

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Cr 20-00638156-0000

BETWEEN:

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION and
WARREN ("SMOKEY") THOMAS, EDUARDO ALMEIDA, SANDRA CADEAU,
DONNA MOSIER, ERIN CATE SMITH RICE, and HEIDI STEFFEN-PETRIE**

Applicants

and



**THE CROWN IN RIGHT OF ONTARIO as represented by
the ATTORNEY GENERAL OF ONTARIO and
THE PRESIDENT OF THE TREASURY BOARD**

Respondent

**APPLICATION UNDER Rule 14.05(3) of the Ontario *Rules of Civil Procedure*,
and the *Canadian Charter of Rights and Freedoms*, ss. 1, 2(b), 2(d), 15, 24(1),
and 28,**

Constitution Act, 1982, s. 52 and Constitution Act, 1867, preamble

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following page.


THIS APPLICATION will come on for a hearing on a date and time to be fixed by the Registrar, at 393 University Avenue, Toronto, Ontario M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: March 16, 2020

Issued by: 

Local Registrar


393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

SUPERIOR COURT
OF JUSTICE
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TORONTO, ONTARIO
M5G 1R7

COUR SUPÉRIEURE
DE JUSTICE
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TO: THE ATTORNEY GENERAL OF ONTARIO

Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario
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AND TO: TREASURY BOARD PRESIDENT

99 Wellesley St. W., Room 4320
Toronto, Ontario
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APPLICATION

1. The Applicants, Ontario Public Service Employees Union (hereinafter "OPSEU"), Warren ("Smokey") Thomas, Eduardo ("Eddy") Almeida, Sandra Cadeau, Donna Mosier, Erin Cate Smith Rice and Heidi Steffen-Petrie, make application for:
 1. A declaration that sections 5, 9, 10, 11, 12, 16, 24 and 26 of the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, S.O. 2019, C. 12 ("Bill 124" or the "Act") violate section 2(d) of the *Canadian Charter of Rights and Freedoms* ("Charter") and that this violation cannot be saved under section 1 of the *Charter*;
 2. A declaration that the *Act* violates section 2(b) of the *Charter* and that this violation cannot be saved under section 1 of the *Charter*;
 3. A declaration that the *Act* violates section 15 and section 28 of the *Charter* and that this violation cannot be saved under section 1 of the *Charter*;
 4. A declaration that the provisions of the *Act* are unconstitutional and thus of no force and effect pursuant to section 52 of the *Constitution Act, 1982*;
 5. A declaration that any terms of any collective agreement or any term or condition of employment imposed by, or as a result of, the *Act* on the Applicants and on OPSEU members are null and void and of no force or effect;
 6. An order for recovery of monies pursuant to section 24 of the *Charter* for any OPSEU member who has lost compensation or foregone compensation as a result of the *Act* with interest;
 7. An order for damages pursuant to section 24 of the *Charter* flowing from the breach and denial of the Applicants' and OPSEU members' *Charter* rights;

8. OPSEU's costs of this Application on a substantial indemnity basis; and
9. Such further and other relief as counsel may advise and this Honourable Court deems fit to grant, including but not limited to further and other relief under section 24 of the *Charter* and section 52 of the *Constitution Act*.

The grounds for the Application are:

A. Applicants

2. The Applicant OPSEU is a trade union within the meaning of the *Ontario Labour Relations Act, 1995*, SO 1995, c. 1, Sched. A ("*LRA*").
3. OPSEU represents some 165,000 active employees who currently work in a wide range of occupations across the province of Ontario. OPSEU members work in the Ontario Public Service ("*OPS*"); in community colleges; for the Liquor Control Board of Ontario; in the health care sector including hospitals, long-term care homes and other health care facilities; social service and developmental services agencies; the publicly funded school system; ambulance services; and municipalities; among other workplaces.
4. The Applicant Warren ("*Smokey*") Thomas has been employed at Providence Care Hospital (formerly the Ontario Psychiatric Hospital) in Kingston, Ontario since 1970. He has been a Registered Practical Nurse (formerly Registered Nursing Assistant) at Providence Care Hospital since 1975.
5. Mr. Thomas has also served as the President of OPSEU since 2007 and has been a member of OPSEU's Executive Board on a continuous basis since 1993.
6. As a Registered Practice Nurse employed by Providence Care Centre, Mr. Thomas is directly affected by the *Act*.

7. The Applicant Eduardo "Eddy" Almeida has been employed as a Correctional Officer by the Ministry of the Solicitor General (formerly the Ministry of Community Safety and Correctional Services) at the Hamilton-Wentworth Detention Centre in Hamilton, Ontario since 1992.
8. Mr. Almeida is also the 1st Vice-President/Treasurer of OPSEU and has served as a member of OPSEU's Executive Board on a continuous basis since 2005.
9. As a Correctional Officer employed by the Ministry of the Solicitor General, Mr. Almeida is directly affected by the *Act*.
10. The Applicant Sandra Cadeau has been employed as an Educational Assistant by the Simcoe County District School Board for 22 years. In her role, she provides support to students to achieve success in academic, behavior, social, and life skills. She currently earns \$25.42 per hour.
11. Ms. Cadeau was elected the Local Vice-President of OPSEU Local 330, representing nearly 2000 OPSEU members employed by the Simcoe County District School Board. She has also been on the bargaining team for OPSEU Local 330 since 2015 and is currently a member of the bargaining team for the Ontario Council of Education Workers. Ms. Cadeau serves as the Chair of OPSEU's Boards of Education Sector.
12. As an Educational Assistant employed by the Simcoe County District School Board, Ms. Cadeau is directly affected by the *Act*.
13. The Applicant Donna Mosier has been employed as a full time Registered Practical Nurse by Sherwood Park Manor, a non-profit long-term care home located in Brockville, Ontario, for approximately 7 years. In her role, Ms. Mosier provides support and health care to residents with cognitive, physical, and mental health disabilities. She currently earns \$26.00 per hour.

14. Ms. Mosier's husband was rendered disabled due to a workplace accident in 2000. Ms. Mosier is the only person in their family who is working. Ms. Mosier is her husband's primary caregiver and is responsible for all household duties and chores given her husband's condition.
15. Ms. Mosier has been a steward with her local since 2019.
16. As a Registered Practical Nurse employed by Sherwood Park Manor, Ms. Mosier is directly affected by the *Act*.
17. The Applicant Erin Cate Smith Rice has been employed for 21 years as a full time Support Worker by Community Living Thunder Bay, a non-profit agency that provides housing, supervision, care and support for individuals with developmental disabilities. In her role, Ms. Smith Rice provides support to individuals with management of finances, meal preparation, communication skills, domestic skills, personal care and administration of prescribed medications. She currently earns \$23.48 per hour.
18. Ms. Smith Rice lives with her husband, her 18 year old son and her husband's 8 year old granddaughter. Ms. Smith Rice is the only member of her household who is currently working.
19. Ms. Smith Rice's husband was injured at work in a mining accident. He has not been able to work for the past few years due to the physical and mental effects of the accident.
20. Ms. Smith Rice's 18 year old son was diagnosed with a seizure disorder three years ago. He lives with Ms. Smith Rice and her husband. Ms. Smith Rice's son is unable to work due to his disorder and is financially dependent on Ms. Smith Rice.
21. Ms. Smith Rice is also the Local President of OPSEU Local 740, representing OPSEU members employed by Community Living Thunder Bay. In addition,

Ms. Smith Rice has also served in every bargaining team for Local 740 since 2009.

22. As a Support Worker employed by Community Living Thunder Bay, Ms. Smith Rice is directly affected by the *Act*.
23. The Applicant Heidi Steffen-Petrie has been employed as an Administrative Services Representative by the Ministry of Agriculture, Food & Rural Affairs, Economic Development Division, Rural Programs Branch located in Guelph, Ontario. She has worked for the Ontario Public Service since 2003. In her role, Ms. Steffen-Petrie provides administrative support to managers and other staff members. She coordinates program related translations, support for French inquiries from the public and stakeholders, and supports staff with technology. She currently earns \$26.80 per hour.
24. Ms. Steffen-Petrie lives with her spouse and two school aged children. She is the only member of her household who is earning an income.
25. Ms. Steffen-Petrie has been Vice President and a steward with her Local. She is also the Co-Chair for her Joint Health and Safety Committee and a member of the Joint Steering Committee for Pay Equity in her workplace.
26. As an Administrative Services Representative employed by the Ministry of Agriculture, Food & Rural Affairs, Ms. Steffen-Petrie is directly affected by the *Act*.

B. Respondents

27. The Respondent, the Attorney General ("AG") of Ontario is the party to be named when a declaration of constitutional invalidity is sought with respect to Ontario legislation. The Respondent, Treasury Board President exercises powers under the *Act* and as such is properly named as a Respondent.

C. Factual Background

I. Background to the Act

28. On June 5, 2019, the Ontario government introduced Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, in the Ontario legislature.
29. The legislature then adjourned from June 7, 2019 until October 28, 2019, following the end of the federal election.
30. On October 28, 2019, the Legislature continued debate on the *Act*. The President of the Treasury Board justified the *Act's* limit on compensation on the basis of the Province's "dire and somber" fiscal situation, in particular, asserting that the Crown had faced a budget deficit of \$15 billion when it came to office. Two weeks earlier, on October 17, 2019 the Financial Accountability Office had reported that the actual deficit in Ontario for 2018-2019 was \$7.4 billion.
31. On November 7, 2019, the *Act* was amended, passed 3rd reading and received Royal Assent.
32. The *Act's* ostensible purpose is to address the province's "very substantial deficit." To purportedly achieve its stated purpose, the *Act* requires that compensation for affected employees in the public sector and broader sector cannot increase beyond a one percent annual increase for a period of three years.
33. The government did not engage in any meaningful consultation prior to the introduction of Bill 124, or between the introduction of Bill 124 and its final passage. Information provided by the government was insufficient and vague. There was no opportunity for any exchange of ideas or input from OPSEU or

other unions. Any answers received to questions were rote and unresponsive to questions.

II. Application of the Act to OPSEU members

34. Members represented by OPSEU are guaranteed the right to freedom of expression under section 2(b) of the *Charter*, the right to collectively bargain under section 2(d) of the *Charter*; and the right to substantive equality on the basis of gender under sections 15 and 28 of the *Charter*.
35. OPSEU is a party to over 600 collective agreements, the majority of which are captured within the scope of the *Act*. The OPSEU members who are impacted by the *Act* work in the public service and government agencies; universities and community colleges; hospitals and other health care facilities; social service and developmental services agencies; the LCBO; the publicly funded school system; Children's Aid Societies; and many other workplaces.
36. Active OPSEU represented employees who are impacted by the *Act* include:
 1. Approximately 35,000 College of Applied Arts and Technology (CAAT) employees;
 2. Approximately 34,000 employees in the health care sector;
 3. Approximately 34,000 employees in the Ontario Public Service;
 4. Approximately 13,000 employees in community services and developmental services agencies;
 5. Approximately 9,000 employees in the LCBO;
 6. Approximately 5,000 university employees;

7. Approximately 3,500 employees in the education sector who are employed by school boards; and
 8. Approximately 2,500 Children's Aid Society employees.
37. In all, approximately 85% of OPSEU's active membership, or some 140,000 members, are impacted by the *Act*.
38. Much of the work performed by OPSEU members is in female dominated workplaces and the majority of OPSEU members affected by the *Act* identify as female. For example, female members make up approximately 85% of OPSEU's membership in the Community Health Care Professionals sector, 85% of Child Treatment workers, 80% of the Hospital Support sector, 80% of Community Services, 80% of Boards of Education workers, 80% of Developmental Services, 75% of the Mental Health sector, and 60% of the OPS. These workers experience depressed wages in comparison to workers in predominantly male dominated workplaces as a result of the "gender wage gap."
39. While the majority of OPSEU members have the right to strike when collective bargaining has reached an impasse, a significant number of OPSEU members do not have the right to strike. Rather, these workers only have resort to interest arbitration before an arbitration panel which issues a final and binding award with respect to collective bargaining disputes which have reached impasse.
40. OPSEU represents approximately 31,000 health care workers in hospital and other health care facilities who do not have the right to strike and for whom collective bargaining impasses can only be resolved by binding interest arbitration pursuant to the *Hospital Labour Disputes Arbitration Act*, RSO 1990, c. H. 14 ("HLDAA").
41. OPSEU also represents approximately 10,000 correctional workers in the OPS who do not have the right to strike pursuant to the *Crown Employees Collective*

46. Through s. 10 and 11, the *Act* severely restricts and effectively bars OPSEU members from exercising their right to collectively bargain and to lawfully strike on issues related to their compensation and benefits, the most important working conditions of any employee.
47. The imposition of the one percent limit is completely arbitrary and fails to take into account consideration of the multitude of workplace issues and the differences in the tens of thousands of different positions impacted by the *Act*. With no engagement in the collective bargaining process, the Crown has, with a broad brush, set a fixed ceiling on any monetary issues for OPSEU members.
48. The one percent ceiling is below inflation. According to the Consumer Price Index, Ontario saw an average increase of 2.7% in food costs, 3.3% in shelter costs, 4.3% in transportation costs and 7.7% in energy costs from December 2018 to December 2019. On average, the Consumer Price Index shows an overall increase of 2.1% for all items from December 2018 to December 2019 in Ontario.
49. There can be no way of knowing what the inflation rate will be in the future, and it is entirely possible that there will be significant increases in the rate of inflation before the end of the moderation periods imposed under the *Act*, which may be as late as 2026 for some OPSEU members.
50. Thus in addition to flagrantly impeding OPSEU's members' constitutional right to meaningful collective bargaining and their right to strike, the *Act* effectively legislates a wage cut for these workers when the rate of inflation is taken into account.

The Disproportionate Effect of the Act on Vulnerable Workers

51. The impact of the sweeping wage cut has a disproportionately adverse effect on some of OPSEU's most vulnerable employees. A one percent increase has a higher monetary value for employees with higher salaries than for those workers who hold lower wage positions. For lower wage workers, a one percent increase will serve to only exacerbate their economic marginalization and create further challenges respecting recruitment and retention for employers.
52. For example, approximately 3000 OPSEU represented members work in the long-term care sector. Many of these members provide the essential work of delivering direct care to aging, disabled, and vulnerable populations. These workers are overwhelmingly female and often women of colour. They are among the lowest paid employees who are affected by the *Act*.
53. Delivering long-term care for our aging population is a clear priority for Ontario. Ontario is currently experiencing a shortage of long-term care beds and a crisis in the recruitment and retention of long-term care workers. The impact of the one percent limit on wages and compensation only functions to aggravate these problems.
54. As the *Act* only applies to long-term care homes that are not-for-profit, for-profit long-term care homes, which will be free to increase wages and compensation by more than one percent, will have a greater ability to retain and recruit workers. This will create an inequity in the compensation of workers doing the same work across the province. It also has broader implications for the most economically marginalized populations who require access to care but may be unable to afford the cost of for-profit long-term care homes.

The Arbitrary Nature of the Moderation Period

55. Section 1 of the *Act* states that its purpose is to:
- “Ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public service.”
56. As noted above, Section 10 of the *Act* limits any increase in salary rates to one percent for any position or class of positions for each 12 month period of the moderation period.
57. Section 9 of the *Act* defines the “moderation period,” the period in which the one percent limit applies, as the three year period beginning:
1. The day immediately following the day a collective agreement expires if a collective agreement is in operation on June 5, 2019;
 2. The day immediately following the day that the previous collective agreement expired if no collective agreement is in operation on June 5, 2019;
 3. The commencement date of the collective agreement if the parties are bargaining a first collective agreement on June 5, 2019;
 4. The commencement date of the collective agreement if an arbitration award has not been issued on or before June 5, 2019;
 5. The date immediately following the day of the expiry of the collective agreement if an arbitration award has been issued on or before June 5, 2019.
58. The definition of the moderation period under s. 9 of the *Act* reflects the speculative and suspect nature of Bill 124’s stated purpose. Approximately 170

OPSEU bargaining units have collective agreements set to expire in 2022, meaning that the moderation period for these units will be imposed from 2022 to 2025. Another approximately 16 OPSEU bargaining units have collective agreements set to expire in 2023, with the moderation period for these units being imposed from 2023 to 2026.

59. For these OPSEU members, the *Act's* severe limitation on their right to collectively bargain their most important working condition – compensation and benefits - will extend 6 to 7 years after the “fiscal situation” that prompted the introduction of the *Act* in the first place. Even if Ontario’s fiscal situation changes dramatically in 2022 or 2023, the *Act* will, nevertheless, impose a strict limit on the salaries and compensation of these workers.

The Effect of the *Act* on Employees Without the Right to Strike

60. Workers who do not have recourse to the right to strike are also affected by the *Act's* restrictions on compensation. Section 10 of the *Act* bars an interest arbitrator from issuing an award that may provide an increase in a salary rate for any position or class of positions that is greater than one per cent for each 12 month period of the moderation period.
61. Section 11 similarly bars an arbitrator from awarding any incremental increases to existing compensation entitlements or for new compensation entitlements that are greater than one percent on average for all employees covered by a collective agreement for each 12 month period of the moderation period.
62. Section 16 of the *Act* provides that the *Act* prevails over any collective agreement or arbitration award that is inconsistent with it. Under this section, the Minister is empowered to issue a declaration that a collective agreement or arbitration is void and deemed never to have had effect.
63. As noted above, approximately 31,000 OPSEU represented workers in hospitals and other health care facilities do not have the right to strike and can

only resort to interest arbitration under HLDAA to resolve a dispute at bargaining.

64. In addition, approximately 10,000 Correctional workers in the OPS are similarly barred from the right to strike and can only resort to interest arbitration under CECBA to resolve an impasse at bargaining.
65. Issues of compensation are frequently referred to interest arbitration given how particularly contentious monetary issues are between parties to a collective agreement.
66. HLDAA and CECBA each statutorily require arbitrators to consider, in making their awards, the factors of the economic situation of Ontario, other comparable employees' terms and conditions of employment, and the employer's ability to attract and retain qualified employees.
67. The imposition of the one percent increase limit for salary rates and all other compensation impedes the power of interest arbitrators to consider the legislated factors outlined in HLDAA and CECBA. Quite simply, even if each of the legislated factors indicated that an increase greater than one percent was appropriate for a given bargaining unit, interest arbitrators would be unable award such an increase and be in compliance with the *Act*.
68. OPSEU members have already experienced the detrimental impact of the *Act*.
69. One example is the current round of bargaining between OPSEU Local 209 and Hamilton Health Sciences. The bargaining unit at issue is comprised of Security Professionals who provide security to hospitals in Hamilton. These workers earn an average of \$20.56 (step 1 of wage grid) to \$26.36 (step 8 – top of wage grid) per hour and perform an important function in ensuring the safety of employees, patients and other members of the public in the hospitals. As hospital employees, these security professionals are captured by HLDAA.

70. The Parties began bargaining on April 8, 2019. On May 28, 2019, the employer tendered an offer of a 1.4% wage increase, which was within the range of acceptability for the Union. Following the introduction of the *Act*, however, the employer rescinded its offer on June 25, 2019 and provided an offer of a one percent increase pursuant to the *Act*.
71. The Parties have been unable to bargain a collective agreement due to the employer's inability to move on its offer of a one percent increase. On June 4, 2019, OPSEU requested the Ontario Labour Relations Board appoint a conciliation officer to assist the parties in reaching an agreement. Conciliation meetings were held on August 20 and September 11, 2019.
72. OPSEU expects the matter to proceed to interest arbitration under HLDAA in the near future.
73. The negative impact of the *Act* on bargaining rights and labour relations between unions and employers is also evident in the current round of bargaining between Sunnybrook Health Sciences Centre – St. John's Rehab ("Sunnybrook") and OPSEU Local 569.
74. OPSEU Local 569 is comprised of Health Professionals such as physiotherapists, occupational therapists, pharmacists, pharmacy technicians, speech pathologists, social workers, recreational assistants, dietitians, and massage therapists. Like the Security Professionals of Hamilton Health Sciences, Sunnybrook workers are captured by HLDAA and do not have the right to strike.
75. OPSEU served Notice to Bargain on January 2, 2019. By April 4, 2019, the Parties had agreed to a number of monetary items which included:
 1. An annual wage increase of 1.75% for each year of a three year agreement beginning on April 1, 2019 and ending on April 1, 2021;

2. Increases in shift premiums for each hour an employee is required to remain available on standby outside of their regularly scheduled working hours; and
 3. An increase in vacation accrual after three years of employment and the lowering of vacation thresholds.
76. On April 17, 2019 an application for a conciliation officer was filed with the Ontario Labour Relations Board to assist the Parties to resolve the outstanding issues in dispute between them. The Parties met with the Conciliation Officer on May 8 and May 9, 2019. On May 15, 2019, the Conciliation Officer filed a "No Board" report, signifying that the parties had officially reached an impasse in bargaining. On June 27, 2019, Larry Steinberg was appointed to be the interest arbitrator under HLDAA and a hearing on this matter is set for April 2, 2020.
77. On February 25, 2020, the Union received notice from Sunnybrook's counsel that the employer was resiling from the agreements it had reached with the Union respecting monetary items, including the 1.75% wages increases, as of April 4, 2019, on the basis that, in the view of the employer, those agreements were now void as a result of Bill 124.
78. In both the Sunnybrook and Hamilton Health Sciences examples, the *Act* has prevented OPSEU from freely reaching collectively bargained agreements on behalf of its members and has unfairly allowed employers to resile from agreements reached in good faith with the Union.
79. As noted, HLDAA contains a statutory requirement that an arbitrator must consider the factors of the terms and conditions of similarly situated employees and the employer's ability to attract and retain qualified employees in rendering a decision on compensation. If an Arbitrator were to follow HLDAA and to determine that an increase above one percent was warranted, they would find

themselves in the impossible situation of complying with both HLDAA and the *Act*.

80. Moreover, in endowing itself with the power to override any collective agreement or interest arbitration award, the government can supersede the will of parties who have freely negotiated collective agreements and the determinations of expert labour arbitrators.
81. These cases are only two examples of the impact of the *Act* on OPSEU members who have been engaged in collective bargaining since the introduction of the *Act*. As a result of the *Act*, either since its passage or as a result of its introduction, OPSEU has been unable to freely negotiate collective agreements for its members with collective agreements that have expired, or are expiring.

The Long Shadow of the *Act* on Workers

82. Section 24 states that an employer cannot provide compensation before or after the applicable moderation period to an employee for compensation that the employee will not, does not or did not receive as a result of the moderation measure in the *Act*.
83. Section 25 of the *Act* provides the Management Board of Cabinet with the power to issue directives to employers and employer's organizations requiring the employer to provide information relating to collective bargaining or compensation that the Management Board of Cabinet considers appropriate for the purpose of ensuring compliance with the *Act*.
84. Under Section 26 of the *Act* the Minister is given the "sole discretion" to make an order declaring that a collective agreement or an arbitration award is inconsistent with the *Act*.

85. These provisions cast a long shadow on the *Act's* impact on affected workers that persists beyond the three year moderation period. According to s. 24, unions would not be able to address the three-year compensation reduction experienced by workers in future rounds of collective bargaining. Thus the impact of the three years of wage reductions in real terms will continue to compound over time.
86. Section 24's bar on a "catch-up" on compensation has broader practical implications for the parties going forward. The *Act* contains no definition of what level of compensation would be viewed as a violation of s. 24. Absent a definition, theoretically **any** post moderation period increase on compensation freely bargained between parties could be construed as an attempt to circumvent s. 24.
87. The added specter of the Minister's ability to exercise their "sole discretion" to deem a collective agreement or an arbitration award to be a violation of the *Act* under s. 26 will only serve to further depress wages and send a chilling effect on collective bargaining.

The Absolute Rule of the Minister under the Act

88. As already noted, s. 26 gives the Minister the "sole discretion" to make an order declaring that a collective agreement or an arbitration award is inconsistent with the *Act*.
89. Further, s. 29 of the *Act* bars the Ontario Labour Relations Board and labour arbitrators from inquiring into or making a decision as to whether the *Act*, a regulation or order made under section 26 is constitutionally valid or in conflict with the *Human Rights Code*.

- 90. These provisions effectively oust the jurisdiction of adjudicators with recognized expertise in labour relations and collective bargaining from reviewing the validity of the *Act* and its impact on the human rights of workers.

D. Charter Violations

Section 2(d) – Freedom of Association

- 91. Section 2(d) of the *Charter* guarantees freedom of association. This right includes the right of employees to join, form and be part of a union of their choosing and to collectively engage in lawful activities to achieve work-related goals and conditions.
- 92. One of the most important manifestations of freedom of association is the right of employees to engage in a meaningful process of collective bargaining, which includes the right to collectively make representations by their union to the employer, to have those representations considered in good faith, and to have the right to strike where bargaining has reached an impasse.
- 93. Government actions that substantially curtail the right to strike or interfere with a union's ability to freely negotiate fundamental terms of employment violate s. 2(d).

Section 2(b) – Freedom of Expression

- 94. Section 2(b) of the *Charter* protects freedom of expression, the foundation of any democratic society.
- 95. The Supreme Court of Canada has recognized that freedom of expression protects the right of workers to strike and to engage in related actions on the picket line. When workers exercise their right to strike and engage in picket lines in a labour dispute, they participate in expressive activities that convey

meaning to employers, the public, and the workers themselves as an expression of collective effort and solidarity.

Section 15 and 28 – Equality Right on the Basis of Sex / Gender

96. Section 15 and 28 of the *Charter* protect everyone from discriminatory or unequal treatment on the basis of protected grounds, including those of sex and gender.
97. The right to equality before and under the law also captures protection from adverse effect discrimination. Adverse effect discrimination occurs where a facially neutral law has an adverse impact or perpetuates pre-existing disadvantage against members of a protected group.
98. Women workers have historically, and continue to be, concentrated in industries and jobs that are different from those held by men. These female dominated industries and jobs tend to be associated with “women’s work” and generally provide lower earnings and wages than those of male-dominated fields. This lower earning capacity has created and perpetuates the “gender wage gap” in Canada, whereby women generally earn substantially less than men.
99. Female dominated fields include: health care workers; administrative and support roles in publicly funded schools, community colleges, universities, and the public service; employees at social service and developmental services agencies; and Children’s Aid Societies staff members.

Section 1: Justification in Free and Democratic Society

100. Section 1 of the *Charter* requires that any limit on a *Charter* right must be demonstrably justified in a free and democratic society. In order for the state to reasonably infringe on a *Charter* right, the Crown must show a pressing and

substantial objective for the limit, that the infringement is proportionate to the objective, and that the benefits of the limit outweigh its deleterious effects.

Charter Violations

101. The *Act* violates the Applicants' fundamental right to freedom of association, freedom of expression, and equality rights in a manner that is not justified in a free and democratic society. As such, pursuant to s. 52 of the *Constitution Act*, 1982, the *Act* should be of no force and effect to the extent of its inconsistency with the *Charter*.

102. The *Act* violates the Applicants' right freedom of association and right to freedom of expression under s. 2(d) and s. 2(b) of the *Charter* by:
 1. Unilaterally imposing the fundamental terms and conditions of compensation and benefits in an arbitrary manner absent any meaningful consultation or negotiation;
 2. Substantially interfering with the bargaining rights of OPSEU and its membership in undermining its ability to meaningfully pursue important workplace goals collectively through freely negotiating essential terms and conditions;
 3. Striking down freely negotiated collective agreements to the extent of any inconsistency with the terms and conditions outlined in the *Act*; and
 4. Violating the Applicants' right to collectively withdraw services or to strike with respect to the Applicants' most fundamental and essential working conditions of compensation and benefits.

103. The *Act* also substantially infringes on the Applicants' right to equality on the basis of sex and/or gender under s. 15 and 28 of the *Charter* by:

1. Adversely impacting and discriminating against the members of female dominated OPSEU bargaining units by denying these members the ability to freely and collectively bargain the terms and conditions related to their compensation and benefits; and
2. Perpetuating the “gender wage gap” between OPSEU members in predominantly female sectors and workers in predominantly male sectors and denying OPSEU the ability to address the historic disadvantage experienced by female workers through collective bargaining.

***Charter* Violations are not justified under Section 1**

104. These violations of s. 2(d), 2(b), 15, and 28 are not reasonable limits which can be demonstrably justified in a free and democratic society and thus are not saved under s. 1 of the *Charter*.
105. The *Act* does not have a factually based pressing and substantial objective.
106. The *Act's* stated purpose is to “ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services.” When Bill 124 was introduced, the government’s rationale for action was the purported need to address a \$15 billion deficit and the dire fiscal situation in Ontario. By October 2019, the Financial Accountability Office in Ontario confirmed that the deficit was \$7.4 billion, a little less than half of the \$15 billion estimated by the government. Despite the erroneous factual basis for the *Act*, the government pressed forward with the passage of the *Act*.
107. Moreover, the stated objective has already been met for those OPSEU members who have been denied the right to strike. Under HLDAA and CECBA interest arbitrators are statutorily required to consider the employer’s ability to pay and the economic situation in Ontario. The effect of the *Act* is to impose

the arbitrarily set wage of a one percent increase even if there is an objective basis for a greater increase in pay such as the economic situation of the province, the need for recruitment and retention of workers, and the need to address inequality in rates of pay between comparably situated workers in the province, including issues of pay equity.

108. The impairments on the *Charter* rights of the Applicants are substantial and not minimal. The *Act* prohibits OPSEU's members to collectively engage in any form of meaningful consultation or negotiation on the most important employment term for every worker – their compensation and benefits. The length of the moderation period and the low and arbitrary limit of a one percent increase are not minimally impairing. As noted, a one percent "increase" is far below the 2.1% rate of inflation in Ontario. In other words, a one percent increase for these workers is a pay cut in real dollars.
109. The fact that the moderation period for many OPSEU members will run from 2022 to 2025 or 2023 to 2026 demonstrates that there is no rational connection between the impact of the *Act* and the *Act*'s stated purpose of addressing Ontario's currently dire fiscal situation. Similarly, the ban of any recuperation of lost compensation and wages beyond the moderation period has no rational connection to Ontario's future financial prospects.
110. The deleterious effects of the *Act* outweigh any benefits the *Act* may provide. The impact of the *Act* on the freedom of association, freedom of expression and right to equality outweighs any possible cost savings that may result from the *Act*. Without any regard to the wishes of the parties to the collective agreements, the issues of quality, recruitment and retention in the workplace, and the collective aspirations of workers, the *Act* sets an arbitrary limit on compensation that will have a long standing and compounding impact on the lives of OPSEU members and their families. The *Act* will perpetuate the historic disadvantage experienced by many of OPSEU's members in female dominated positions. For many OPSEU members who earn relatively lower pay, the effect of the *Act* will be to intensify the economic marginalization of these workers.

111. OPSEU members are entitled to be awarded damages for the breach of their *Charter* protected rights and freedoms. Awarding damages to these workers would assist in vindicating the *Charter* rights of OPSEU and its members and would deter the legislature from acting in a manner that infringes fundamental rights and freedoms in the future.

E. Statutory Provisions

112. The Applicants rely on the following statutory provisions:

1. *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, SO 2019, c 12;
2. Sections 1, 2(b) 2(d), 15, 24(1) and 28 of the *Canadian Charter of Rights and Freedoms*;
3. Section 52 of the *Constitution Act, 1982*;
4. *Ontario Labour Relations Act, 1995*, SO 1995, c. 1, Sched. A;
5. *Crown Employees Collective Bargaining Act, 1993*, SO 1993, c 38;
6. *Colleges Collective Bargaining Act, 2008*, S.O. 2008, c. 15;
7. *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5;
8. *Hospital Labour Disputes Arbitration Act*, RSO 1990, c. H. 14;
9. Rule 14 the *Rules of Civil Procedure*, RRO 1990, Reg 194; and
10. Such other grounds as counsel may request and as to this Honourable Court may seem just.

3. The following documentary evidence will be used at the hearing of the application:

- a. The affidavit of Steve Saysall, to be affirmed;
- b. The affidavit of Sandra Cadeau, to be affirmed;
- c. The affidavit of Donna Mosier to be affirmed;
- d. The affidavit of Erin Cate Smith Rice to be affirmed;
- e. The affidavit of Heidi Steffen-Petrie to be affirmed;
- f. The affidavits of expert evidence, to be affirmed;
- g. Such further evidence as counsel may advise and this Honourable Court may admit.

Date: March 16, 2020

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ALMEIDA, SANDRA CADEAU, DONNA MOSIER
ERIN CATE SMITH RICE and HEIDI STEFFEN-PETRIE
Applicants

-and-

THE CROWN IN RIGHT OF ONTARIO as represented by
ATTORNEY GENERAL FOR ONTARIO and THE
PRESIDENT OF THE TREASURY BOARD
Respondent

Court File No.: Cv-20-00638156-0000

Ontario
Superior Court of Justice
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at Toronto, ON

NOTICE OF APPLICATION

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