that *Nevsun* is distinguishable from the present Application because *Nevsun* involved the application of customary international law. Abella J explained that customary international law is part of the law of Canada (para 90). Because of that, customary international law must be treated as any other Canadian law, i.e., it is subject to judicial notice and therefore does not require proof by evidence (paras 95 and 97).

[145] The basis for taking notice of customary law as confirmed by the Supreme Court in *Nevsun* is not transferable to international conventions and treaties because those treaties and conventions are not part of Canada's customary laws.

[146] In *International Air Transport Association v. Canada (Transportation Agency)*, 2020 FCA 172 ("International Air") the Federal Court of Appeal noted that the law in Canada remains unsettled when it comes to the need for expert evidence on international law (para. 14).

[147] This Court determines that because the Application raises a breach of section 2(d) of the *Charter*, the cases I should consider and follow most closing on the question of whether expert opinion on international law is necessary are the leading Canadian cases on the right to bargain collectively and the right to strike under s. 2(d) of the *Charter*. That includes the decision of the Supreme Court of Canada in *Saskatchewan Federation of Labour*.

[148] Professor Macklem's evidence does not, as alleged by the Employer, wade into the ultimate issue. His conclusions about breaches by the Employer of international law are not determinative of whether this Court finds that the Employer breached s.2(d) of the *Charter*.

[149] There are no exclusionary rules that apply to Professor Macklem's evidence. Professor Macklem is clearly qualified to give opinion evidence on the right to collective bargaining and the right to strike at international law.

[150] This Court finds that Professor Maklem's evidence meets the threshold requirements of admissibility.

[151] The Court now addresses whether the benefits of admitting Professor Macklem's evidence are outweighed by the costs.

Step 2: Professor Macklem's Report at the Gatekeeping Stage

[152] This Court has found that Professor Macklem's report is necessary and relevant. This Court can benefit from Professor Macklem's expert evidence on the developments in international law that relate to collective bargaining and the right to strike.

[153] The Employer has had the opportunity to cross examine Professor Macklem and could have led its own expert evidence in response, had it chosen to do so.

Conclusion on Admissibility of Professor Macklem's Report

[154] I find that the benefits of admitting Professor Macklem's evidence outweigh any costs associated with its admissibility.

Conclusions

[155] The report of Dr. Hebdon is admitted in its entirety.

[156] The report of Professor Macklem is admitted in its entirety.

[157] The NSTU was entirely successful on this motion and is entitled to its costs. If the parties cannot agree on costs, this Court will receive costs submissions within 30 calendar days of this decision.

Smith, J.