

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION,
KAREN EBANKS and ALEXANDRA BUSCH

Applicants
(Respondents in Appeal)

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO, as represented by THE
ATTORNEY GENERAL OF ONTARIO, THE PRESIDENT OF THE
TREASURY BOARD, and THE MINISTER OF EDUCATION

Respondents
(Appellants in Appeal)

AND BETWEEN:

ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION,
PAUL WAYLING and MELODIE GONDEK

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(Respondents in Appeal)

and

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PRESIDENT OF THE TREASURY BOARD, THE MINISTER OF
EDUCATION, and THE ATTORNEY GENERAL OF ONTARIO

Respondents
(Appellants in Appeal)

**FACTUM OF THE INTERVENER,
Women's Legal Education and Action Fund ("LEAF")**

(Title of Proceeding Continued on p. ii)

AND BETWEEN:

THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO,
ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS
FRANCO-ONTARIENS, JADE ALEXIS CLARKE,
CHRISTINE GALVIN, and YVES DUROCHER

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TREASURY BOARD, and the MINISTER OF EDUCATION

Respondents
(Appellants in Appeal)

AND BETWEEN:

THE ONTARIO NURSES' ASSOCIATION, VICKI MCKENNA
and BEVERLY MATHERS

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and MINISTER OF LONG-TERM CARE

Respondents
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ONTARIO PUBLIC SERVICE EMPLOYEES UNION and
WARREN ("SMOKEY") THOMAS, EDUARDO ALMEIDA,
SANDRA CADEAU, DONNA MOSIER, ERIN CATE SMITH RICE,
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ASSOCIATIONS, ASSOCIATION OF PROFESSORS OF THE UNIVERSITY
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UNIVERSITY OF WESTERN ONTARIO FACULTY ASSOCIATION,
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AMALGAMATED TRANSIT UNION LOCAL 1587,
CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION,
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HALTON DISTRICT EDUCATION ASSISTANTS ASSOCIATION,
DUFFERIN-PEEL EDUCATION RESOURCE WORKERS' ASSOCIATION,
ASSOCIATION OF PROFESSIONAL STUDENT SERVICES PERSONNEL,
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LOCAL 30213 OF THE NEWSPAPER GUILD/COMMUNICATIONS
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Applicants
(Respondents in Appeal)

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO, as represented by
the ATTORNEY GENERAL OF ONTARIO
and the PRESIDENT OF THE TREASURY BOARD

Respondents
(Appellants in Appeal)

AND BETWEEN:

UNIFOR, KELLY GODICK, SARAH BRAGANZA, and KATHLEEN ATKINS

Applicants
(Respondents in Appeal)

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO, as represented by
the ATTORNEY GENERAL OF ONTARIO
and the PRESIDENT OF THE TREASURY BOARD

Respondents
(Appellants in Appeal)

AND BETWEEN:

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Academic Staff Association

Applicants
(Respondents in Appeal)

and

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the PRESIDENT OF THE TREASURY BOARD

Respondents
(Appellants in Appeal)

AND BETWEEN:

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Applicants
(Respondents in Appeal)

and

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Respondents
(Appellants in Appeal)

AND BETWEEN:

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Applicants
(Respondents in Appeal)

and

THE CROWN IN RIGHT OF ONTARIO, as represented by the PRESIDENT
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**FACTUM OF THE INTERVENER,
WOMEN'S LEGAL EDUCATION AND ACTION FUND ("LEAF")**

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PART I- OVERVIEW

1. This appeal concerns the constitutionality of the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, which limited compensation increases to 1% during moderation periods. The court below found a violation of s. 2(d), which was not justified under s. 1.¹
2. LEAF submits that the *Charter* interests at stake must be considered from a gendered perspective, drawing on the interpretive role of s. 28.² LEAF acknowledges that the application judge dismissed a s. 15 challenge and declined to find a violation of s. 28, with reasons referring to the “override” capacity of s. 28.³ The application judge’s conclusion that no s. 28 “override” role applied does not affect this Court’s ability to consider s. 28 in its interpretive capacity.⁴ LEAF relies on s. 28’s interpretive role in addressing the constitutional issues before this Court from a gendered perspective, relying on the facts accepted below. This is consistent with established jurisprudence that *Charter* provisions inform one another’s interpretation.⁵
3. The animating goal of s. 28 is to promote substantive gender equality in the enjoyment and exercise of other protected *Charter* rights and freedoms. Section 28 has a freestanding interpretive role, mandating a gender-inclusive *Charter* analysis, requiring courts to ensure that the interpretive approach underpinning the enjoyment of rights and freedoms includes the perspectives of

¹ *OECTA v. His Majesty*, [2022 ONSC 6658](#) [“*Decision*”], para 9.

² Section 28 provides: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”

³ *Decision, supra*, para [231, 243-244](#). Neither the ss. 15 nor 28 holdings have been cross-appealed.

⁴ See *R. v. Edwards Books and Art Ltd.*, [1986 CanLII 12 \(SCC\)](#), [1986] 2 SCR 713 [“*Edwards Books and Art*”], in which s. 27, an interpretive clause (multiculturalism), was held to inform the approach to s. 2(a) (freedom of religion) despite the Supreme Court explicitly rejecting a s. 15 breach in the same case.

⁵ *Dubois v. The Queen*, [1985 CanLII 10 \(SCC\)](#), [1985] 2 SCR 350 (para [43](#), per Lamer J.); *R. v. Lyons*, [\[1987\] 2 SCR 309](#), para [21](#); *R v. Tran*, [\[1994\] 2 SCR 951](#), at p. 976; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007 SCC 27 \(CanLII\)](#), [2007] 2 SCR 391 [“*Health Services BC*”], para [80](#); *R. v. Stillman*, [2019 SCC 40 \(CanLII\)](#), [\[2019\] 3 SCR 144](#), para [21](#).

individuals affected by gender discrimination, and promotes their full inclusion in society.⁶ In the circumstances of this case, the application judge found that the labour market is segregated by gender, a trend that is accompanied by systemic discrimination that devalues feminized work.⁷ The landscape of work affected by Bill 124 was accordingly not a “neutral” playing field. As a result, in assessing the effects of Bill 124, the evidence must be considered in light of its impact on the ability of women to redress gender inequality through meaningful collective bargaining.

4. Considering these gender dynamics is consistent with the underlying purpose of the s. 2(d) guarantee, which at its core empowers vulnerable workers to address inequality and power imbalances in their employment. As informed by s. 28, freedom of association includes collective efforts to meaningfully negotiate to redress gendered labour matters related to fair compensation, staffing, retention, and precarious employment. Wage restraint legislation that precludes such negotiations has a disproportionate impact on the exercise of freedom of association in feminized sectors affected by the historic and ongoing devaluation of gendered labour.

5. Section 28 requires the promotion of substantive gender equality as an important societal value when assessing the justificatory requirements under s. 1. The economic advancement and inclusion of workers affected by systemic gender discrimination must be considered at all stages of the s. 1 analysis, and especially in weighing the gendered impact of the *Act* against Ontario’s claimed benefit of fiscal responsibility.

PART II - FACTS

6. LEAF takes no position on the facts, although it notes the following findings in the decision

⁶ Section 28’s roles include both the interpretive role described in this factum, as well as a substantive or “override” role not at issue in this appeal, having regard to the special language of “Notwithstanding anything in this *Charter*”, which is relevant in cases involving the s. 33 override. See *Hak c. Procureure générale du Québec*, [2019 QCCA 2145](#) (CanLII); *Hak c. Procureur général du Québec*, [2021 QCCS 1466](#) (CanLII) (appeal under reserve).

⁷ *Decision, supra*, paras [241-242](#).

below. Ontario’s workforce is segregated by gender, with women predominating in particular fields, namely health care, social service and education work.⁸ Work within feminized sectors has historically and continues to be devalued, affecting working conditions and compensation patterns relative to non-feminized fields.⁹ This is influenced by the “care penalty” or “charity penalty” that distorts the understanding and valuation of work traditionally performed by women.¹⁰ All of these trends apply particularly to affect working conditions and compensation for racialized women, who disproportionately work in caring professions and whose working conditions and compensation are therefore especially unequal, precarious, and undervalued.¹¹

7. LEAF also notes the application judge referred to evidence that women workers perceived that Bill 124 affected them in gendered ways.¹² While not addressing the gendered implications directly, the application judge also noted the significant adverse impact of Bill 124 on the ability of unions in the feminized health and long-term care sectors to bargain staffing ratios of full-time and part-time employees, job security, and benefits and pensions for part-time and casual workers, and thereby address recruitment and retention.¹³

PART III – ISSUES AND LAW

A. Section 28’s Interpretive Role

(i) A Purposive Approach to Section 28

8. The animating goal of s. 28 is to promote substantive gender equality in the enjoyment of

⁸ *Decision, supra*, para [241](#). The Government’s own data demonstrates that 79% of workers impacted by Bill 124 are women: Demographics Document (A.1.01.0009), Exhibit H to Affidavit of Jay Porter (Mar 4/21) [“Porter Affidavit”], EXB, A.1.01.0001, pp. 2-15; Porter Affidavit, EXB, A.1.01.0001, para 98, p. 49.

⁹ *Decision, supra*, para [241](#); see also Decent Work for Women, EXB, H.2.01.0002, pp. 27-29.

¹⁰ *Decision, supra*, para [241](#); see also Armstrong Report, EXB, E.2.01.0004, paras 6, 73-78, pp. 6, 42-47.

¹¹ *Decision, supra*, para [241](#); see also Tiessen Affidavit, EXB, H.2.01.0001, paras 31-34, 58-65, pp. 8-9, 15-18.

¹² *Decision, supra*, para [142](#).

¹³ *Decision, supra*, paras [81-82](#); [99-100](#).

other protected *Charter* rights and freedoms. Section 28 seeks to mandate a gender-inclusive *Charter* analysis, requiring courts to ensure that the interpretive approach underpinning the enjoyment of rights and freedoms includes the perspectives of individuals affected by gender discrimination, and promotes their full inclusion in society. Applying a strictly gender-neutral lens to the analysis of *Charter* breaches does not fulfil the mandate of s. 28, including the protection of substantive rather than formal equality.¹⁴

(ii) Charter History Informs Section 28’s Interpretive Role

9. A purposive analysis should take into account s. 28’s history,¹⁵ and the problems it sought to address, namely the denial of legal personhood and full societal participation to women, and the employment of a universal male subject as the basis for the consideration of legal rights.¹⁶ The language chosen, “male and female persons”, reflects an intention to extend the *Charter*’s protection and interpretive framework to include embodied perspectives and experiences based on gender,¹⁷ and to protect the rights of women as against the rights of men.¹⁸

(iii) Linguistic Features Inform Section 28’s Interpretive Role

10. Section 28 uses strong mandatory language (“guaranteed”), with an expansive scope in relation to the entire *Charter* (“anything in this Charter”). The specific reference to “rights and freedoms” provides guidance that s. 28 is intended to play an important interpretive role with respect to the sections of the *Charter* conferring these rights and freedoms, any purported

¹⁴ Strauss, C. (2021). Section 28’s Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*. *Can. J. of Women & L.*, 33, 84 [“*Strauss Paper*”], p. 92. Please note Strauss is a Senior Staff lawyer at LEAF.

¹⁵ Froc, K. (2015). *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (Doctoral dissertation) [“*Froc - Untapped Power*”], p. 101; *Syndicat de la fonction publique du Québec inc. v. Quebec (Attorney General)*, [2004 CanLII 76338](#) (QC CS) [“*Syndicat*”], para [1408](#).

¹⁶ *Strauss Paper*, pp. 91-94.

¹⁷ *Strauss Paper*, pp. 103-104. See also pp. 103-104 for a discussion that a modern approach to this language must ensure protection for all individuals who face gender-based discrimination, consistent with the “living tree” doctrine.

¹⁸ *Strauss Paper*, p. 104.

justifications advanced for breaches of these rights and freedoms, as well as remedies.¹⁹

(iv) Placement Within the Charter Defines Section 28’s Interpretive Role

11. Section 28 immediately follows s. 27 (multiculturalism), which has an explicitly interpretive role. LEAF’s proposed interpretive role for s. 28 is consistent with the SCC’s decision in *R. v. Edwards Books and Art Ltd.*, which concerned s. 2(a) as informed by s. 27.²⁰ Notably the majority considered and applied s. 27 in an interpretive capacity despite the SCC explicitly (and unanimously) rejecting a s. 15 breach.²¹

(v) Section 28 Case Law and Scholarship

12. The case law addressing s. 28 of the *Charter* is underdeveloped and inconsistent.²² While there are some recent examples of its use,²³ the s. 28 case law has largely failed to fulfill s. 28’s purpose in advancing substantive gender equality in the enjoyment of *Charter* rights and freedoms.²⁴ This case represents an important opportunity for s. 28 to play its intended role,

¹⁹ Baines, B. (2005). *Section 28 of the Canadian Charter of Rights and Freedoms: A purposive interpretation*. Can. J. Women & L., 17, 45 [*“Baines”*], p. 24; *Froc – Untapped Power*, pp. 387, 415. In addition, although not at issue in this appeal, the “notwithstanding” wording in s. 28 articulates a powerful substantive role for this section in relation to any other aspect of the *Charter*.

²⁰ *Edwards Books and Art*, *supra*, paras [80](#), [96](#).

²¹ *Edwards Books and Art*, *supra*, para [157](#). See also Wilson J. concurring in finding a s. 2(a) violation which was not saved by s. 1, with reasoning informed by s. 27, para [207](#).

²² Section 28 was employed (along with s. 15) in a small number of early SCC decisions, including as an influence in interpreting the scope of protections afforded by s. 7 and s. 11(d): see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [[1999](#)] [3 SCR 46](#) [*“Health Services NB”*] para [112](#).; *R. v. Osolin*, [[1993](#)] [CanLII 54](#) (SCC), [[1993](#)] [4 SCR 595](#), at p. 669; *R. v. Seaboyer*; *R. v. Gayme*, [[1991](#)] [CanLII 76 \(SCC\)](#), [[1991](#)] [2 SCR 577](#), at pp. 698-699. The SCC has also considered s. 28 in the context of the equal enjoyment of *Charter* rights and freedoms by men: see *R. v. Hess*; *R. v. Nguyen*, [[1990](#)] [2 SCR 906](#) (at 943-944).). Section 28 was referred to in the FCA decision in *Native Women’s Assn. of Canada v. Canada (C.A.)*, [[1992](#)] [CanLII 8495 \(FCA\)](#), [[1992](#)] [3 FC 192](#) which was overturned by the SCC on appeal [[1994](#)] [CanLII 27 \(SCC\)](#), [[1994](#)] [3 SCR 627](#) but without comment on the use of s. 28 as an interpretive aid. The B.C. Court of Appeal has characterized s. 28 as an interpretive provision only, which by itself does not confer any rights and cannot be contravened: *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [[2009](#)] [BCCA 153](#) (CanLII), para [64](#).

²³ In *R v Kapp*, in concurring reasons, Justice Bastarache employed s. 28 in the interpretation of s. 25 (Aboriginal rights): *R. v. Kapp*, [[2008](#)] [2 SCR 483](#), para [97](#) (per Bastarache J.). More recently, in *R. v. Brown*, the majority of the SCC, addressing submissions by LEAF, considered *Charter* equality interests (including as arising under s. 28) under the s. 1 analysis: See *R. v. Brown*, [[2022](#)] [SCC 18](#) (CanLII) [*“Brown”*], paras [70-71](#).

²⁴ *Strauss Paper*, pp. 88-89.

particularly given the gendered effect of Bill 124 on the exercise of the constitutional right to engage in meaningful collective bargaining.

13. A strong body of scholarship supports s. 28’s robust interpretive role in *Charter* analysis.²⁵ At minimum, s. 28 has a clear role as a “gender equality interpretive tool”²⁶ that acts as an interpretive “film” over the *Charter*.²⁷ This approach calls for reading s. 28 as though it were the “last paragraph” of each section of the *Charter*.²⁸ When courts address other *Charter* rights and freedoms, s. 28 operates to require consideration that “[p]eople of different genders do not enjoy their *Charter* rights and freedoms identically.”²⁹ Section 28’s interpretive role also requires courts to ensure that seemingly neutral concepts or frameworks do not reinforce gender hierarchy.³⁰ The scholarship further supports an intersectional approach, recognizing that gender discrimination intersects with other forms of discrimination, including those faced by racialized communities.³¹

B. Section 2(d) As Informed by Gender and Section 28

14. At its very core, s. 2(d) protects the interests of vulnerable individuals to redress power imbalances through associational activity,³² which is nowhere more relevant than in the employment relationship.³³ The central aims of s. 2(d) in addressing inequality and power imbalances through collective bargaining should not be considered through a strictly gender-

²⁵ *Strauss Paper*, pp. 98-101; *Froc - Untapped Power*, pp. 388-389.

²⁶ *Strauss Paper*, pp. 88, 92-96; Shachar, A.V. (2013). *Interpretation Sections (27 and 28) of the Canadian Charter*. Sup Ct L Rev 61, 147, p. 147.

²⁷ *Froc -Untapped Power*, pp. 140, 235 and 389; *Strauss Paper*, p. 95

²⁸ *Baines*, p. 66; *Strauss Paper*, p. 95; *Froc – Untapped Power*, p. 391.

²⁹ *Strauss Paper*, p. 101.

³⁰ *Froc - Untapped Power*, pp. 20, 403; see also *Strauss Paper*, pp. 92, 94-96.

³¹ *Froc - Untapped Power*, pp. 199-200.

³² *Reference Re Public Service Employee Relations Act (Alta.)*, [1987 CanLII 88 \(SCC\)](#), [1987] 1 S.C.R. 313, para [87](#), per Dickson C.J.; *Health Services NB*, *supra*, para [81](#); *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015 SCC 1](#), para [58](#); *Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#) (CanLII), paras [51-54](#)

³³ *Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#) (CanLII), [2015] 1 SCR 245, paras [51-54](#).

neutral lens, as this neither reflects the realities of the labour market nor fulfils the mandate of both ss. 2(d) and 28. Rather, the determination of whether legislation substantially interferes with collective bargaining must consider gendered power dynamics affecting the landscape of work, and systemic power imbalances of those affected by intersectional grounds of discrimination, such as racialized women. Such an approach is not simply consistent with, but is mandated by, the s. 28 interpretive “guarantee”.

15. International law enriches an understanding of gendered needs in the exercise of freedom of association under s. 2(d).³⁴ A forceful role for s. 28 is consistent with and influenced by Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women*.³⁵ The right to bargain collectively is itself recognized through international instruments that influenced foundational s. 2(d) case law.³⁶ The International Labour Organization (ILO) has long recognized, in its *Fundamental Principles*³⁷ and in many publications, that collective bargaining provides a crucial structure through which workers affected by gender discrimination can seek improvements aimed at advancing their equal participation in the workforce and their unique needs.³⁸

³⁴ See *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII), para 28.

³⁵ *Froc - Untapped Power*, pp. 381-383, as well as Article 3 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR] and Article 3 of the *International Covenant on Economic and Social Rights*, 16 December 1966, 993 UNTS 3 [ICESCR].

See Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1 March 1980, 1249 UNTS 13, Can TS 1982 No 31 (Entered into force September 3, 1981, ratification by Canada December 10, 1981).

³⁶ See *Health Services BC, supra*, paras 69-79, citing *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171; *ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17.

³⁷ International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (Geneva, ILO, 2022), online: <https://www.ilo.org/declaration/lang--en/index.htm> See also ILO, Decent Work, online: <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm>; International Labour Organization. Address by Mr. Juan Somavia, Director General of the International Labour Organization. Proceedings of the 87th Session, International Labour Conference, Geneva, Switzerland, 1 June 1999: <https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

³⁸ Jane Pillinger, Verena Schmidt, & Nora Wintour. Negotiating for gender equality. (Geneva: ILO, 2016), online: https://www.ilo.org/global/topics/collective-bargaining-labour-relations/publications/WCMS_528947/lang--en/index.htm; International Labour Organization, 8. Freedom of Association and Collective Bargaining, online:

16. The historical and ongoing devaluation of women’s labour affects their need for and exercise of freedom of association. Collective bargaining in feminized sectors is important to the advancement of women’s economic interests and in redressing historical trends that devalue gendered labour.³⁹ Restrictions on freedom of association may operate to perpetuate the unequal enjoyment of protected freedoms as well as entrench gendered differences in the valuation of work. Although wage restraint legislation has facially neutral effects, it has a particularly severe impact on freedom of association in feminized sectors where wages are already depressed, and it prevents workers from meaningfully bargaining to advance their interests in achieving gender equality.

17. Restrictions on collective bargaining affecting feminized sectors produce uniquely gendered adverse consequences. In addition to lost opportunities to bargain related to compensation-related matters, workers are prevented from meaningfully acting together to address matters of particular concern to them rooted in their gendered identities, including the “care penalty”, trends related to precarity (such as staffing levels and ratios of full-time, part-time and casual workers, and unequal compensation for such work), and the ability to promote through bargaining the recruitment and retention of women workers in the workforce.⁴⁰ These matters are of significant importance to the advancement of workers affected by gender discrimination, and their full participation in society – interests at the core of an approach to s. 2(d) informed by substantive gender equality pursuant to s. 28.

18. The concerns in this regard, while relevant to all workers within feminized sectors, apply

International Labour Organization <<https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang-en/index.htm>>; Shauna L. Olney, Elisabeth Goodson, Kathini Maloba-Caines, & Faith O’Neill. Gender Equality: a Guide to Collective Bargaining. (Geneva: ILO, 1998), online: https://www.ilo.org/public/libdoc/ilo/1998/98B09_13_engl.pdf.

³⁹ See Armstrong Report, EXB, E.2.01.0004, paras 98-99, 104-108, 113, pp. 56-57, 60-62, 66.

⁴⁰ While not directly addressing the gendered (and racialized) implications, the *Decision* describes the circumstances of a unit of PSWs, more than half of whom are part-time, in a facility with a chronic problem of retention of PSW and nursing positions, see paras [92-97](#).

with particular force when taking into account the intersectional historical and ongoing discrimination affecting the labour of racialized women. The availability and scope of collective bargaining must be understood to have a special significance for those whose working conditions are precarious and devalued by intersecting grounds of discrimination. For these workers, the guarantee of freedom of association, and its promise to redress power imbalances, has particular significance that must be recognized and weighed within the *Charter* analysis.

C. Section 1 As Informed by Gender and Section 28

19. As confirmed by the SCC's recent decision in *Brown*, the promotion of the substantive gender equality interests reflected in s. 28 is an important societal goal recognized within s. 1.⁴¹ LEAF submits that given the *Act*'s gendered impacts, the societal goal of promoting the women's economic advancement and inclusion must inform the justification analysis. A contextual approach informed by s. 28 begins by recognizing the historical and ongoing gender segregation in the workforce, and its implication for gendered employment patterns, participation, and remuneration.

20. In the application of the *Oakes* test, at the pressing and substantial stage, given the disproportionate impact of the *Act* on feminized labour, care should be taken to ensure the existence of a true fiscal emergency that could warrant limitations on protected *Charter* freedoms. In assessing minimal impairment, the Court must consider whether less intrusive measures could have been employed, with particular attention to the gendered impacts. For example, rather than

⁴¹ *Brown, supra*, paras [70-71](#), [111](#), [119](#). The SCC was addressing the constitutionality of a Criminal Code provision precluding the defence of automatism due to self-induced intoxication. While the automatism provision was facially neutral, the Court was alive to the strong correlation between alcohol/drug use and violence against women. The gendered equality interests informed the 'pressing and substantial' purpose and salutary effects, and were weighed in the proportionality balancing (see paras [146-148](#), [165](#)). See also *R. v. Butler*, [1992 CanLII 124](#) (SCC), [1992] 1 SCR 452, para [50](#), and *R. v. Red Hot Video Ltd.*, [1985 CanLII 633](#) (BC SC) (C.A.), paras [49-50](#) as a pre-*Oakes* example of the use of s. 28 within s. 1

limiting all compensation increases to 1%, even for workers neither employed nor paid by Ontario, the *Act* could have limited funding allocations, which would have allowed for relative compensation adjustments for individuals affected by gender discrimination while meeting the stated goal of responsible fiscal management.⁴² Furthermore, at the proportionality stage, s. 28 demands that the Court go beyond a gender-neutral assessment of the extent and genuineness of the fiscal pressures experienced by the government, and instead meaningfully weigh the claimed benefit of fiscal responsibility against the impact of the *Act* on women's economic advancement and their ability to address and redress inequality in the workplace.⁴³

21. LEAF submits that the guarantee of s. 28 would be undermined if s. 1 resulted in workers affected by systemic gender discrimination not enjoying the full benefit of the freedom to collectively bargain because the *Act* operated to justify a restriction on freedom of association disproportionately affecting the working conditions and valuation of gendered work, as well as the ability to organize and seek redress through collective bargaining for gendered labour concerns.

PART III - ORDER SOUGHT

22. LEAF takes no position on the disposition of the appeal and seeks no costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May, 2023,



Christine Davies/Danielle Sandhu/Kat Owens
Goldblatt Partners LLP/ LEAF

⁴² See *Decision, supra*, para [70](#).

⁴³ See *Syndicat, supra*, para [1433](#).

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION ET AL

Respondents

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO ET AL

Appellants

- and -

**WOMEN'S LEGAL EDUCATION AND ACTION FUND ("LEAF"), CANADIAN CIVIL
LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF COUNSEL TO
EMPLOYERS**

Interveners

CERTIFICATE RESPECTING TIME

I certify that:

- i. an order under subrule 61.09 (2) (original record and exhibits) has been obtained or is not required, and
- ii. 15 minutes has been ordered for oral argument.

DATED AT TORONTO this 9th day of May, 2023,



Christine Davies/Danielle Sandhu/Kat Owen
Goldblatt Partners LLP/ LEAF

**SCHEDULE “A”
LIST OF AUTHORITIES**

Case Law

<i>TAB</i>	<i>AUTHORITY</i>
1.	<i>OECTA v. His Majesty</i> , 2022 ONSC 6658
2.	<i>R. v. Edwards Books and Art Ltd.</i> , 1986 CanLII 12 (SCC) , [1986] 2 SCR 713
3.	<i>Dubois v. The Queen</i> , 1985 CanLII 10 (SCC) , [1985] 2 SCR 350
4.	<i>R. v. Lyons</i> , [1987] 2 SCR 309
5.	<i>R v. Tran</i> , [1994] 2 SCR 951
6.	<i>Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia</i> , 2007 SCC 27 (CanLII) , [2007] 2 SCR 391
7.	<i>R. v. Stillman</i> , 2019 SCC 40 (CanLII) , [2019] 3 SCR 144
8.	<i>Hak c. Procureure générale du Québec</i> , 2019 QCCA 2145 (CanLII)
9.	<i>Hak c. Procureur général du Québec</i> , 2021 QCCS 1466 (CanLII) (appeal under reserve)
10.	<i>Syndicat de la fonction publique du Québec inc. v. Québec (Attorney General)</i> , 2004 CanLII 76338 (QC CS)
11.	<i>New Brunswick (Minister of Health and Community Services) v. G. (J.)</i> , [1999] 3 SCR 46
12.	<i>R. v. Osolin</i> , 1993 CanLII 54 (SCC), [1993] 4 SCR 595
13.	<i>R. v. Seaboyer; R. v. Gayme</i> , 1991 CanLII 76 (SCC), [1991] 2 SCR 577
14.	<i>R. v. Hess; R. v. Nguyen</i> , [1990] 2 SCR 906
15.	<i>Native Women’s Assn. of Canada v. Canada (C.A.)</i> , 1992 CanLII 8495 (FCA) , [1992] 3 FC 192
16.	<i>Native Women's Assn. of Canada v. Canada</i> , 1994 CanLII 27 (SCC) , [1994] 3 SCR 627
17.	<i>McIvor v. Canada (Registrar of Indian and Northern Affairs)</i> , 2009 BCCA 153 (CanLII)
18.	<i>R. v. Kapp</i> , [2008] 2 SCR 483

19.	<i>R. v. Brown</i> , 2022 SCC 18 (CanLII)
20.	<i>Reference Re Public Service Employee Relations Act (Alta.)</i> , 1987 CanLII 88 (SCC) , [1987] 1 S.C.R. 313
21.	<i>Mounted Police Association of Ontario v. Canada (Attorney General)</i> , 2015 SCC 1
22.	<i>Saskatchewan Federation of Labour v. Saskatchewan</i> , 2015 SCC 4 (CanLII)
23.	<i>Quebec (Attorney General) v. 9147-0732 Québec inc.</i> , 2020 SCC 32 (CanLII)
24.	<i>R. v. Butler</i> , 1992 CanLII 124 (SCC), [1992] 1 SCR 452
25.	<i>R. v. Red Hot Video Ltd.</i> , 1985 CanLII 633 (BC SC) (C.A.)

Secondary Sources

<i>TAB</i>	<i>DOCUMENT NAME</i>
1.	Strauss, C. (2021). <i>Section 28's Potential to Guarantee Substantive Gender Equality in Hak c Procureur général du Québec</i> . <i>Can. J. of Women & L.</i> , 33, 84
2.	Froc, K. (2015). <i>The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms</i> (Doctoral dissertation)
3.	Baines, B. (2005). <i>Section 28 of the Canadian Charter of Rights and Freedoms: A purposive interpretation</i> . <i>Can. J. Women & L.</i> , 17, 45
4.	Shachar, A.V. (2013). <i>Interpretation Sections (27 and 28) of the Canadian Charter</i> . <i>Sup Ct L Rev</i> 61, 147
5.	Article 3 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171
6.	Article 3 of the International Covenant on Economic and Social Rights, 16 December 1966, 993 UNTS 3
7.	Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1 March 1980, 1249 UNTS 13, Can TS 1982 No 31 (Entered into force September 3, 1981, ratification by Canada December 10, 1981)
8.	ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, 68 U.N.T.S. 17

9.	Article 2 of the <i>Convention on the Elimination of All Forms of Discrimination Against Women</i> , 1 March 1980, 1249 UNTS 13, Can TS 1982 No 31 (Entered into force September 3, 1981, ratification by Canada December 10, 1981)
10.	ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize , 68 U.N.T.S. 17
11.	International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (Geneva, ILO, 2022), online: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf
12.	ILO, Decent Work, online: https://www.ilo.org/global/topics/decent-work/lang-en/index.htm
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14.	Jane Pillinger, Verena Schmidt, & Nora Wintour. Negotiating for gender equality. (Geneva: ILO, 2016), online: https://www.ilo.org/global/topics/collective-bargaining-labour-relations/publications/WCMS_528947/lang-en/index.htm
15.	International Labour Organization, 8. Freedom of Association and Collective Bargaining, online: International Labour Organization < https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang-en/index.htm
16.	Shauna L. Olney, Elisabeth Goodson, Kathini Maloba-Caines, & Faith O’Neill. Gender Equality: a Guide to Collective Bargaining. (Geneva: ILO, 1998), online: < https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_113700.pdf

SCHEDULE “B”

Protecting a Sustainable Public Sector for Future Generations Act, 2019, S.O. 2019, c. 12 – Bill 124

Canadian Charter of Rights and Freedoms

Rights and freedoms in Canada

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

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Multicultural heritage

27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Égalité de garantie des droits pour les deux sexes

28 Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes

**ONTARIO ENGLISH CATHOLIC
TEACHERS ASSOCIATION, ET AL.**

Respondents

- and

**HIS MAJESTY THE KING IN
RIGHT OF ONTARIO, ET AL**

Appellant

Court File No.: COA-23-CV-0010

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **TORONTO**

**FACTUM OF THE INTERVENER,
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