IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Teachers' Federation v. British Columbia,* 2014 BCSC 121

Date: 20140127
Docket: L021662
Registry: Vancouver

Between:

British Columbia Teachers' Federation and David Chudnosky, on his own behalf, and on behalf of all Members of the British Columbia Teacher's Federation

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia

Defendant

- and -

Docket: Vancouver
Registry: S124584

Between:

British Columbia Teachers' Federation on behalf of all Members of the British Columbia Teachers' Federation

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

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Place and Date of Trial:	Vancouver, B.C. September 9-13, 16-20, 23-26, 2013 November 18-22, 2013
Post-Trial Application:	January 13, 2014
Place and Date of Judgment:	Vancouver, B.C. January 27, 2014

Summary

The hearing before this Court follows on the Court's declaration on April 13, 2011 that legislation interfering with teachers' collective bargaining rights was unconstitutional as a breach of s. 2(d) of the Canadian Charter of Rights and Freedoms, which guarantees freedom of association.

The legislation at issue deleted collective agreement terms and prohibited collective bargaining having to do with a range of working conditions, many having to do with class size and composition and the number of supports provided in classes to students with special needs.

The freedom of workers to associate has long been recognized internationally and in Canada as an important aspect of a fair and democratic society. Collective action by workers helps protect individuals from unfairness in one of the most fundamental aspects of their lives, their employment.

Normally the result after legislation is determined by a court to be unconstitutional is that it is struck down. This is part of Canada's democratic structure, which requires that governments must act legally, within the supreme law of the country, the Constitution.

Here this result was suspended for twelve months to give the government time to address the repercussions of the decision.

The government did not appeal.

After the twelve months expired, the government enacted virtually identical legislation in Bill 22, with the duplicative provisions coming into force on April 14, 2012.

The over-arching question, then, is whether there is something new that makes the new legislation constitutional when the previous legislation was not.

The government argues there are two new facts that make the new legislation constitutional.

First, the government argues that its "good faith consultation" with the union after the first court decision declaring legislation to be unconstitutional, essentially immunized the

subsequent duplicative legislation from a similar constitutional challenge. This Court concludes otherwise. The government discussions with the union did not cure the unconstitutionality of the legislation.

The Court has concluded that the government did not negotiate in good faith with the union after the Bill 28 Decision. One of the problems was that the government representatives were pre-occupied by another strategy. Their strategy was to put such pressure on the union that it would provoke a strike by the union. The government representatives thought this would give government the opportunity to gain political support for imposing legislation on the union.

The second argument by the government is that the new legislation has a critical difference from the otherwise identical legislation found to be unconstitutional, and that is that one of the two branches of the legislation was time limited.

There were two branches to the Bill 28 legislation previously declared unconstitutional. One was a deletion of existing terms in the collective agreement and a prohibition on including terms in the collective agreement in the future regarding these working conditions. The second was a prohibition on collective bargaining over certain working conditions.

The government argues that there is a crucial difference between the Bill 22 package of legislation and the earlier legislation declared unconstitutional, in that in Bill 22 it temporally limited the second branch of the legislation: the continued prohibition on collective bargaining about the working conditions terms was extended until the end of June 2013 and then repealed.

However, in Bill 22 the government re-enacted legislation identical to that first branch of what was previously declared unconstitutional, namely, the deletion and prohibition of hundreds of collective agreement terms on working conditions.

The Court concludes that there is no basis for distinguishing the new legislation from the previous findings of this Court. The new duplicative legislation substantially interferes with the s. 2(d) Charter rights of teachers, which protects their freedom to associate to make representations to their employer and have the employer consider them in good faith.

As a result, the Court finds the duplicative legislation in Bill 22 to be unconstitutional, namely s. 8, part of s. 13, and s. 24, set out in Appendix A. The unconstitutional provisions that have not already expired, ss. 8 and 24, are struck down.

When legislation is struck down as unconstitutional, it means it was never valid, from the date of its enactment. This means that the legislatively deleted terms in the teachers' collective agreement have been restored retroactively and can also be the subject of future bargaining.

Striking down the unconstitutional legislation will have implications for teachers and their employers but both sides will have interests in resolving these implications through collective bargaining and the tools already existing to resolve labour disputes.

The Court has also concluded that it is appropriate and just to award damages against the government pursuant to s. 24(1) of the Charter. This is in order to provide an effective remedy in relation to the government's unlawful action in extending the unconstitutional prohibitions on collective bargaining to the end of June 2013. The government must pay the BCTF damages of $2 million.

The BCTF has also challenged other action taken by the government since the Bill 28 Decision: the government's conduct in issuing Mandate 2010 to the employers' association for collective bargaining, commonly known as the net zero mandate; the government's legislation appointing a mediator with a narrow mandate at the end of the 2011-2012 round of collective bargaining, Mr. Charles Jago; and two regulations enacted by the government, the Learning Improvement Fund Regulation, and the Class Size and Compensation Regulation.

The Court concludes that none of this other challenged government conduct was unconstitutional. The government has a role and responsibility in respect of the education system that entitles it to establish some fiscal and policy parameters around the collective bargaining between the teachers' employee association, the BCTF, and that of the employers' association, BCPSEA, so long as there can still be room for movement within those parameters.

Cases Cited:

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 3

Association of Justice Counsel v. Canada (Attorney General), 2012 ONCA 530

Authorson v. Canada (Attorney General), 2003 SCC 39

Babcock v. Canada (Attorney General), 2002 SCC 57

British Columbia Teachers' Federation v. British Columbia, 2011 BCSC 469

British Columbia Teachers' Federation v. British Columbia, 2011 BCSC 1372

British Columbia Teachers' Federation v. British Columbia, 2012 BCSC 2090

British Columbia Teachers' Federation v. British Columbia, 2013 BCSC 1216

British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn. (Class Size and Composition Grievance), [2010] B.C.C.A.A.A. No. 1

British Columbia Teachers' Federation v. British Columbia Public School Employers' Association, 2004 BCSC 86

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson), [1996] 3 S.C.R. 480

Canadian Union of Public Employees v. Nova Scotia (Labour Relations Board), [1983] 2 S.C.R. 311

Carey v. Ontario, [1986] 2 S.C.R. 637

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835

Dunmore v. Ontario (Attorney General), 2001 SCC 94

Federal Government Dockyard Trades and Labour Council v. The Attorney General, 2011 BCSC 1210, aff'd 2013 BCCA 371

Gardner v. Williams Lake (City), 2006 BCCA 307

Halvorson v. British Columbia (Medical Services Commission), 2003 BCCA 264

Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia, 2002 BCSC 1509

Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27

Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources), 2013 BCCA 412

Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, 2002 SCC 13

Meredith v. Canada (Attorney General), 2013 FCA 112

Mounted Police Association of Ontario v. Canada (Attorney General), 2012 ONCA 363

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54

Norton v. Shelby County (1896), 118 U.S. 425 at 442

Ontario (Attorney General) v. Fraser, 2011 SCC 20

R. v. Demers, 2004 SCC 46

R. v. Ferguson, 2008 SCC 6

R. v. Mentuck, 2001 SCC 76

Royal Oak Mines Inc. v. Canada (Labour Relations Board), [1996] 1 S.C.R. 369

Schachter v. Canada, [1992] 2 S.C.R. 679

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41

Vancouver (City) v. Ward, 2010 SCC 27

Statutes and Regulations Cited:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Class Size and Compensation Regulation, B.C. Reg 52/2012

Education and Health Collective Bargaining Assistance Act, S.B.C. 1996, c. 1

Education Improvement Act, S.B.C. 2012, c. 3

Education (Leaning Enhancement) Statutes Amendment Act, 2006, S.B.C. 2006, c. 21

Education Services Collective Agreement Amendment Act, 2004, S.B.C. 2004, c. 16

Education Services Collective Agreement Act, S.B.C. 2002, c. 1

Industrial Relations Act, R.S.B.C. 1979, c. 212

Labour Relations Code, R.S.B.C. 1996, c. 244

Learning Improvement Fund Regulation, B.C. Reg. 103/2012

Public Education Collective Agreement Act, S.B.C. 1998, c. 41

Public Education Flexibility and Choice Act, S.B.C. 2002, c. 3

Public Education Labour Relations Act, S.B.C. 1994, c. 21 (now R.S.B.C. 1996, c. 382)

Public Sector Employers Act, S.B.C. 1993, c. 65 (now R.S.B.C. 1996, c. 384)

School Act, R.S.B.C. 1996. c. 412

Skills Development and Labour Statutes Amendment Act, 2001, S.B.C. 2001, c. 33

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Background

[1] On April 13, 2011, this Court concluded that the defendant Province of British Columbia (the "government") had infringed teachers' freedom of association guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. The decision is indexed at 2011 BCSC 469 (the "Bill 28 Decision"). This is a companion judgment and the two must be read together.

[2] The Bill 28 Decision concluded at paras. 306-308 that the government had infringed teachers' s. 2(d) *Charter* rights by enacting legislation in 2002 which substantially interfered with teachers' collective bargaining in two ways:

a) firstly, it voided hundreds of terms of a collective agreement which had previously been negotiated dealing with various Working Conditions, which in short-hand can be understood as class size and class composition conditions[1], and,

b) secondly, it prohibited collective bargaining over the same subject matters in the future. [2]

[3] The legislation at issue was similar in effect to legislation that had been introduced at the same time affecting unions in the health sector.

[4] In 2007, the Supreme Court of Canada's judgment in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 [*Health Services*], found the similar legislation in the health sector to be

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[1] This aspect of the legislation found unconstitutional in the Bill 28 Action was s. 5 of the *Education Services Collective Agreement Amendment Act, 2004*, S.B.C. 2004, c. 16 [*Amendment Act*] which worked together with s. 1 to delete terms of the parties' collective agreement retroactive to July 1, 2002; following the Bill 28 Decision this was repealed and then reinstated in 2012 by ss. 8, 9 and 24 of Bill 22, the *Education Improvement Act*, S.B.C. 2012, c. 3 [*EIA*].

[2] This aspect of the legislation found unconstitutional in the Bill 28 Action was s. 8 of *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 [*PEFCA*]. which amended s. 27(3)(d) to (j) of the *School Act* to prohibit collective bargaining on certain Working Conditions; following the Bill 28 Decision this was repealed and then reinstated in 2012 by s. 13 of Bill 22, the *Education Improvement Act*, but it provided that the reinstated bargaining prohibition would be repealed on June 30, 2013, pursuant to new s. 27(7) of the *School Act*.

unconstitutional as it violated the s. 2(d) *Charter* guarantee of freedom of association and was not justified under s. 1 of the *Charter*.

[5] The legislation in *Health Services*, like the Bill 28 legislation, voided numerous terms of collective agreements that had been negotiated in the past and it prohibited collective bargaining on the same subject matters in the future. Also, the legislation had been enacted without consultation with the affected unions.

[6] The Bill 28 Decision further held that the infringement on the teachers' freedom of association was not a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter* (at para. 381).

[7] As a result, this Court declared the infringing legislation to be unconstitutional and invalid. However, the declaration of the invalidity was suspended for a period of twelve months to allow the government time to address the repercussions of the decision (at para. 382).

[8] No appeal was taken.

[9] While there were different pieces of legislation at issue, the primary pieces of legislation were contained in Bill 28. By way of shorthand, I will refer collectively to the legislation declared unconstitutional as Bill 28, that proceeding, number L021662, as the "Bill 28 Action" and as noted, the judgment as the "Bill 28 Decision".

[10] In the Bill 28 Decision I also held that the plaintiff, the British Columbia Teachers' Federation ("BCTF"), had reserved the right to argue any additional remedies and that they could seek a further hearing in this regard.

[11] Following the Bill 28 Decision the parties had some discussions but did not reach a settlement of outstanding issues between them.

[12] A day after the year following the Bill 28 Decision had passed, on April 14, 2012, the Province of British Columbia then enacted new legislation, the *Education Improvement Act*, S.B.C. 2012, c. 3 [*EIA*], also known as "Bill 22". This legislation stated that it repealed the legislation which had been declared unconstitutional in the

Bill 28 Decision. But at the same time Bill 22 also then immediately re-enacted the previously declared unconstitutional provisions in essentially identical terms, with one change:

a) the government again voided the same terms of the parties' collective agreement, again retroactive to July 1, 2002[3]; and,

b) the government again prohibited the parties' from negotiating the subject matter of those terms in collective bargaining. However, the one change was that the prohibition on collective bargaining was time limited, and would expire by June 30, 2013[4].

[the "Bill 22 Duplicative Provisions", set out in Appendix A]

[13] Also, previous legislation having to do with prohibiting collective agreement terms on school calendaring and hours of work, which had been found unconstitutional in the Bill 28 Action, was repealed and not repeated in the new legislation. No issue is taken with the fact that it is therefore no longer in force[5].

[14] It is obvious that since this Court found in the Bill 28 Decision that Bill 28 substantially interfered with the s. 2(d) freedom of association rights of teachers, that to the extent Bill 22 simply duplicates the unconstitutional legislation, it too substantially interferes with s. 2(d) rights unless there are new circumstances.

[15] The government says that the new legislation is not unconstitutional, despite it duplicating the earlier legislation found to be unconstitutional. It advances two reasons:

a) First, it says that the discussions it had with the BCTF following the Bill 28 Decision and before enacting the new legislation amount to consultation in good faith with the BCTF. It argues that this means that

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[3] Sections 8 and 24 of the *EIA* which essentially re-enacted the provisions of s. 5 of the *Amendment Act*.
[4] Section 13 of the *EIA* which essentially re-enacted the provisions of s. 8 of *PEFCA* by re-enacting s. 27(3)(d) to (j) of the *School Act*.
[5] The legislation in the Bill 28 Action at issue was s. 15 of *PEFCA*, which had added s. 78.1 to the *School Act*; this was repealed by s. 17 of the *EIA*.

any subsequent legislative interference with collective bargaining is not a substantial interference and so is not unconstitutional.

b) Second, it relies on the time-limited nature of the duplicative prohibition on collective bargaining. It argues that since the BCTF would regain the right to collectively bargain on the subject matter of the legislation after June 30, 2013, neither the duplicative legislative restriction on bargaining nor the duplicative legislative deletion of collective bargaining terms can be said to substantially interfere with the process-based right of freedom of association.

[16] The BCTF has now brought an application in the Bill 28 Action for additional remedies flowing from the Bill 28 Decision, namely, damages. It also seeks orders striking down the Bill 22 Duplicative Provisions.

[17] As well, the BCTF have commenced a new action, challenging the constitutionality of the Bill 22 legislation, Action Number S124584 (the "Bill 22 Action"). This is in response to the government's position that the Bill 22 legislation cannot be challenged in the Bill 28 Action.

[18] In addition, in the Bill 22 Action, the teachers' union challenges other government conduct as unconstitutional. This other government conduct can be divided into three categories:

a) the enactment of two regulations at the same time as Bill 22 (and the corresponding enabling legislation in Bill 22), namely:

i. the Learning Improvement Fund Regulation of the Minister of Education, Ministerial Order Number M077[6] ("LIF Regulation");

ii. the Class Size and Compensation Regulation of the Minister of Education, Ministerial Order Number M078[7] ("Class Size Compensation Regulation");

[6] *Learning Improvement Fund Regulation*, B.C. Reg. 103/2012, established pursuant to ss. 18, 19 of the *EIA*.

b) government conduct in issuing the collective bargaining mandate to the Public Sector Employers' Council ("PSEC"), entitled "Employers Guide to Mandate 2010" ("Mandate 2010"); and,

c) the enactment of s. 6 of Bill 22 which provided for the appointment of a government mediator to settle the terms of a new collective agreement within legislated terms of reference.

[19] As part of Bill 22, s. 18 of the *EIA* enacted a new provision of the *School Act*, R.S.B.C. 1996. c. 412 [*School Act*], s. 115.2, dealing with a new "learning improvement fund" ("LIF") by which grants can be made from the Minister of Education to school boards to enable them to "address learning improvement issues". The LIF Regulation deals with allocation of the fund.

[20] Section 14 of the *EIA* amended s. 76.1 of the *School Act* to provide for maximum class sizes of 30 students for grades 4 to 12, subject to exceptions; and or additional compensation to teachers where the class size is exceeded. By s. 22 of the *EIA*, the Minister was permitted to make regulations respecting class sizes and compensation in respect of class sizes. The Class Size Compensation Regulation followed. In short, it sets out the exceptions to the class size limits, and provides a formula for payments to eligible teachers where class sizes exceed the legislated size of 30 students.

[21] The BCTF says that both regulations are designed to diminish the union's role as an association advancing the Working Conditions of teachers.

[22] I pause to note that the government does not argue that either of the above regulations ameliorate the Bill 22 Duplicative Provisions interference with collective bargaining rights or provide a substitute for collective bargaining. However, in answer to the BCTF challenge to these regulations, it asserts that the regulations do not interfere with collective bargaining rights.

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[7] Class Size and Compensation Regulation, B.C. Reg 52/2012; also challenged is its enabling legislation, s. 14(c) of the *EIA*, which resulted in changes to s. 76.1(2.1) to (2.4) of the *School Act*.

[23] In summary the challenged provisions of Bill 22, the *EIA*, are: ss. 6, 8, 13, 14(c), 18, 19, 21, 22 and 24.

[24] Further or in the alternative the BCTF seeks a sizeable award of damages.

[25] Some procedural and substantive issues arose as to in which proceeding the court ought to consider the government conduct in the year after the Bill 28 Decision and in enacting Bill 22 and issuing Mandate 2010. I will address these miscellaneous issues toward the end of the judgment.

[26] At times in discussing the s. 2(d) *Charter* right generally and the parties' arguments, I have used the term "collective bargaining" as a short form only. I recognize that the protection of s. 2(d) does not require the state to respect exclusively a traditional model of collective bargaining, referred to as the "Wagner" model.[8] The Court in *Ontario (Attorney General) v. Fraser,* 2011 SCC 20 [*Fraser*], slightly changed the nomenclature regarding the s. 2(d) right from a collective bargaining right, as sometimes described in *Health Services*, to a right more generally described as the protection of "associational collective activity in furtherance of workplace goals" (at para. 38). The latter is what is meant in this judgment when collective bargaining rights are mentioned.

[27] Nevertheless, it is part of the factual context of this case that the model of employee associational activity which is in place in British Columbia and applies as between the members of the BCTF and their employers is a traditional collective bargaining model.

Issues

[28] I will address the issues in the following order:

1. What is the legal relevance of government consultation in the analysis of the s. 2(d) *Charter* protection of freedom of association?

[8] For a helpful description of the Wagner model see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2012 ONCA 363 at paras. 23-29.

2. What are the facts regarding the nature of the parties' discussions post-the Bill 28 Decision and prior to the enactment of Bill 22?

3. Did the parties' discussions post-the Bill 28 Decision, and prior to the enactment of Bill 22, save the Bill 22 Duplicative Provisions?

4. Does the time limit on the collective bargaining prohibition in Bill 22 change the analysis of the constitutionality of either of the Bill 22 Duplicative Provisions?

5. Does s. 1 of the *Charter* apply to save the Bill 22 Duplicative Provisions from a finding of unconstitutionality?

6. Are either or both of the two regulations unconstitutional?

    a. The Learning Improvement Fund Regulation;

    b. The Class Size and Compensation Regulation;

7. Is the government's directive to public sector employers contained in Mandate 2010 unconstitutional?

8. Is s. 6 of the *EIA*, which provided for the appointment of a mediator to settle the terms of a collective agreement within legislated terms of reference, unconstitutional?

9. What remedies are the plaintiff's entitled to, if at all, in the two actions?

10. Miscellaneous issues.

[29] As in the Bill 28 Action, the question of what is sound educational policy is not a question for this Court's determination.

[30] Also it is important to note that the government does not argue that it passed Bill 22 in any urgent or exigent circumstances.

Glossary and Chronology and Cast of Characters

[31] For ease of reference, the following terms are used in this judgment for the following meanings:

AIC	April 17, 1998, Agreement in Committee reached between the BCTF and the government but rejected by BCPSEA. It included the K-3 Memorandum. This agreement was implemented by the *Public Education Collective Agreement Act*, S.B.C. 1998, c. 41, for a three year term (1998-2001).
Amendment Act	The *Education Services Collective Agreement Amendment Act, 2004*, S.B.C. 2004, c.16, enacted April 2004.
BCPSEA	British Columbia Public School Employers' Association.
BCTF	British Columbia Teachers' Federation, the plaintiff.
Bill 22	*Education Improvement Act*, S.B.C. 2012, c. 3 [*EIA*], enacted March 17, 2012.
Bill 22 Duplicative Provisions	*Education Improvement Act*, ss. 8, 13, and 24, and set out in Appendix A.
Bill 27	The *Education Services Collective Agreement Act*, S.B.C. 2002, c. 1 [*ESCAA*], enacted January 2002.
Bill 28	The *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 [*PEFCA*], enacted January 2002.
Class Size Compensation Regulation	*Class Size and Compensation Regulation*, B.C. Reg 52/2012.
COF	Proposed "Class Organization Fund"
EIA	*Education Improvement Act*, S.B.C. 2012, c. 3, Bill 22.
ESCAA	*Education Services Collective Agreement Act*, S.B.C. 2002, c. 1, Bill 27.
K-3 Memorandum	Memorandum of Agreement governing class sizes for kindergarten to Grade 3 class sizes, originally negotiated between BCTF and the government, as part of the AIC in April 1988. An amended K-3 Memorandum of Agreement was negotiated between BCTF and BCPSEA on February 7, 2001. It was incorporated into the 1998-2001 Collective Agreement.
LIF	"Learning Improvement Fund", enacted via s. 18 of the *EIA*, creating s. 115.2 of the *School Act*.
LIF Regulation	*Learning Improvement Fund Regulation*, B.C. Reg. 103/2012.
PEFCA	*Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3, Bill 28.

PELRA	*Public Education Labour Relations Act*, S.B.C. 1994, c. 21 (now R.S.B.C. 1996, c. 382) enacted on June 10, 1994, designating BCPSEA as the employers' association and BCTF as the teachers' bargaining agent.
PSEA	*Public Sector Employers Act*, S.B.C. 1993, c. 65 (now R.S.B.C. 1996, c. 384), enacted on July 27, 1993.
PSEC	Public Sector Employers' Council established under the *PSEA.*
School Act	*School Act*, R.S.B.C. 1996, c. 412
Working Conditions	Class size, class composition (the number of students with special needs integrated per class), ratios of non-enrolling teachers to students (teachers not assigned to classrooms, such as librarians, counsellors and special education teachers), and teacher workload.

[32] As well, the following is a very brief chronology of relevant events for context, starting with some points in the chronology set out in the Bill 28 Decision, but expanded after April 2004:

1987	Through amendments to the *Industrial Relations Act,* R.S.B.C. 1979, c. 212, and the *School Act*, teachers for the first time gained the right to engage in collective bargaining.
1987-1993	First period of collective bargaining between local teachers' unions (called associations) and school boards. Several collective agreements were reached during this time period.
1993	The Report of the Korbin Commission was released, recommending changes to the structure of the public sector.
1993	The *PSEA* was enacted. It established the PSEC. It mandated that employers' associations be established for six public sector employers. Soon thereafter, BCPSEA was formed as the employers' association for public schools.
June 10, 1994	*PELRA* was enacted, designating BCPSEA as the employers' association for school boards and as bargaining agent. BCTF was designated as the bargaining agent for public school teachers.
April 28, 1996	The *Education and Health Collective Bargaining Assistance Act*, S.B.C. 1996, c. 1, came into effect. This allowed for means by which a mediator could impose a collective agreement on the parties.

June 17, 1996	BCPSEA and BCTF concluded the Transitional Collective Agreement in May 1996, with an effective date of June 17, 1996, and expiring on June 30, 1998. It rolled over existing language in the 1993-1994 previous local collective agreements.
1998	At the invitation of the parties, the government became involved in collective bargaining between BCTF and BCPSEA. Ultimately the government negotiated directly with BCTF.
April 17, 1998	The government and BCTF reached an Agreement in Committee ("AIC") including a K-3 Memorandum of Agreement. It provided for a rollover of other terms of previous local agreements bargained during 1988-1994. BCPSEA members voted to reject the AIC.
May 4, 1998	BCPSEA, BCTF and the government sign Article A.1, agreeing to continue all of the provisions of the Transitional Collective Agreement, unless amended or modified.
June 30, 1998	The Transitional Collective Agreement expired.
July 1, 1998	The *Public Education Collective Agreement Act* was enacted, imposing a collective agreement on the parties. The collective agreement carried forward the terms of the Transitional Collective Agreement, as well as the terms of the AIC and the K-3 Memorandum, for the term July 1, 1998 to June 30, 2001.
June 1999	BCPSEA and BCTF signed LOU #3, adding certain common provincial language in the 1998-2001 Collective Agreement dealing with non-enrolling / ESL ratios.
June 2000	BCPSEA and BCTF signed LOU #5 revising the ESL ratios in the collective agreement.
February 2001	BCPSEA and BCTF signed the 2001 K-3 Memorandum incorporating class size provisions for these grades into the 1998-2001 Collective Agreement.
May 10, 2001	A new provincial government was elected.
August 16, 2001	The *Skills Development and Labour Statutes Amendment Act, 2001*, S.B.C. 2001, c. 33, was enacted to amend the *Labour Relations Code*, R.S.B.C. 1996, c. 244, to include education as an essential service.
2001	Period of collective bargaining between BCTF and BCPSEA. BCPSEA was also consulting with new government on potential legislative changes that could reduce the scope of collective bargaining. BCTF was not consulted about the potential legislation.
January 27, 2002	Bill 27, *ESCAA*, was enacted.
January 28, 2002	Bill 28, *PEFCA*, was enacted.
May 30, 2002	BCTF filed this proceeding [L021662] alleging that teachers' *Charter*-protected rights had been violated with the passage of Bill 27 and Bill 28.

August 30, 2002	Arbitrator issued his decision deleting extensive provisions in the collective agreement, pursuant to s. 27.1 of the *School Act*, which was added by s. 9 of *PEFCA*.
January 22, 2004	Shaw J. quashed the arbitrator's decision, in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2004 BCSC 86.
April 29, 2004	The *Amendment Act* was enacted. It effectively restored the arbitrator's decision by deleting all sections of the collective agreement that had been deleted by the arbitrator.
2009	The government developed a mandate which it gave public sector bargaining agents, known as Mandate 2010. One aspect of Mandate 2010 was known as the "net zero mandate": public sector employers were not to agree to any changes to collective agreements that would result in a net increase in costs to government.
March 2011	A round of collective bargaining commences between BCPSEA and BCTF. Mandate 2010 applied. The government had an additional mandate that it asked BCPSEA to achieve in bargaining, seeking concessions from BCTF in favour of greater management rights.
April 13, 2011	The Bill 28 Decision is rendered. It declares ss. 8 and 15 of *PEFCA* and s. 5 of the *Amendment Act* unconstitutional and invalid but suspends the declaration of invalidity for twelve months to allow the government time to address the repercussions of the decision.
May-Nov 2011	The government conducts discussions with the BCTF about the repercussions of Bill 28. Paul Straszak leads for the government and Susan Lambert for the BCTF.
September 2011	Collective bargaining continues. Teachers commence partial job action, withdrawing some non-essential services.
February 28, 2012	Bill 22, the *Education Improvement Act*, introduced in the legislature.
March 15, 2012	Bill 22 is enacted. However, certain sections at issue in the present Bill 22 Action are not brought into force until April 14, 2012.
March 28, 2012	The government appoints a mediator, Dr. Charles Jago, in respect of the BCTF-BCPSEA collective bargaining. The mediator's terms are legislatively limited by s. 6(1) of Bill 22.
April 14, 2012	The Learning Improvement Act Regulation is brought into force.
June 26, 2012	The BCTF and BCPSEA sign a Memorandum of Agreement re changes to the 2006-2011 collective agreement, which Dr. Jago as mediator forwards to the Minister of Education. This is ratified by BCTF members on June 29, 2012.
July 1, 2012	The Class Size and Compensation Regulation is brought into force.

[33] In the present hearing the parties filed affidavit evidence in the Bill 28 Action, but also called evidence in the Bill 22 Action dealing with much of the same subject matter. They conceded that for the most part the oral evidence had overtaken the affidavit evidence. However, the plaintiff does continue to rely on two affidavits in the Bill 28 Action: the Affidavit #2 of Brian Porter sworn May 5, 2010; and the Affidavit #1 of Colleen Hawkey sworn February 5, 2010.

[34] The following is a list of the witnesses whose evidence was led at the hearing of the present proceeding, and that person's role at the relevant time:

Avison, Claire	Assistant Deputy Minister, Ministry of Education (June 2011 - present), and Ministry Representative in post-Bill 28 discussions
Davis, Rick	Superintendent, Achievement Division, Ministry of Education (2007 - present), Member of Executive Council, Ministry of Education (2007 - present)
Drescher, Peter	Educational Consultant (2010 - present), Deputy Superintendent of the Surrey School District (2001 - 2010)
Foster, Doug	Executive Director of Strategic Initiatives, Ministry of Finance (2004 - 2012)
Gorman, James	Deputy Minister of Education (January 2008 - June 2013)
Hawkey, Colleen	Project Director of Edudata Canada, Senior Researcher for the BCTF (2003 - 2007)
Lambert, Susan	President of the BCTF (July 1, 2010 - June 30, 2013)
Porter, Brian	Administrative Staff Member (term appointment) of the BCTF (September 2007 - present), Administrative Staff Member of the BCTF and member of BCTF Bargaining Team (1990 - 2006)
Strasnak, Paul	CEO of PSEC, Ministry of Public Safety and Solicitor General (June 2009 - September 2012), led government side in post-Bill 28 discussions with BCTF
Zacharuk, Christina	Executive Director of Public Sector Bargaining and Compensation, Public Service Employers' Counsel, Ministry of Public Safety and Solicitor General (2008 - February 2012)

Issue 1: What is the Legal Relevance of Government Consultation in the Analysis of s. 2(d) *Charter* Protection of Freedom of Association?

[35] The government submits that pre-legislative consultation is a factor for the court to consider in determining whether or not the Bill 22 Duplicative Provisions are a substantial interference with the collective bargaining freedom of association protected by s. 2(d) of the *Charter*. Since it argues that it consulted with the BCTF prior to Bill 22, it argues that the Bill 22 Duplicative Provisions are not unconstitutional even though the legislation repeats the terms of Bill 28 that were found to be unconstitutional.

[36] The BCTF argues that pre-legislative consultation can never immunize otherwise unconstitutional legislation from being found to be a violation of *Charter* rights.

[37] The BCTF does acknowledge that pre-legislation consultation may be relevant to the analysis under s. 1 of the *Charter* as to whether or not the legislation amounts to minimal impairment of the right. It says that does not apply here when the Court already found that the virtually identical legislation in Bill 28 was not minimal impairment.

[38] To analyze this issue on the legal relevance of consultation it is necessary to turn to the Supreme Court of Canada's decisions in *Health Services* and *Fraser*.

The *Health Services* Decision

[39] In 2002, the provincial government of British Columbia passed Bills 27, 28 and 29 affecting public sector unionized workers and their collective agreements. Bills 27 and 28 are the Bills affecting the teachers, and the subject of the Bill 28 Decision.

[40] The legislation was two-pronged:

a) first, the legislation invalidated existing terms of collective agreements; and,

b) second, the legislation prohibited including any terms in future collective agreements dealing with the same subject matters.

[41] Bill 29 affected several unions in the health sector. Those unions challenged the legislation as unconstitutional because it infringed their members' rights to freedom of association protected by s. 2(d) of the *Charter*. The unions' challenge to the legislation ultimately succeeded in the landmark decision of the Supreme Court of Canada in *Health Services*.

[42] In *Health Services* the Court asked the question of whether the *Charter* s. 2(d) guarantee of freedom of association "extends to the right of employees to join together in a union to negotiate with employers on workplace issues or terms of employment -- a process described broadly as collective bargaining" (at para. 38). The question was answered affirmatively, at para. 86:

> We conclude that the protection of collective bargaining under s. 2(*d*) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.

[43] In *Health Services* the Supreme Court of Canada reviewed the history of collective bargaining rights in Canada and internationally.

[44] As reviewed in *Health Services* at paras. 45-53, workers' attempts to organize in order to improve their working conditions date back to the late Middle Ages in England, and to the fur trade in Canada. In the 18th and 19th centuries, laws were passed to criminalize workers organizations as being in restraint of trade or part of a criminal conspiracy. When more workers were given the right to vote through suffrage reforms, the laws gradually began to change. In Canada, a strike by typographers in Toronto in 1872, calling for a nine-hour work day, led to arrests and criminal charges. The public concern about this led to legislative reform, de-criminalizing union efforts to improve workers' conditions of employment.

[45] Over time the protection of workers' rights to associate to influence working conditions has been seen as enhancing democracy. As quoted in *Health Services* at para. 57:

> …scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy, ... the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."
>
> ([Karl E. Klare,] "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978), 62 Minn. L. Rev. 265, at pp. 281-84)

[46] As explained in *Health Services*, when the *Charter* was enacted by Parliament in 1982, the concept of freedom of association encompassing collective bargaining had a long tradition in Canada (at para. 64-65). Collective bargaining was seen as fulfilling an important social purpose, by providing a means to promote the common well-being. Collective bargaining is a means of providing equality in the workplace, diminishing the arbitrary power of the employer and allowing workers a means to protect themselves from unfair or unsafe work conditions (at para. 84).

[47] In *Health Services*, some of the collective agreement terms that were invalidated and the subject matters that were prohibited from future collective agreements due to the challenged legislation, had to do with contracting out, layoffs, and bumping (or seniority rights). The Supreme Court of Canada found that this constituted "substantial interference" with the workers' s. 2(d) right of freedom of association.

[48] Further the Supreme Court of Canada in *Health Services* found that some other terms invalidated by the legislation, relating to transfers and reassignments, were "relatively minor" (para. 131) and were replaced with legislation containing similar employee protections (para. 118). The legislative override of these terms was found not to be "substantial interference" with the unions' ability to engage in collective bargaining.

[49] The Court in *Health Services* acknowledged that actions by the government which can be challenged as violating the right to collective bargaining can either be

actions as employer of public sector employees; or actions as legislator in enacting legislation. It noted that the conduct at issue in the case was legislative, not that the government violated s. 2(d) as employer (at para. 88).

[50] The fact that the government was not the employer in *Health Services* was one reason that some of the legislation was found not to be an interference with collective bargaining. Legislation which abolished government programs was not unconstitutional because the government was not the employer, and so these programs were outside of the collective bargaining process (at para. 125).

[51] Nevertheless, the Court in *Health Services* set out the general legal principles which would apply to both types of government conduct, as employer or as legislator. At para. 89 the Court held:

> …the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.
>
> [Emphasis added.]

[52] The Court developed a two-step inquiry for determining whether or not government conduct (whether legislative conduct or conduct as employer) constituted substantial interference with the s. 2(d) *Charter* protection. The first step required consideration of the importance of the matter to the collective activity, and the second step required consideration of the "manner" or "process" in which the government measure was taken.

[53] With respect to the second step, the Court in *Health Services* said this:

a) if the changes touch on collective bargaining but "preserve a process of consultation and good faith negotiation" then s. 2(d) will not be violated (at paras. 93-94);

b) this second inquiry asks "does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining -- the duty to consult and negotiate in good faith?" (para. 97);

c) if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining (para. 129);

d) one is to consider "the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(*d*). … Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached" (para. 109).

[54] Again, the above statements of the second inquiry in *Health Services* were meant to generally apply to all types of government conduct, legislative and as employer.

[55] One can easily understand how government as employer must engage in a process that respects the fundamental precept of collective bargaining, if as employer it takes steps that interfere with collective bargaining but wants to argue that it did not violate s. 2(d) rights. But by stating the test this way for all types of government conduct, the Court in *Health Services* raised the possibility that pre-legislative consultation might be relevant in determining whether subsequent legislation itself substantially interferes with collective bargaining.

[56] It is unclear exactly what type of hypothetical situation the Court in *Health Services* had in mind, as noted by one commentator:

> The Court is not clear whether this "saving" effect of good faith consultation follows because it would inevitably lead to inoffensive legislation, or because it would effectively take the place of collective bargaining between employer and employee. The latter is, of course, a much more plausible idea where the employer is the government and not a private sector party.
>
> Peter Carver, "Comparing Aboriginal and Other Duties to Consult in Canadian Law" (2012) 49 Alta. L. Rev. 855 at 871.

[57] However once the statement of general principles was behind the Court, and when it came to the actual analysis of the government conduct at issue, which was legislative and not as employer, the majority decision in *Health Services* did not refer to any pre-legislative consultation process or lack thereof. Rather, the Court framed the second inquiry question as a consideration of the content or impact of the legislation: see paras. 132-136. The Court examined whether the content of the legislation itself preserved "the process of good faith bargaining and consultation" (at para. 133). This was stated as "exclusively" the focus (para. 133). It was also described earlier as "the bottom line" (at para. 107; see also paras. 113-115).

[58] After examining the content of the legislation, the Court in *Health Services* found that the legislation constituted a "virtual denial of the s. 2(d) right to a process of good faith bargaining and consultation" (para. 135). It was by focussing exclusively on the provisions themselves that the Court was able to reach this conclusion, and not by considering the process leading to the legislation. The Court held at paras.132-133, 135-136:

> Having concluded that the subject matter of ss. 6(2), 6(4) and 9 of the Act is of central importance to the unions and their ability to carry on collective bargaining, we must now consider whether those provisions preserve the processes of collective bargaining. Together, these two inquiries will permit us to assess whether the law at issue here constitutes significant interference with the collective aspect of freedom of association, which *Dunmore* recognized.
>
> This inquiry refocuses our attention squarely and exclusively on how the provisions affect the process of good faith bargaining and consultation. In this case, we are satisfied that ss. 6(2), 6(4) and 9 interfere significantly with the ability of those bound by them to engage in the associational activity of collective bargaining.
>
> …
>
> The difficulty, however, is that the measures adopted by the government constitute a virtual denial of the s. 2(*d*) right to a process of good faith bargaining and consultation. The absolute prohibition on contracting out in

> s. 6(2), as discussed, eliminates any possibility of consultation. Section 6(4) puts the nail in the coffin of consultation by making void any provisions in a collective agreement imposing a requirement to consult before contracting out. Section 9, in like fashion, effectively precludes consultation with the union prior to laying off or bumping.
>
> We conclude that ss. 6(2), 6(4) and 9 of the legislation constitute a significant interference with the right to bargain collectively and hence violate s. 2(*d*) of the *Charter*.
>
> [Emphasis added.]

[59] The Court in *Health Services* went on to consider whether or not the infringements on the workers' s. 2(d) rights could be saved under s. 1 of the *Charter*.

[60] In the s. 1 analysis, the Court in *Health Services* considered whether or not the legislation minimally impaired the *Charter* rights of the parties. The Court held that it did not. In reaching this conclusion, the Court considered as a factor the government's complete lack of consultation with the union prior to passing the legislation. The Court held at paras. 156-161:

> An examination of the record as to alternatives considered by the government reinforces the conclusion that the impairment in this case did not fall within the range of reasonable alternatives available to the government in achieving its pressing and substantial objective of improving health care delivery. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter.
>
> Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.
>
> In this case, the only evidence presented by the government, including the sealed evidence, confirmed that a range of options were on the table. One was chosen. The government presented no evidence as to why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it.
>
> The evidence establishes that there was no meaningful consultation prior to passing the Act on the part of either the government or the HEABC (as employer). The HEABC neither attempted to renegotiate provisions of the collective agreements in force prior to the adoption of Bill 29, nor considered any other way to address the concerns noted by the government relating to labour costs and the lack of flexibility in administrating the health care sector. The government also failed to engage in meaningful bargaining or

> consultation prior to the adoption of Bill 29 or to provide the unions with any other means of exerting meaningful influence over the outcome of the process (for example, a satisfactory system of labour conciliation or arbitration). Union representatives had repeatedly expressed a desire to consult with government regarding specific aspects of the Act, and had conveyed to the government that the matters to be dealt with under the Act were of particular significance to them. Indeed, the government had indicated willingness to consult on prior occasions. Yet, in this case, consultation never took place. The only evidence of consultation is a brief telephone conversation between a member of the government and a union representative within the half hour before the Act (then Bill 29) went to the legislature floor and limited to informing the union of the actions that the government intended to take.
>
> This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.
>
> We conclude that the government has not shown that the Act minimally impaired the employees' s. 2(*d*) right of collective bargaining.
>
> [Emphasis added.]

[61] The majority judgment in *Health Services* suggests that a government's prior good faith consultation with a union, prior to conduct which interferes with collective bargaining, is potentially relevant in two ways:

a) First, prior consultation by the government may be relevant on the second part of the inquiry into whether or not to whether the measure constituted substantial interference with the s. 2(d) *Charter* right. If the impugned government conduct has followed a process of good faith consultation, it may be less likely to adversely impact the employees' right to collective bargaining (at para. 129). However, the Court's decision is nuanced in this regard. Close analysis suggests that this is a less significant factor when the challenge is to legislation as opposed to government conduct *qua* employer. When the challenge is to legislation, what seems most significant is whether the content of the legislative provisions themselves preserve a process of good faith consultation.

b) Second, prior consultation by the government is relevant under the s. 1 analysis, in considering whether or not the legislation minimally impairs the right. If a legislative change has been made without consultation, it will be more difficult for the government to establish that it searched for a minimally impairing solution (at para. 157).

[62] The minority judgment (dissenting in part) in *Health Services* disagreed with the majority's approach to the analysis of whether or not a s. 2(d) infringement had taken place, although she did agree that there was such an infringement with respect to some parts of the challenged legislation.

[63] Importantly on the "consultation" issue, Deschamps J. disagreed with the majority's suggestion that the court should consider the "process" by which the government measure was implemented when the measure at issue is legislative. In her view, this would imply a duty to consult which is inconsistent with the principle that the legislature does not need to consult before it legislates. She held at para. 179:

> With respect to the second inquiry ("the manner in which the measure impacts on the collective right to good faith negotiation and consultation" (para. 93)), I am concerned with the way this test is restated and applied in the majority's reasons. For example, rather than focussing on the impact on the right, the majority refer to "the manner in which the government measure is accomplished" (para. 109), "the process by which the measure was implemented" (para. 112) and "the process by which the changes were made" (para. 129). With respect, these formulations imply a duty to consult that is inconsistent with the proposition that "[l]egislators are not bound to consult with affected parties before passing legislation" (para. 157), one with which I fully agree.

[64] It may be that the concern expressed by Deschamps J. was implicitly reconciled in the next leading Supreme Court of Canada case on the issue, where consultation prior to legislation was not mentioned as a factor in assessing the s. 2(d) right: *Fraser*.

The *Fraser* Decision

[65] The majority judgment in *Fraser* summarized the state of the law regarding the s. 2(d) *Charter* protection of freedom of association at para. 2:

> Section 2(*d*) of the *Charter* protects the right to associate to achieve collective goals. Laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right of free association and therefore constitute a limit on the s. 2(*d*) right of free association, which renders the law or action unconstitutional unless it is justified under s. 1 of the *Charter.* This requires a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith.
>
> [Emphasis added.]

[66] In its summary of the case law, the Court in *Fraser* did not mention anything about prior consultation potentially curing subsequent legislation from its substantial interference with freedom of association. It viewed the question as whether or not the legislation "makes meaningful association to achieve workplace goals effectively impossible" (at para. 98). This includes the question of whether the legislation itself (not the pre-legislation consultation process), "provides a process that satisfies this constitutional requirement", namely, "the right of an employees' association to make representations to the employer and have its views considered in good faith" (at para. 99). [Emphasis added.]

[67] The majority judgment in *Fraser* summarized *Health Services* without any reference to consultation or the lack thereof being a factor in the s. 2(d) analysis: see para. 37.

The Bill 28 Decision and Consultation

[68] The Bill 28 Decision applied the analytical steps laid out in *Health Services*. The absence of consultation prior to the legislation was mentioned as a factor in the Bill 28 Decision, both in terms of analyzing the process by which the legislation was brought about (para. 307), and in analyzing whether the legislation minimally impaired the right (paras. 365, 374). That of course does not mean that if any form of consultation had occurred, the legislation would have been saved.

[69] The present question regarding whether or not there is any distinction to be made as between the impact of a consultation process on government conduct as legislator versus government conduct as employer, was not argued or addressed in the Bill 28 Decision because there was no consultation.

[70] Further, the Bill 28 Decision was delivered before the Supreme Court of Canada's further clarification of the s. 2(d) *Charter* protection in *Fraser*, in which there was no mention of consultation as a factor.

[71] The Bill 28 Decision did not suggest or consider that government consultation after a determination that legislation is invalid could potentially cure the unconstitutionality of the legislation. This proposition was not argued.

Analysis of Relevance of Pre-Legislative Consultation

[72] As I have reviewed, the Supreme Court of Canada in *Health Services* suggested that government consultation has two possible areas of relevance in a case where it is alleged that the government interfered with s. 2(d) rights:

a) in the second stage of the inquiry as to whether or not the government conduct amounts to substantial interference with employees' freedom of association under s. 2(d);

b) in determining whether a s. 2(d) violation is saved under s. 1 of the *Charter*, as a minimal impairment of the right.

[73] In *Fraser*, the Court did not refer to consultation as relevant.

[74] In my view, the ambiguity in *Health Services* regarding the relevance of consultation prior to the impugned government conduct, and the majority approach in *Fraser* which did not consider pre-legislative consultation as being at all relevant to the question of a violation of the s. 2(d) right, can be reconciled if one distinguishes between consultation on legislation; and consultation which is similar to collective bargaining in a situation where the government is acting as employer.

[75] In *Fraser*, the government was not the employer. What was at issue was not the legislated deletion of past negotiated collective agreement terms. Rather, what was at issue was whether the legislative scheme introduced for agricultural workers violated their s. 2(d) rights.

[76] The Court in *Health Services* identified that the challenge in that case was against government conduct as legislator, not as employer (at para. 88).

Nevertheless, the fact that the unions involved public sector workers whose employment costs were funded by the government was an important part of the context. The Court's later review of *Health Services* suggests that the Court subsequently understood its decision as in part being based on the government being the indirect or direct employer of the affected employees: see para. 35 of *Fraser*.

[77] When the majority in *Health Services* spoke of the relevance of the process by which the impugned government conduct came about, and whether that process respected the fundamental precepts of collective bargaining, it was attempting to set out general principles that would apply to government conduct whether as legislator or as employer. But when it came to analyzing the constitutionality of the challenged legislation at issue in that case, the lack of prior consultation was not a factor in concluding that the legislation on its face significantly interfered with the s. 2(d) right.

[78] The majority in *Health Services* reinforced the principle that legislatures are not required to consult prior to enacting legislation (at para. 157; see also *Authorson v. Canada (Attorney General)*, 2003 SCC 39). Likewise, the majority in *Fraser* emphasised that judicial deference to Parliament does not play a part in the s. 2(d) analysis but only in the s. 1 analysis at the minimal impairment stage (at para. 81). These comments are consistent with the conclusion that when considering whether or not there is a s. 2(d) infringement there is little need to examine government pre-legislative consultation when assessing the government's role as legislator, not as employer.

[79] If legislation on its face substantially interferes with s. 2(d) *Charter* rights, it is hard to envision many situations where pre-legislative consultation would "save" the effect such that the legislation would be found not to substantially interfere with s. 2(d) rights, unless in its consultation the government was acting *qua* employer in respect of the people affected by the legislation.

[80] One can imagine the hypothetical situation where the government as employer engages in a process akin to collective bargaining with a single union, but due to an impasse, then passes legislation which imposes some terms of the

collective agreement for a limited time period without otherwise restricting future collective bargaining. This may have been the hypothetical situation envisioned by the majority judgment in *Health Services* in noting that the process of consultation may be relevant to the s. 2(d) analysis.

[81] But where the government is not the employer and passes legislation after an employer-employee labour negotiations impasse, it is difficult to see how government pre-legislation consultation with the union could be relevant to the question of whether or not the legislation substantially interferes with the s. 2(d) right. However, in that situation, government pre-legislation consultation could be relevant to the s. 1 *Charter* analysis and the question of whether or not the government considered other solutions. Also, the background of the labour impasse could be relevant to understanding the context and any exigencies that applied to the situation.

[82] In trying to appreciate the distinction between government conduct as legislator and government conduct as employer, in my view it is also important to consider the normal remedies that flow from a constitutional challenge.

[83] Normally the remedy from a challenge to unconstitutional legislation is a declaration that the law is of no force and effect, as mandated by s. 52(1) of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act*].

[84] However the remedy for other, non-legislative government conduct which is in violation of *Charter* rights flows from s. 24(1) of the *Charter*. The case law distinguishes between the two remedies and holds that rarely and in very limited circumstances can both remedies be granted: *Schachter v. Canada*, [1992] 2 S.C.R. 679 [*Schachter*] at 720; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13 [*Mackin*] at paras. 78, 81.

[85] The difference in remedies as between unconstitutional government legislation and unconstitutional government conduct as employer was the subject of comment in *Meredith v. Canada (Attorney General),* 2013 FCA 112. There the

Federal Court of Appeal found the trial judge to have erred in not considering the two issues separately and contextually, noting that the differing remedies require separate analysis (at paras. 61-65).

[86] What would happen in a situation where the government passed a law which on its face substantially interfered with s. 2(d) *Charter* rights of a large group of workers, for example encompassing several unions, but it consulted with one union representing a small subset of those workers prior to passing the law? Would the law be saved with respect to the small subset of workers but be deemed of no force and effect with respect to the other workers?

[87] Of course different remedies for an unconstitutional law are discouraged as contrary to the rule of law. As noted, the typical remedy for an unconstitutional law is to strike down the law, unless it can be saved by striking down only part of the law or by reading in content to make the law constitutional. As held in *R. v. Ferguson*, 2008 SCC 6 [*Ferguson*] at para. 65:

> The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies: see *Osborne, per* Wilson J. In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole: *Vriend*; *Sharpe*. Where this is not possible - as in the case of an unconstitutional mandatory minimum sentence - the unconstitutional provision must be struck down. The ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects. In either case, the remedy is a s. 52 remedy that renders the unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books.

[88] If government conduct as legislator is challenged, s. 1 of the *Charter* may apply to save the legislation; but if a government action is challenged, it is not an action "prescribed by law" and cannot be justified under s. 1: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] at para. 39.

[89] The *Hutterian Brethren* case also contains an interesting discussion about reasonable accommodation in human rights law and employer/employee relationships, and the s. 1 analysis, at para. 71 as follows:

> In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*. Where the government has passed a measure into law, the provisions of s. 1 apply. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects.

[90] One can see the merits of the above analysis in *Hutterian Brethern* applied to pre-legislation consultation as well: that when the government has passed a law it is entitled to justify the law based on s. 1 of the *Charter*, not by showing that it has engaged in a pre-legislative consultation process.

[91] Just as it is hard to imagine a law that is otherwise an interference with a *Charter* right being found not to interfere because of pre-legislative consultation, it is even harder to imagine a situation where legislation is found to be unconstitutional as amounting to substantial interference with s. 2(d) rights, but then this unconstitutionality could be "cured" by the government "consulting" with the union after the fact of the legislation. This is essentially the unusual position the government takes in this case.

[92] As a matter of principle I am of the view that it would be rare that the government could rely on its "consultation" conduct after the fact of legislation declared invalid based on its breach of a s. 2(d) *Charter* right, to cure the unconstitutionality of the legislation, and to then pass virtually identical legislation. Such a process would encourage state actors to ignore s. 2(d) rights with impunity as there would be no practical consequences for a breach.

[93] It would seem more relevant in this situation to judge the new legislation on its content only: is there something new about it which this time did preserve the process of employee associational conduct protected by the s. 2(d) *Charter* right?

[94] But if the government is entitled to rely on its pre-legislative consultation as saving legislation from being found to violate s. 2(d) rights, then I conclude based on *Health Services* that the pre-legislative consultation process has to be akin to a process of good faith negotiation between employer and employee association.

[95] In other words, I conclude that where, as here, the government relies on its conduct in the s. 2(d) analysis as amounting to a process of good faith consultation justifying subsequent legislative interference with collective bargaining rights, then its conduct must be judged *qua* employer.

[96] I will examine the consultation between the government and the BCTF prior to the enactment of Bill 22 considering the facts in the context of two overall inquiries:

a) as part of the s. 2(d) *Charter* inquiry, was the pre-legislation consultation akin to a process of good faith consultation between employer and employee; and,

b) as part of the s.1 *Charter* inquiry, does the consultation shows that the government searched for solutions that would minimally impair the teachers' s. 2(d) rights.

Content of Consultation Relevant to the s. 2(d) Inquiry

[97] A related question is: what is the content of an employer's duty to negotiate in good faith with an association of employees?

[98] The majority judgments in *Health Services* and *Fraser* make it clear that what is being assessed by the court in the s. 2(d) analysis, is whether the government by its conduct preserved a process allowing the employees the right to, in association, make collective representations in furtherance of workplace goals to their employer, and to have the employer consider them in good faith: see *Fraser*, paras. 38, 43, 50 [emphasis added]; see also *Association of Justice Counsel v. Canada (Attorney General)*, 2012 ONCA 530 at para. 28.

[99] There has been some judicial comment on the scope of the employer duty to negotiate in good faith.

[100] The standards of bargaining in good faith were reviewed in *Health Services* at paras. 98-107, citing such cases as *Canadian Union of Public Employees v. Nova Scotia (Labour Relations Board)*, [1983] 2 S.C.R. 311 at 341 and *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369. Hallmarks of good faith bargaining include:

a) a commitment of time and preparation;

b) a willingness to exchange and explain positions;

c) avoidance of unjustified delays in negotiations; and

d) endeavouring to reach an agreement and to strive to find a middle ground.

[101] As explained in *Health Services*, a party who engages in inflexible "surface bargaining" does not meet the duty to bargain in good faith. This includes the situation where a party pretends to want to reach agreement, but in fact has no intention of doing so and wants to destroy the collective bargaining relationship (at para. 104).

[102] If the nature of the proposals is "aimed at avoiding the conclusion of a collective agreement or destroying the collective bargaining relationship", then the duty to bargain in good faith is breached (*Health Services* at para. 105).

[103] But the Court in *Health Services* emphasized that "failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record" (para. 107).

[104] In *Fraser* at paras. 40-41, the majority affirmed what the majority held in *Health Services*. The bargaining activities protected by s. 2(d) of the *Charter* are more than a mere right to make representations to one's employer. Section 2(d):

> …requires the employer to engage in a process of consideration and discussion to have them considered by the employer. In this sense, collective bargaining is protected by s. 2(*d*). The majority stated:
>
> > Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith,

> in the pursuit of a common goal of peaceful and productive accommodation. [para. 90]

By way of elaboration on what constitutes good faith negotiation, the majority of the Court stated:

- Section 2(*d*) requires the parties to meet and engage in meaningful dialogue. They must avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract (paras. 98, 100 and 101);
- Section 2(*d*) does not impose a particular process. Different situations may demand different processes and timelines (para. 107);
- Section 2(*d*) does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse (paras. 102-103);
- Section 2(*d*) protects only "the right ... to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method" (para. 91).

[105] Thus, in examining the content of any pre-legislative consultation here in relation to the s. 2(d) analysis, the first question was whether the government was the employer in the discussions or at least involved the employer in the discussions so as to ensure that the employer considered the employee representations in good faith.

[106] If the government position in the negotiations was *qua* employer, then its representatives' conduct needed to be examined to determine whether they provided a meaningful process of consideration of the BCTF representations. Did the government representatives make a commitment of time and preparation; show a willingness to exchange and explain positions; avoid unjustified delays in negotiations; and endeavour to reach an agreement and to strive to find a middle ground? Or conversely, did they just pretend to want to reach agreement, or was their true goal one of undermining the collective bargaining influence of the BCTF?

[107] As in any constitutional challenge, the context and facts surrounding the challenged government conduct are essential.

[108] One part of the context is the conduct of the BCTF in the discussions. The government does not submit that its efforts to bargain in good faith were sabotaged because the BCTF failed to bargain in good faith. However, the government submissions were critical of the BCTF stance taken in the discussions and so I will review both sides' positions. Good faith negotiations are a two-way street, and if a party refuses to participate in the other party's good faith efforts to engage them, the obligation to consult might not run very deep: see for example *Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources)*, 2013 BCCA 412 at paras. 92, 117.

[109] Another important aspect of the context is the result in the Bill 28 Decision and the collective bargaining context at the time the Bill 28 Decision was rendered and following, and so I will review these aspects of the facts as well.

[110] I turn now to the find the facts regarding the government's discussions with the BCTF prior to enacting Bill 22.

Issue 2: What are the Facts Regarding the Nature of the Parties' Discussions Post-the Bill 28 Decision and Prior to the Enactment of Bill 22?

Context of Bill 28 Decision

[111] The present case is unusual give that much of the background context was already determined by the findings of fact in the Bill 28 Decision. The parties are the same and they agree that they are bound by those findings.

[112] The history of teachers' collective bargaining leading up to Bill 28 is set out in the Bill 28 Decision at paras. 60-185.

[113] The current model of collective bargaining which has applied to teachers since before Bill 28 is governed by the *Labour Relations Code*, as amended, the *School Act*, and the *Public Education Labour Relations Act*.

[114] In short, BCTF is the exclusive bargaining agent for teachers; and the employers' association, BCPSEA, is the exclusive bargaining agent for school boards, the employers of teachers.

[115] This model came out of a report by Judi Korbin following a commission of inquiry into public sector human resource issues. The theory behind it was to provide a balance of bargaining power between management and labour (Bill 28 Decision, para. 85).

[116] BCPSEA is one of six public employers' associations. All belong to the Public Sector Employers' Council ("PSEC"), which is a council established pursuant to the *Public Sector Employers' Act* or *PSEA*. PSEC is comprised of one or more ministers of government, senior civil servants such as deputy ministers, and a member of each of the employers' associations. The functions of PSEC are set out in s. 4 of *PESA*:

> 4(1) The functions of the council are
>
> > (a) to set and coordinate strategic directions in human resource management and labour relations,
> >
> > (b) to advise the government on human resource issues with respect to the public sector, and
> >
> > (c) to provide a forum to enable public sector employers to plan solutions to human resource issues,
>
> consistent with cost efficient and effective delivery of services in the public sector.
>
> (2) In addition, it is a function of the council to enable representatives of public sector employees to consult with public sector employers on policy issues that directly affect the employees.

[117] Korbin believed that the PSEC structure would provide a framework for public sector employer associations to consult and collaborate with government over where public resources would be best spent (Bill 28 Decision, at para. 75).

[118] Government representatives are also members of the boards of directors of each of the employers' associations, including BCPSEA. One of the purposes of employer associations, in addition to carrying out collective bargaining objectives, and fostering consultation with representatives of employees, is to assist in carrying out the objectives and to comply with strategic directions of PSEC.

[119] Bill 28 was introduced in 2002, as the *Public Education Flexibility and Choice Act* or *PEFCA*. Section 8 of Bill 28 removed teachers' right to collectively bargain

over certain working conditions, which for ease of reference I will refer to as the "Working Conditions", such as restrictions on class sizes, class composition (the number of students with special needs integrated per class), ratios of non-enrolling teachers to students (teachers not assigned to classrooms, such as librarians, counsellors and special education teachers), and workload.

[120] These prohibitions on collective bargaining were introduced through amendments to s. 27 of the *School Act*: see Bill 28 Decision, paras. 28-29. In particular, s. 27 of the *School Act* was amended by s. 8 of Bill 28 as underlined as follows:

> 27(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment between a board and a teacher are
>
> (a) the provisions of this Act and the regulations,
>
> (b) the terms and conditions, not inconsistent with this Act and the regulations, of a teachers' collective agreement, and
>
> (c) the terms and conditions, not inconsistent with paragraphs (a) and (b), agreed between the board and the teacher.
>
> (2) A provision of an agreement referred to in subsection (1) (b) excluding or purporting to exclude the provisions of this Act or the regulations is void.
>
> (3) There must not be included in a teachers' collective agreement any provision
>
> (a) regulating the selection and appointment of teachers under this Act, the courses of study, the program of studies or the professional methods and techniques employed by a teacher,
>
> (b) restricting or regulating the assignment by a board of teaching duties to administrative officers,
>
> (c) limiting a board's power to employ persons other than teachers to assist teachers in the carrying out of their responsibilities under this Act and the regulations,
>
> (d) restricting or regulating a board's power to establish class size and class composition,
>
> (e) establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes,
>
> (f) restricting or regulating a board's power to assign a student to a class, course or program,
>
> (g) restricting or regulating a board's power to determine staffing levels or ratios or the number of teachers or other staff employed by the board,
>
> (h) establishing minimum numbers of teachers or other staff,

> (i) restricting or regulating a board's power to determine the number of students assigned to a teacher, or
>
> (j) establishing maximum or minimum case loads, staffing loads or teaching loads.
>
> (4) Subsection (3) does not prevent a teachers' collective agreement from containing a provision respecting hiring preferences for teachers who have previously been employed by the board.
>
> (5) A provision of a teachers' collective agreement that conflicts or is inconsistent with subsection (3) is void to the extent of the conflict or inconsistency.
>
> (6) A provision of a teachers' collective agreement that
>
> (a) requires the employers' association to negotiate with the Provincial union, as defined in the Public Education Labour Relations Act, to replace provisions of the agreement that are void as a result of subsection (5), or
>
> (b) authorizes or requires the Labour Relations Board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (5),
>
> is void to the extent that the provision relates to a matter described in subsection (3) (a) to (j).

[121] Bill 28 also rendered void any existing provisions in a teachers' collective agreement relating to the above matters. Section 9 of the legislation tasked an arbitrator with determining which provisions were rendered void in the collective agreement that then existed between BCTF and BCPSEA.

[122] The arbitrator determined that the legislation had the effect of rendering invalid hundreds of provisions in the collective agreement relating to these Working Conditions.

[123] The arbitrator's decision deleting terms of the collective agreement was subsequently quashed as too broad in a decision of Shaw J. of this Court in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2004 BCSC 86.

[124] The government then legislatively overrode the Shaw J. decision in 2004, restoring the arbitrator's decision to delete hundreds of terms of the collective agreement retroactively to July 1, 2002, pursuant to s. 5 of the *Amendment Act*: Bill 28 Decision, at paras. 30-33.

[125] Section 5 of the *Amendment Act* was both retroactive to July 1, 2002, and applied after that date as well. It provided:

> 5(1) Despite any decision of a court to the contrary made before or after the coming into force of this section,
>
> (a) the deletion under section 1 of words, phrases, provisions and parts of provisions from a collective agreement between the British Columbia Teachers' Federation and the British Columbia Public School Employers' Association is deemed to have taken effect on July 1, 2002, and
>
> (b) those deleted words, phrases, provisions and parts of provisions must not for any purpose, including any suit or arbitration commenced or continued before or after the coming into force of this section, be considered part of that collective agreement on or after July 1, 2002.
>
> (2) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter merely because it makes no specific reference to that matter.
>
> [Emphasis added.]

[126] Section 15 of *PEFCA*, or Bill 28, also restricted the right to collectively bargain over school calendaring and hours of days of work although there was a limited "consultation" right: Bill 28 Decision, at paras. 36-39.

[127] In the Bill 28 Decision this Court concluded that ss. 8 and 15 of *PEFCA*, and s. 5 of the *Amendment Act*, infringed teachers' freedom of association guaranteed by s. 2(d) of the *Charter*. This infringement was not saved by s. 1 of the *Charter*: Bill 28 Decision, at para. 381.

[128] Parenthetically other challenges to legislation are addressed in the Bill 28 Decision but are mostly irrelevant for present purposes. In summary, s. 9 of *PEFCA* was also unconstitutional but its effect was already spent and was duplicated by s. 5 of the *Amendment Act*. Section 4 of *ESCAA* which merged local collective agreements was found not to infringe teachers' freedom of association.

[129] As well, this Court rejected the claim that the government had engaged in unconstitutional conduct by way of acting in concert with BCPSEA to engage in bad faith bargaining (Bill 28 Decision, at paras. 180-185). In reaching this conclusion,

this Court noted that the government was not the bargaining agent negotiating directly with the BCTF (para. 181).

Remedy in Bill 28 Decision

[130] As noted, the result in the Bill 28 Decision was a ruling that certain provisions of the legislation were unconstitutional and invalid. Normally this result means that legislation is null and void, pursuant to s. 52(1) of the *Constitution Act*.

[131] The result of declaring the legislation invalid is that the broad range of Working Conditions issues could once again be the subject of collective bargaining and terms dealing with these issues would no longer be prohibited from being included in a collective agreement between the teachers and BCPSEA. As well, the hundreds of terms of the collective agreement which had been deleted by the legislation would be restored now that the legislation was invalid.

[132] Because this would impact the scope of the collective bargaining process and the collective agreement between BCPSEA and the BCTF the declaration of invalidity was suspended for a period of twelve months "to allow the government time to address the repercussions of the decision".

[133] The one year suspension of declaration is often used when unconstitutional legislation is struck down which may impact ongoing government operations. This suspension recognizes that courts do not have the expertise to understand all of the policy and fiscal issues facing governments, and so it allows governments time to adjust their policies and financial priorities to meet the repercussions of the legislation being struck down. Also, where a legitimate purpose of the legislation might be saved by amendment to the legislation, it allows the government time to consider and pass amendments which do not violate the constitution.

[134] Here the parties knew that the BCTF had an outstanding claim for damages that it wanted to pursue as part of the Bill 28 Action. The government and BCTF saw the one year suspension period as an opportunity to negotiate a settlement of that claim.

Collective Agreement Carry-Forward Clause

[135] Bill 28 affected the collective agreement that then existed between BCTF and BCPSEA for the time period July 1, 2001, to June 30, 2006.

[136] The next collective agreement entered into between BCTF and the BCPSEA was entered into for the time period July 1, 2006, to June 30, 2011 (the "2006 Collective Agreement").

[137] Just prior to the Bill 28 Decision coming down in April 2011, BCTF and BCPSEA commenced the next round of collective bargaining in March 2011. Their collective bargaining was limited by Bill 28. However, both parties to the bargaining had inserted "placeholders" at the bargaining table to address the potential that the Working Conditions issues might be returned to bargaining.

[138] As I have noted, there were two key aspects to the Bill 28 Decision:

a) first, the Court found that it was unconstitutional for the government to have legislatively deleted the Working Conditions clauses from the parties' existing collective agreement in 2002 and by prohibiting a return to those clauses; and,

b) second, the Court found that it was unconstitutional for the government to have legislatively prohibited the teachers' union from addressing the Working Conditions in future collective bargaining.

[139] Both issues needed to be addressed by the government post-the Bill 28 Decision and both had very different implications.

[140] After the Bill 28 Decision, the BCTF sought to have the Working Conditions issues returned to the collective bargaining table. It was told by the BCPSEA representatives at the collective bargaining table that they still could not collectively bargain the Working Conditions issues, because the Bill 28 Decision had granted the government a one year suspension on the declaration of invalidity in respect of the unconstitutional legislation.

[141] The government maintained this position in its discussions with the BCTF as well. Indeed, its position throughout the discussions with the BCTF was that returning these subjects to collective bargaining was contrary to government policy objectives.

[142] Returning the right to collectively bargain these issues immediately would have simply meant that the BCTF and BCPSEA could commence talks between employer and union on the same subject matters without dictating the end result of those talks. Like any collective bargaining, there could be trade-offs or an impasse reached on all sorts of terms. If an impasse was reached, a plethora of tools were available to resolve the impasse, including mediation or arbitration, as noted in the Bill 28 Decision at para. 368.

[143] As for the unconstitutional legislation deleting the previously negotiated Working Conditions terms of the collective agreement, if the declaration that the legislation was invalid was not suspended for one year, the parties understood that the Working Conditions terms would have been returned to the parties' collective agreement effectively immediately.

[144] This is because the collective agreements between the BCTF and BCPSEA contained standard terms which carried forward all prior terms of the previous collective agreement, unless otherwise amended or modified.

[145] For example, the 2006 Collective Agreement contained this language:

> ARTICLE A.1 TERM, CONTINUATION AND RENEGOTIATION
>
> …
>
> Except as otherwise specifically provided, this Collective Agreement is effective ~~July 1, 2011 to June 30, 2004~~. **July 1, 2006 to June 30, 2011.** The parties agree that not less than four (4) months preceding the expiry of this Collective Agreement, they will commence collective bargaining in good faith with the object of renewal or revision of this Collective Agreement and the concluding of a Collective Agreement for the subsequent period.
>
> In the event that a new Collective Agreement is not in place by ~~June 30, 2004~~ **June 30, 2011** the terms of this Collective Agreement are deemed to remain in effect until the date on which a new Collective Agreement is concluded.

> All terms and conditions of the Previous Collective Agreement are included in the Collective Agreement, except where a term or condition has been amended or modified. ~~by or under the *Education Services Collective Agreement Act or in* ~~accordance with this Collective Agreement
>
> ….

[146] The parties to the collective agreement had not amended or modified the Working Conditions terms.

[147] Because of the carry-forward clause, the parties expected that the legal result of the Bill 28 Decision invalidating the legislation which had deleted Working Conditions clauses from the collective agreement was that these clauses would be automatically restored to the collective agreement unless some other agreement was reached.

[148] The government's concern was that if the Working Conditions clauses were returned to the collective agreement retroactively, teachers would have the ability to make grievances where the clauses had been breached in the past. The government was concerned that this could be very costly for employers and ultimately the government. Mr. Straszak estimated for the government that these arbitrated labour claims could give rise to an estimated $500 million retroactive liability and could cost the government approximately $200 million to $275 million going forward.

[149] It is very important to note that the government did not assert before this Court at any time that the costs implications of restoring the collective agreement clauses amounted to exigent circumstances justifying the government's re-interference with collective bargaining rights in Bill 22. To so argue would be to reargue the facts before the Court at the time of the original Bill 28 Decision.

[150] There is nothing new about the potential cost implications of the Court's Bill 28 Decision declaring the legislation invalid.

[151] Nevertheless, after the Bill 28 Decision the teachers had an interest in avoiding ongoing labour claims. These claims would be extremely time-consuming and complicated and involve potentially difficult proof issues given the passage of

time. Other arbitrated labour claims involving alleged large scale violations of the government legislated class size maximums had proven to be complex although not impossible to assess: see for example, *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn. (Class Size and Composition Grievance)*, [2010] B.C.C.A.A.A. No. 1.

[152] Furthermore, both *Health Services* and *Fraser* make it clear that the government has the right to pass legislation which interferes with collective bargaining rights, so long as it is not substantial interference and thus a violation of s. 2(d) of the *Charter* (unless justified under s. 1 of the *Charter*).

[153] The BCTF presumably knew that if it was unable to collectively bargain some kind of resolution with BCPSEA regarding the implications of the old Working Conditions clauses being returned to their collective agreement, then the government might decide to pass legislation which was presumably something less restrictive than the former legislation, but which might still impose limiting parameters on the collective agreement that might not be to the union's liking.

[154] In short, after the Bill 28 Decision, if the parties were acting in good faith, there ought to have been an interest on all sides -- the BCTF, BCPSEA and the government -- in negotiating a resolution to the implications of the invalidated legislation which would have the effect of returning the past negotiated clauses to the collective agreement.

Government Acting *Qua* Employer or Not

[155] The facts of the present case are like the facts in *Health Services* involving public sector workers who are not directly employees of the government.

[156] As noted above, while the government is not the employer, it funds the employment relationship. The government also issues fiscal and policy directions to the employer association, BCPSEA, which is the exclusive bargaining agent for employers of teachers. The government also has representatives from the Ministry of Education and the Ministry of Finance on the board of directors of BCPSEA.

[157] The government has over and over again emphasized in its submissions and through its representatives in negotiations with the BCTF that it is not the employer of teachers and that the discussions between it and the BCTF are not collective bargaining.

[158] It is to be remembered that the BCTF claimed, as part of its original case in the Bill 28 Action, that the government had acted in concert with BCPSEA to collectively bargain in bad faith. The government vigorously defended this claim, emphasizing that it was not the employer and it did not engage in collective bargaining with the BCTF.

[159] The Court accepted the government's argument that it could not be found to have acted in concert with BCPSEA to bargain in bad faith. As concluded in the Bill 28 Decision at paras. 178-180, there was no evidence that the government had directed BCPSEA in the collective bargaining; the government was not the bargaining agent for employers (para. 181); and there was no evidence the government had directed BCPSEA to render meaningless the collective bargaining process.

[160] Likewise, in the Bill 28 Action, the government argued that one aspect of the impugned legislation did not interfere with collective bargaining, because it interfered with an Agreement in Committee (AIC), including a K-3 Memorandum, which had been imposed by government by legislation (see paras. 99-105, 198). In that situation the government had negotiated directly with the BCTF, and then imposed an agreement on the parties by legislation, without the involvement or approval of BCPSEA. In the Bill 28 Action, the government argued that this legislation, the product of negotiations between the government and BCTF, was not the product of collective bargaining and so subsequent legislative interference with it was not interference with collective bargaining.

[161] However, as found in the Bill 28 Decision, BCPSEA subsequently agreed to carry forward the terms of the AIC, and signed on to both it and the K-3 Memorandum making both part of the parties' collective agreement (at paras. 107, 114). The government argued that this still did not make the collective agreement

"freely negotiated", because the reason that BCPSEA signed on was because the government was threatening that school districts would lose funding if they did not sign. This argument was rejected in the Bill 28 Decision, noting that government funding is always a significant influence in any collective agreement in the public sector, but nevertheless BCPSEA could still have refused to agree to the government's terms (paras. 205-206).

[162] It was the fact that BCPSEA and BCTF ultimately made the legislated terms part of their collective agreement, that made these terms the product of collective bargaining. This defeated this aspect of the government's argument in the Bill 28 Action that because the results of its own negotiations with BCTF were not collective bargaining, hence interference with the results could not be interference with collective bargaining.

[163] The point of this review is to emphasise that the government in the Bill 28 Action steadfastly maintained that it is not the employer of teachers; that its direct discussions with the BCTF are not the equivalent of collective bargaining; and that its relationship with BCPSEA does not make it part of the collective bargaining between BCPSEA and BCTF. These arguments were accepted by the Court in the Bill 28 Decision.

[164] In the present Bill 22 Action, challenges to the government's conduct in issuing bargaining mandates to BCPSEA are likewise met by the government defence that the government is not the employer and cannot direct BCPSEA to formulate proposals in collective bargaining, the government can only make suggestions and let its policy preferences be known.

[165] Further, following the Bill 28 Decision, the government representatives consistently maintained in their discussions with the BCTF that they did not represent the employer, and that their discussions were separate from collective bargaining between BCTF and BCPSEA.

[166] The government relies on this distinction to its advantage, as it avoids being dragged into labour relations disputes between the union and the employer

association. Because the government is not the employer it maintains that it cannot be accused of bargaining in bad faith with the BCTF over Working Conditions.

[167] If the government cannot bargain in bad faith with the teachers' union because it is not the employer, surely it cannot bargain in good faith either. It simply cannot bargain as it is not the employer. This means that even if the government does listen to the representations of the teachers' employee association (a premise very much challenged by the BCTF here), it is not the employer listening.

[168] There is a very strong argument therefore that the government's pre-legislative consultation with the BCTF following the Bill 28 Decision is not relevant to assessing the constitutionality of Bill 22, as these discussions could not amount to a process of employer-employee negotiations.

[169] The government submits that this interpretation would mean that while there is a constitutional obligation to consult on government, government would have no practical ability to fulfill it. This is not so.

[170] The government as legislator has different obligations than the government as employer. The government as employer does have a duty to consult with its employees in a process that allow the employees a meaningful opportunity to influence their Working Conditions. As legislator it has an obligation to safeguard and to not interfere with s. 2(d) *Charter* rights. It can fulfill this obligation by the content of its legislation.

[171] The facts show that the employer bargaining agent, BCPSEA, is a separate entity from government. The government does have tools to influence it, including the tools of withholding or granting public funding, issuing policy mandates, or imposing legislation. It may be that in using these tools it can either facilitate or interfere with collective bargaining between BCPSEA and the BCTF. But this does not mean that it can negotiate as though it is the employer.

[172] The government submits that BCTF stood in the way of meaningful negotiations, because early in the discussions it turned down an offer by

Mr. Straszak to combine the negotiations: the Bill 28 discussion table and the collective bargaining table. However, I do not consider this a fair conclusion.

[173] Mr. Straszak framed the issue on the basis that it would still be illegal to engage in collective bargaining on the Working Conditions issues, because the legislation prohibiting collective bargaining was still in force for a year after the Bill 28 Decision. He did not explain how combining the two tables would get around the problem of the continuing legislative prohibition on collective bargaining over the Working Conditions. He also never responded meaningfully to the requests by the BCTF that the government return the right to collectively bargain over Working Conditions so that it could make it part of its ongoing collective bargaining with BCPSEA.

[174] BCTF considered correctly that the effect of the Bill 28 Decision would be to restore its right to collectively bargain on Working Conditions issues. It was never given a good reason why the government did not simply act right away to repeal the legislation so that these issues could be added to the ongoing collective bargaining. The BCTF did not see the point of having a combined table -- the Bill 28 repercussion negotiations and collective bargaining -- as on its position if collective bargaining was restored then collective bargaining could deal with the issues regarding Working Conditions.

[175] However, the position maintained by Mr. Straszak in his discussions with the BCTF was that the government was planning not to return these subjects to collective bargaining at all and that all the government needed to do to fix the unconstitutional legislation was for the government to engage in consultation.

[176] In any event, I find that the process followed in the post-Bill 28 discussions between the government and the BCTF did not involve collective bargaining or any similar employer-employee negotiations.

[177] BCPSEA was not an active participant at the table in the post-Bill 28 discussions between the government and BCTF. While some people on the

government side of the table wore two hats and may have reported to BCPSEA, the discussions did not involve BCPSEA as a party.

[178] In all the circumstances I am not persuaded that the government's discussions with the BCTF following the Bill 28 Decision constitute a "process of engagement" permitting the employee association "to make representations to employers, which employers must consider and discuss in good faith" (*Fraser* at para. 2).

[179] I find that the discussions between BCTF and the government in the year following the Bill 28 Decision are best characterized as settlement discussions: an attempt to settle the outstanding issues arising from the consequence of the Bill 28 Decision and particularly to deal with the union's claim for damages.

[180] The government records regarding its decision not to appeal the Bill 28 Decision were consistent with this characterization: the government concluded that the government should pursue a negotiated consultation mechanism to address the issue of damages, rather than a further Court hearing.

[181] On this basis alone, the fact that the government was not the employer and BCPSEA was not at the negotiations table, I find that the fact and content of the government's negotiations with the BCTF following the Bill 28 Decision are simply not relevant to the issues I must decide regarding whether or not Bill 22 was a substantial interference with s. 2(d) *Charter* rights. These were post-Bill 28 settlement negotiations that ultimately failed to reach agreement, leaving the BCTF with its remedies flowing from the Bill 28 Decision.

[182] Nevertheless, if I am wrong on my conclusions that it was necessary for the government to be acting *qua* employer if it seeks to rely on its discussions with the BCTF as affecting the analysis of the substance of the s. 2(d) right, I will go on to also make findings of facts regarding those discussions, analyzing whether the content might approximate an employer-employee good faith consultation process, ameliorating the extent to which the Bill 22 legislation interferes with collective bargaining.

[183] The facts regarding the nature of the discussions between the government and BCTF following the Bill 28 Decision and prior to the government enacting Bill 22 must also be considered from the perspective of s. 1 of the *Charter*, namely, do the facts reveal that the government searched for solutions that would minimally impair the teachers' collective bargaining rights?

Content of Negotiations Post-Bill 28 Decision

[184] Both parties here were mindful that there was a good likelihood of subsequent litigation if they did not reach agreement, and this litigation would likely require production of internal records. As such, manifest expressions of good faith in the parties' documents and stated positions to each other have to be treated with caution as they are easily self-serving and insincere. If the government is entitled to rely on pre-legislative consultation as entitling it to then legislatively interfere with collective bargaining, it follows that it must be a meaningful process. In assessing the process, the court is required to consider the whole of the evidence, the parties' conduct as well as words.

[185] At the same time, it is not the Court's role to undertake a forensic critique of each detail of the meetings between the BCTF and the government. A negotiation may still be meaningful even if some meetings or positions taken were less so.

Government Position Post-Bill 28 Decision

[186] The province's team in addressing the Bill 28 Decision repercussions with the BCTF was led by Paul Straszak, then President and CEO of PSEC.

[187] Mr. Straszak explained that he was not representing PSEC but was representing the government in the post-Bill 28 Decision discussions. Assisting him and at the government side of the table from time to time were Christina Zacharuk, James Gorman, Claire Avison, Peter Drescher and Jacquie Griffiths. In the background providing information and views at times was Rick Davis.

[188] Key to Mr. Straszak's strategy was his stated position to the BCTF that the Bill 28 Decision did not require the government to restore to the collective bargaining

process the Working Conditions, either as a subject for collective bargaining or by way of restoring the deleted clauses to the collective agreement. Rather, his position was that the Bill 28 Decision affirmed that the government had legitimate public policy objectives, but where it had gone wrong was in its failure to consult with the union prior to introducing legislation which removed Working Conditions from collective bargaining and from the collective agreement.

[189] Mr. Straszak's stated view, which he communicated to the union, was that the Bill 28 Decision simply required the government to rectify its error in not having undertaken a good faith negotiations process before the legislation was introduced.

[190] Mr. Straszak described the situation as: "[t]he legal problem stemmed not from the law itself, or from the legitimacy of government's objectives behind the law, but from government's failure to consult 'in good faith' prior to making changes to the collective agreement".

[191] I find that what Mr. Straszak communicated to the BCTF was that the government considered the post-Bill 28 Decision discussions as its opportunity to document that it consulted with the BCTF "in good faith" concerning its legitimate policy objectives, without the necessity of changing the end result. The message he communicated was that the government was not planning to restore the BCTF's members' ability to collectively bargain the Working Conditions nor would it restore any Working Conditions language to the collective agreement.

[192] A party cannot say it is consulting if it starts from the position that its mind is made up no matter what the other side presents by way of evidence or concerns.

[193] The Bill 28 Decision, like the *Health Services* decision preceding it, concluded that the legislation was unconstitutional because of a variety of factors: by vitiating negotiated collective agreement language; by prohibiting collective bargaining on like subject matter in the future; and, by a lack of prior consultation before the introduction of the legislation.

[194] To the extent Mr. Straszak focused on the lack of prior consultation as the single factor making the Bill 28 legislation unconstitutional, and all that was needed to make it constitutional was consultation, he was incorrect. I find that the fact that this shaped his position in discussions with the union representatives was a significant impediment to the progress of the discussions.

BCTF Position Post-Bill 28 Decision

[195] The BCTF's then President, Susan Lambert, was involved in most of the post-Bill 28 Decision discussions with the government representatives. Assisting her was Jim Iker, then First Vice President of BCTF, as well as others from time to time.

[196] The BCTF position was that collective bargaining should take place based on the premise that the Working Conditions could be bargained and that the Working Conditions language had been restored. The BCTF did not see any need to delay this, given that the collective bargaining had just commenced. It wanted the unconstitutional legislation repealed immediately.

[197] Once the Working Conditions and Working Conditions clauses were returned to bargaining and the collective agreement, BCTF felt that the employer association, BCPSEA, and it could bargain any changes to this language as part of the collective bargaining process.

[198] Since the BCTF was not given this opportunity, I cannot conclude that it was unrealistic in expecting that if it could collectively bargain these issues BCTF and BCPSEA could have successfully negotiated an outcome.

[199] The BCTF did see a role for negotiating at a separate table with the government the additional remedies that should flow from the Bill 28 Decision such as damages.

Course of Negotiations

[200] Mr. Straszak's strategy for the Bill 28 Decision discussions, from the government side, was that the negotiations needed to conclude by November 30, 2011, and if there was no deal reached, the negotiations would have set the stage

for the government to impose legislation prior to the expiry of the deadline of twelve months from the Bill 28 Decision.

[201] At the May 20, 2011 meeting, which was the first meeting between the government and union representatives after the Bill 28 Decision, Mr. Straszak framed the government's intention as being to engage the BCTF in discussions about how the government might make informed amendments to Bill 28 prior to the expiry of the twelve-month period of suspension.

[202] The union response was to disagree that the negotiations should be about new restrictive legislation. It felt that collective bargaining on the Working Conditions should be restored immediately, as well as the collective agreement terms which Susan Lambert described as the "floor" from which collective bargaining would start.

[203] The BCTF saw the purpose of discussions with the government as dealing with what it saw as the only outstanding issue: the additional remedies it was claiming as a result of its success in the Bill 28 Decision. The BCTF communicated that it saw these remedies as including a restoration of approximately $275 million in funding that it saw as being cut as a result of the unconstitutional legislation.

[204] The two sides next met on June 3, 2011. Both sides essentially repeated earlier stated views and continued to disagree on the starting position for the discussions.

[205] The government's position was that it did not need to restore collective bargaining to the same scope as before, that it had same objectives as pre-Bill 28 and saw the collective agreement terms as an impediment to those objectives, and it could draft new legislation after consulting with the union.

[206] The BCTF sensed that if it accepted the government position it would be starting from a position that accepted watering down of its collective bargaining rights and stripping of collective agreement language. Its position was that the result of the Bill 28 Decision was that teachers' collective bargaining rights should be

restored in full, the deleted collective agreement language restored, and the parties should discuss compensation.

[207] The BCTF also explained its view that government funding should be in place for the start of the September 2011 school year. The BCTF also communicated its position that the additional remedy flowing from the Bill 28 Decision should be in the form of money to address conditions in schools, not remedies for individual teachers.

[208] The two sides then exchanged correspondence, and next met on July 7, 2011.

[209] At that meeting Claire Avison gave a presentation on behalf of the Ministry of Education. She outlined that the government team was planning to outline the government's policy objectives, and then at a later date to provide a detailed review of how the 2001 Collective Agreement language "affects school districts' ability to enhance educational outcomes".

[210] In her presentation, Ms. Avison identified that the government was seeking to achieve three policy objectives: flexible class sizes; optimal class composition for education program delivery, with decisions made at the school level; and the appropriate allocation of non-enrolling teachers. She stated that the government felt that in order to achieve these objectives, changes to the teachers' collective agreement were seen as necessary and that was the basis for the 2002 legislation. However, she explained that while there were flaws in the process, the government's policy interests behind Bill 28 remained the same.

[211] Ms. Avison gave a number of examples in her presentation which implied that the collective agreement language had impeded flexibility and choice by "arbitrary" class size maximums and staffing levels and by a "formula driven approach".

[212] When Susan Lambert asked questions during the presentation, and questioned the factual basis for Ms. Avison's assertions that the collective agreement language impeded these policy objectives, and as to how this

presentation addressed the repercussions of the Bill 28 Decision, Mr. Straszak saw these questions as disruptive.

[213] As was pointed out by the BCTF in the meeting, Ms. Avison was repeating the same government policy objectives and arguments that the collective agreement clauses on Working Conditions impeded these objectives, as had been canvassed extensively in evidence at the trial of the Bill 28 Action.

[214] The government's policy objectives and rationale for those objectives were the same as had been in place when Bill 28 was enacted and had been the subject of extensive evidence in the Bill 28 Action following which the Bill 28 Decision was not uncritical of the government's assertions: see paras. 141-147. The BCTF representatives were well familiar with all of this background.

[215] In the Bill 28 Decision, under the *Charter* s. 1 analysis, I accepted that the government had a legitimate "pressing and substantial objective" related to the legislation, namely, its goal of providing greater flexibility to school boards to manage class size and composition issues, and to respond to choices of parents and students (at para. 39). However, it is important to note that this finding was in the context of the low threshold of the first stage of the s. 1 analysis. Because of judicial deference to the development of government policy, this analysis does not require proof that the objective is based on solid and persuasive evidence: as a policy objective it is enough that it be a theoretical objective asserted by the government (at para. 325).

[216] Importantly, this Court did not find in the Bill 28 Decision that the existing Working Conditions language in the 2001 Collective Agreement in fact impeded flexibility and choice. Rather, this Court found the government evidence of this to be unpersuasive: see paras. 129-130, 141-147.

[217] Collective bargaining normally provides a great forum to deal with controversies such as the degree to which certain working condition language interferes with management flexibility: each party has the opportunity in that forum to challenge the factual basis underlying the opposite party's position that the collective

agreement terms advance or impede a stated objective and to respond to the other side's concerns by proposing changes to their agreement.

[218] By their negative reaction to questions, it appears that the government representatives were not willing to engage in real dialogue at the meeting. It is important to note that in making her presentation, Ms. Avison had not even yet read the collective agreement terms at issue, nor apparently had any other member of the government team.

[219] The July 7, 2011 meeting was largely a waste of time. The government had yet to make any proposal on how to address the repercussions of the Bill 28 Decision.

[220] Frustrated at the government's approach and emphasis on consultation being all that the government was required to do, the BCTF suggested that both parties return to the Court to seek clarification of the Bill 28 Decision. The government representatives said they would consider this, but later communicated that it was not the government's choice to do so.

[221] The July 7 meeting ended with the government representatives explaining that at their next meeting, Peter Drescher would provide a presentation as to what would happen if the deleted collective agreement terms were to be restored. The government representatives proposed another meeting in July, but the BCTF representatives were not available until August.

[222] The parties exchanged correspondence in July concerning their respective interpretations of the Bill 28 Decision. Mr. Straszak again emphasized his view that the flaw in the legislation was the lack of consultation. He wrote on July 14, 2011:

> Fundamentally, that is the Court's holding: a finding of constitutional invalidity because of a lack of prior consultation, coupled with a 12-month suspension of any declaration of invalidity…

[223] The BCTF replied by letter of August 3, 2011, taking issue with "the government's position…that the only fault in the legislation was the lack of prior consultation". The BCTF said that it saw the finding of constitutional invalidity as:

> …based on the fact that the government used its legislative power to effectively nullify the collective agreement to its benefit, and to the detriment of British Columbia teachers. Further, the legislation not only conflicted with existing collective agreements, but also precluded collective bargaining in the future on a number of significant issues and conditions of employment. This was found by Justice Griffin not to be minimally impairing and was therefore a breach of s.2(d) of the *Charter*.

[224] In the BCTF letter, the BCTF asked the government to repeal the legislation so that BCPSEA could bring proposals to the table and the BCTF and BCPSEA could immediately collectively bargain on the Working Conditions issues. The government did not respond to this request.

[225] Because of the position taken by the government representatives that the Bill 28 Decision did not require the government to restore collective bargaining rights and only required it to consult, the BCTF applied for a court ruling seeking some guidance on the parties' respective interpretations of the Bill 28 Decision.

[226] The application was not heard until October 11, 2011, with oral reasons for judgment delivered the next day. This Court declined to weigh in on these issues, considering it not the proper function of the court "to supervise whether or not the BCTF and the province are presently accurately describing the state of the law in their communications with each other": *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 1372 at para. 21.

[227] In the meantime, the parties' fourth meeting occurred on August 11, 2011.

[228] At that meeting, the government announced its intention to repeal the provisions of the *School Act* dealing with school calendaring, specifically s. 78.1. This was the provision which had been enacted by s. 15 of *PEFCA*, declared unconstitutional in the Bill 28 Decision. The government ultimately did repeal s. 78.1 in Bill 22. While this was progress, the government was still maintaining the position that so long as it "consulted" with the union, it need not repeal the other unconstitutional legislation, prohibiting bargaining over Working Conditions and deleting the Working Conditions clauses from the collective agreement.

[229] Mr. Drescher, a retired deputy superintendent of the Surrey School District, made a presentation on behalf of the government at the August 11, 2011 meeting.

[230] In Mr. Drescher's presentation he attempted to illustrate the implications for the Surrey School District if the collective agreement terms on Working Conditions were restored. There were two overall themes to his presentation.

[231] First, it was Mr. Drescher's submission that returning to the deleted collective agreement provisions on Working Conditions would have a drastic effect on the other services the school district could provide, based on the assumption current funding levels did not change. This was because the Working Conditions language would require more staff to be hired and the funding for this would have to come out of other education programs.

[232] Mr. Drescher estimated that if the collective agreement provisions were returned to the Surrey School District, it would cost that District approximately $33 million annually. That school district is the largest in the province, representing approximately 10% of the total.

[233] Second, Mr. Drescher voiced the theme that collective agreement terms on Working Conditions were unduly rigid, not sufficiently flexible to meet the needs of districts and parents, and that this rigidity would be even more of a problem if the 2001 Collective Agreement was restored in a 2010 or 2011 context given changes in demographics.

[234] Mr. Drescher testified at trial. I found him to be well-meaning, but the evidence on which he based the second theme in his presentation to the BCTF was a repetition of an earlier myth: that Working Conditions terms in the prior collective agreement caused extraordinary complications for families and school districts. For example, his written presentation stated:

> Waitlists/Inability to Access Neighbourhood Programs
>
> Previous contract language often challenged neighbourhood schools to accommodate families that moved into the community during the year. It resulted in waitlists, assignment into other schools for at least the balance of the school year and separation of siblings.

[235] Mr. Drescher acknowledged in cross-examination that he could not identify specific examples of the problems he described for 2001 (when the Working Conditions language was in the collective agreement) and that he had only really addressed his mind to what might happen in 2010 or 2011 if contract language was restored. He said that he was relying on what Rick Davis told him regarding past problems.

[236] The Bill 28 Decision found that Rick Davis's understanding of problems was based on unsubstantiated hearsay, and that his many examples of problems could have been resolved under existing collective agreement language: Bill 28 Decision, at paras. 141-145. While Mr. Davis was called by the government as a witness during the present hearing before me, he again did not substantiate these alleged past problems with the past collective agreement language.

[237] Furthermore, Mr. Drescher's presentation was unduly alarmist from an administrative standpoint about the potential impact of the restoration of Working Conditions terms in the collective agreement.

[238] For example, in his presentation Mr. Drescher identified that one significant problem that would be caused by the Working Conditions language in the collective agreement, was the problem of a possible increase in combined and multi-age classes, also known as split classes. This potential problem was purely speculative.

[239] As was pointed out in cross-examination of Mr. Drescher, the Surrey School District has long had many multi-grade classes. For example, of approximately 99 elementary schools, 96 or 97 have multi-grade classes. Multi-grade classes are a natural result of fixed enrollment numbers and fixed teacher numbers per school. It is part of every school year that school administrators must juggle the composition of classes depending on enrollment.

[240] As mentioned, in the Bill 28 Decision this Court found that in fact the collective agreement terms on Working Conditions did provide significant flexibility. The government did not appeal these findings. In the Bill 28 Decision, this Court held at paras. 128-130:

> The individual local agreements that had been negotiated across the school districts in the province in the 1987-1993 timeframe showed a variety of terms and conditions regarding class size and composition. Of 75 school districts, some 58 negotiated provisions related to class size and composition. Sometimes the process of collective bargaining had involved job action.
>
> Many local teachers' associations agreed to class size and composition provisions which were not rigid but which allowed for exceptions or alterations, thereby providing flexibility to school boards with respect to class size and class composition. The following are some examples of the variety of provisions that existed in the local teachers' agreements, which permitted school districts to exceed class size limits or class composition restrictions:
>
> > (a) if a student joined the school late in the year;
> >
> > (b) with the consent or request of a teacher;
> >
> > (c) with the consent of the teacher for educationally sound reasons;
> >
> > (d) if external financial constraints were imposed on the Board;
> >
> > (e) for band, choir, or physical education classes, at the request of the teacher;
> >
> > (f) where it was not "possible" to stay within limits;
> >
> > (g) if the student could not be reassigned to a different class at the same school with fewer students;
> >
> > (h) if the student could not be reassigned to an adjacent school;
> >
> > (i) by up to two students after September, providing that the teacher could request additional support; or
> >
> > (j) if the teacher was assigned less than the maximum in another class so that the teacher's total workload was not increased.
>
> Even where provisions in the local agreements or the later provincial collective agreements led to disagreements with respect to class size or class composition limits, local associations and the BCTF regularly settled grievances or requested remedies at arbitration that ensured that students were not moved from schools or out of classes during the school year. For example, if class size or composition limits were exceeded, the teacher might not request that students be removed from the class, but might seek extra support, or a day of paid leave to compensate for the increased workload.

[241] The above reference was inclusive, not exclusive, and there were other terms in the collective agreement which provided flexibility in class size and composition.

[242] Mr. Drescher's evidence revealed that the employer side of running schools would prefer to make decisions unencumbered by the employee's union.

[243] Most employers would naturally find that they would have more flexibility and choice if they were not encumbered by a union. That as an end in and of itself does not justify legislative interference with freedom of association.

[244] The fallacy in the government position to the effect that collective agreements were not flexible is that the government legislation imposed class size limits that were absolutes and not open to negotiation, whereas the collective agreement terms were open to negotiation and to exceptions.

[245] For example, Mr. Drescher's cross-examination revealed that since the Class Size Compensation Regulation accompanying Bill 22 was enacted effective July 1, 2012, the Surrey School District has not wanted to exceed class sizes of 30 so as to avoid having to pay additional compensation to teachers (leaving aside the legislated exceptions, such as music band). It has therefore quite successfully managed not to exceed those class sizes, including by creating multi-grade classes where the numbers warrant it.

[246] This contradicts the notion that class size maximums cannot be accommodated by administrators, even in situations where arguably the legislated maximums are more rigid than what might be collectively bargained.

[247] The evidence did not reveal any difference between legislated class size maximums, and those that are negotiated at the collective bargaining table, from an administrative standpoint. The only difference appears to be that the teacher's union has a chance to influence these maximums, if it is a matter open to collective bargaining.

[248] As of the August 11, 2011 meeting, it was now one-third into the year the government had been given to address the repercussions of the Bill 28 Decision, and it had yet to present any proposal that was a change in its position on which it had based its defence of the constitutionality of Bill 28.

[249] Unfortunately by linking the two themes together in his presentation, that restoring the deleted clauses would have associated costs to school districts and

that the Working Conditions clauses were not suitably "flexible", Mr. Drescher's presentation appeared based on false logic. It implied that the issue was the flexibility of the clauses, rather than the overall limitations in government funding available for education. It also did not address the teachers' desire to collectively bargain these Working Conditions.

[250] Nevertheless, the approximate cost to government of restoring the collective agreement language, if nothing else changed, was relevant information. The costs implications would have to be dealt with eventually at the collective bargaining table if the clauses were restored. Since government was the source of funding for schools, the Bill 28 discussions presented government and BCTF with an opportunity to discuss the funding issues: what additional funding might government be willing to provide, and would there be strings attached, and what other trade-offs might be made given that public funding is not unlimited.

[251] The BCTF was expecting and wanting a government proposal that would identify new funding and confirm its restored collective bargaining rights.

[252] Mr. Straszak's strategy up to this point was to present the government's policy objectives without much opportunity for dialogue from the BCTF, and without any specific government proposal to try to close the gap that existed between the parties on how to address the Working Conditions in collective bargaining. However, he did say that there might be additional funding to address the issues, which would be considered beyond the net zero mandate that then applied to collective bargaining.

[253] At the August 11, 2011 meeting, the BCTF asked the government representatives a number of questions: what was the government planning for corrective legislation; when would the illegal legislation be repealed; when would the collective bargaining mandate be changed to reflect the Bill 28 Decision? The BCTF was informed that it was the government's position that the Working Conditions language would not be returned to the collective agreement. This was given as a firm position, without any room for negotiation.

[254] Mr. Straszak also did not indicate any willingness on the part of the government to restore the right to collectively bargain Working Conditions.

[255] Furthermore, the BCTF was told by the government representatives that before the government could discuss alternative proposals, it was important first to have the BCTF understand the government's "policy objectives". The BCTF representatives expressed frustration at time being lost to hear these objectives stated again, and asked to receive a government proposal.

[256] After the Bill 28 Decision of April 13, 2011, the government presented its first proposal to the BCTF on September 9, 2011, described as "a Framework for Discussion". This framework described a proposal whereby the province would establish a class organization fund ("COF") as its solution to class composition issues. It suggested that the allocation of the COF would be to school districts based on "consultation" with the BCTF and in order to address "complex class organization issues".

[257] Mr. Straszak explained that it was intended to address classes which had the highest needs for support for "vulnerable" learners.

[258] The size of the proposed COF was not identified but it was described as incremental or supplemental to funding otherwise provided to school districts.

[259] The framework proposed that the COF would be based on a separate agreement between the BCTF and the Province of British Columbia and would not be the subject of grievance under the collective agreement. However, when presenting it Mr. Straszak suggested other enforcement or dispute resolution measures could be discussed as part of the agreement.

[260] The government's framework also proposed that allocation of the funds in the COF would be based on a process whereby the principal of a school would consult with staff to identify classes with extra challenging circumstances for student learning. The school superintendent would formulate a tentative plan for the allocation of the district COF to schools, in consultation with the local union

president. The Ministry of Education would only release that district's allocation of COF funds if there was agreement between the district and the local union on the allocations of those funds.

[261] At this point there were only two months left in the government's imposed deadline of having to complete the negotiations by end of November 2011.

[262] The COF proposal did not address other Working Conditions issues. It also did not address any return of the right to collectively bargain over Working Conditions. It was presented as an alternative to collective bargaining.

[263] The meeting was the first time the BCTF had seen any proposal from the government. The BCTF representatives were not prepared to comment on it at the meeting.

[264] The BCTF issued a press release on September 13, 2011, criticising the Framework for Discussion. Criticisms included:

a) that the proposed COF would create competition between vulnerable students for scarce resources and was therefore profoundly unfair;

b) if teachers disagreed with management on how the COF was to be allocated, their students would receive no funding;

c) there was no assurances as to the stability of the funding from year to year;

d) it was not enforceable under the collective agreement; and,

e) it did not address the rights issues that were at the heart of the Bill 28 Decision.

[265] The latter point, of course, was a reference to the fact that the government had not made any proposal that included the right to collectively bargain over Working Conditions, a point also made by Ms. Lambert in a letter to Mr. Straszak the same day.

[266] The government representatives criticized the BCTF for issuing a press release critiquing the proposal. I do not find this to be a significant point. The fact is that this form of communication did reach Mr. Straszak.

[267] The BCTF points out that it was the government side of the negotiations that released information regarding the framework proposal to BCPSEA, which issued its own "information update" first, reviewed by the government. The BCPSEA public statement stated that the COF was an alternative to returning the Working Conditions language to the collective agreement.

[268] The Minister of Education at the time, George Abbott, wrote to Ms. Lambert on September 14, 2011, by email. He stated as that former Minister of Health, he had direct experience in reaching a settlement in a similar case, referencing the settlement with the health sector unions post-the *Health Services* decision.

[269] Ms. Lambert replied by letter dated September 16, 2011. It was clear from her letter that the BCTF saw the health service settlement as significantly different from what was proposed in the "Framework for Discussion". As she correctly pointed out, to settle with the health care unions, the government repealed the unconstitutional legislation. However, in the government proposal to the BCTF it was not even prepared to discuss repealing the unconstitutional legislation or to permit those issues to be dealt with in the process of collective bargaining. The government did not correct Ms. Lambert's understanding of its position.

[270] Following the BCTF press release pointing out issues that it had with the "Framework for Discussion" and the COF funding proposal, Mr. Straszak wrote to the BCTF by letter of October 3, 2011. In his letter, he provided his response to the concerns raised by the BCTF. He also attached a draft COF memorandum of agreement as a new proposal.

[271] The varied government proposal still stated that the COF memorandum of agreement would not form part of the collective agreement and would not be subject to grievance under the collective agreement.

[272] For the first time Mr. Straszak mentioned the size of the proposed COF. The government was proposing that the fund would total $165 million over a three year period ($30 million in 2012-2013; $60 million in 2013-2014; and $75 million in 2014-2015), and $75 million per year after that "for each year the fund is operated". He did not provide any details as to the stability of the government future funding to the COF.

[273] The COF memorandum of agreement contained a broad and comprehensive release of teachers' claims arising from the Bill 28 Decision. It also released teachers' claims for other outstanding grievances which did not arise from the impugned legislation or the Bill 28 Decision. These other grievances, which were in the thousands, were related to alleged violations by schools of legislation imposing class size maximums (known as the *Education (Leaning Enhancement) Statutes Amendment Act, 2006,* S.B.C. 2006, c. 21, or Bill 33).

[274] Mr. Straszak did not respond at all to the BCTF concern that the proposal did not provide any explanation as to why the subject matter of the Working Conditions could not be returned to collective bargaining.

[275] Following the court application seeking clarification of the Bill 28 Decision, dismissed on October 12, 2011, the parties next met on October 24, 2011.

[276] BCTF presented its first written proposal at that meeting. The BCTF representatives read through some of the deleted collective agreement terms on Working Conditions, and submitted to the government representatives that the terms were flexible, involved collaboration, and therefore did meet government objectives.

[277] The BCTF proposed that the right to collectively bargain be restored and the unconstitutional legislation be repealed. It also proposed that the collective agreement provisions deleted by the unconstitutional legislation be deemed in full force and effect upon repeal of the legislation. It proposed that the government fully fund the return of lost teaching positions needed to comply with the restoration of the collective agreement provisions. It also proposed compensation to "address effects of a decade during which teachers were deprived of their *Charter* Rights", and if the

parties could not agree upon compensation, they would submit their dispute to arbitration.

[278] The government in its submissions is very critical of the BCTF first proposal as simply a reiteration of its position from the beginning of the discussions. It is a fair description, but not a fair criticism. The BCTF had listened to the government representatives state over and over that the government policy objectives of flexibility could not be met by the Working Conditions clauses in the collective agreement and seemingly not by any bargaining over Working Conditions. After having won a court victory affirming the teachers' collective bargaining rights, the government's position seemed to be contrary to the Court's decision.

[279] The BCTF correctly perceived that the government representatives had not read the Working Conditions terms in the collective agreement. It was therefore appropriate for the BCTF representatives to try to educate the government representatives on the terms that were at issue.

[280] The next day, October 25, 2011, the BCTF also presented a written set of principles which it felt should underlie the parties' discussions. This was at Mr. Straszak's suggestion, and it was meant to respond to and be parallel to the government's earlier statement of policy objectives. The BCTF principles were: that teachers must be able to bargain all Working Conditions; government should respect the expertise of the teaching profession; government must comply with the law; parties to a collective agreement should abide by it unless changed with the agreement of both parties; an injured party should be made whole; and the parties should be able to rely on the truth of each other's representations.

[281] In the exchange between the parties on October 25, 2011, the BCTF accused the government team as just positioning and not addressing the collective bargaining rights that had been the subject of the Bill 28 Decision. Ms. Lambert stated clearly that what the union wanted was the right to collectively bargain Working Conditions.

[282] In his response, Mr. Straszak denied that the government team was positioning, but agreed that the government did have a different interpretation of the

Bill 28 Decision than the union. He agreed that the present discussions were not collective bargaining and were not intended to be collective bargaining, and he made no suggestion that the government was going to put back on the table any ability of the union to collectively bargain over the Working Conditions. Rather, he emphasized that the government had a right to pass legislation where it has legitimate policy objectives, that the court had said that when it does so it must respect a union's right to represent its members, and so that was the right he was giving the union in these discussions.

[283] The next meeting was on October 27, 2011. At that meeting the government presented a revised proposal to the BCTF. This proposal included two documents, a draft letter of understanding between BCPSEA, the BCTF and the province (the "LOU") and a COF memorandum of agreement (the "MOA") between the same three parties.

[284] The government's proposal was similar in structure to its earlier COF proposal: the establishment of a fund to target certain "high priority" classes. The proposal now was that there would be a limited grievance procedure having to do with the allocation of the fund.

[285] The government's proposal suggested only a limited role for the BCTF:

a) the Ministry would consult with the BCTF regarding the method of allocating the Fund to school districts;

b) there would then be consultation between principals of schools and staff, and District Superintendents and local union presidents and other school staff, regarding a plan for use of the Fund, and if no agreement was reached, the District Superintendent could forward the final plan to the Ministry which would then release that school district's allocation of the Fund;

c) the Fund would not otherwise alter rights to establish classes in schools.

[286] The government's proposal still contained a broad release of all claims arising from the Bill 28 Decision, and a release of other outstanding grievances unrelated to the impugned legislation.

[287] The proposed LOU set out the "intention" of the Minister to establish a COF that would be in the amount of $165 million in total for the next three years and then $75 million in each subsequent year "that the Fund is operated". Any dispute under the MOU was to be submitted to arbitration.

[288] Amongst other things, the government's proposal still did not propose restoring the teachers' ability to collectively bargain the Working Conditions, and instead, appeared to seek their agreement to give up those rights which they felt they had won in the Bill 28 Decision. No argument was presented as to why the teachers' right to collectively bargain Working Conditions was a barrier to the government.

[289] The BCTF's earlier stated concern also remained unaddressed: that there were no assurances as to the stability of the funding. If the proposal was agreed to, the teachers would have given up their collective bargaining rights but the government would still have the freedom to unilaterally de-fund the COF. This potential result would leave the very limited "consultation" under the MOA and LOU meaningless and the teachers would still have no ability to raise the Working Conditions at the collective bargaining table.

[290] Also at the October 27, 2011 meeting, the government representatives admitted that they had not read the deleted collective agreement clauses until after the prior meeting. Now that they had done so, they said they had concluded that some of the clauses did not relate to the "priorities" the government "has set for the consultation". They gave the example that one of the clauses dealt with the requirement that procedures be established for evacuation of handicapped children during fire and earthquake drills. They said that they planned to review all of the deleted language and identify those clauses they felt could be returned to collective bargaining.

[291] The BCTF did not approve of the format of the government's proposal but decided to make a counter proposal in the same format, a draft letter of understanding and a draft "class size, class composition and learning specialist staffing levels supplemental fund" memorandum of agreement. This was presented at a meeting on November 10, 2011.

[292] In BCTF's second proposal, it was no longer seeking restoration of all the deleted language from the collective agreement, although it was still seeking restoration of a considerable part of that deleted language.

[293] The BCTF's proposal was that the terms in its proposed LOU would form part of the collective agreement. The LOU terms contained class size limits for K-12 but subject to a weighting formula; class composition ratios; and several provisions for dealing with exceptional circumstances. The exceptions to the class size maximums under the proposal were wide ranging, and included with the agreement of the local union and the affected member of school staff for educationally sound reasons; where students enrolled after the first week of October; music band and choir. The proposed LOU also contained provisions for negotiated or arbitrated exceptions.

[294] The BCTF representatives explained that it was their intention that the LOU would be the only collective agreement language on class size and class composition. Its proposal, which the BCTF considered a concession desired by the government, meant that there would be only province-wide language, as opposed to language at the local level. To explain, the BCTF and BCPSEA collective agreement had province-wide terms, as well as some terms that were locally negotiated. The BCTF understood that BCPSEA preferred having province-wide terms on these issues and that was the basis for the BCTF proposal.

[295] All other Working Conditions clauses in the collective agreement were to be restored according to the proposal.

[296] As for the BCTF's proposed MOA, this was meant to be a settlement of the outstanding issues arising from the Bill 28 Decision and result in any grievances being withdrawn that related to the Bill 28 Decision. The BCTF MOA proposed that

the government would establish a fund to enable compliance with the LOU; as well as supplemental funding to increase teacher preparation time over a four year period.

[297] The BCTF representatives explained that fundamental to their proposal was the restoration of the right to collectively bargain over the Working Conditions. However, they said they were also trying to recognize the government's policy objectives.

[298] The MOA proposal to provide four years of additional teacher preparation time was described by the BCTF as compensation for the harm done under the approximate decade of unconstitutional legislation. In return, they would release claims in relation to the Bill 28 Decision, but the release was narrower than the government's proposal because it did not release the wider range of outstanding grievances unrelated to Bill 28.

[299] Like the government's proposed MOA, disputes under the BCTF proposed MOA would be subject to arbitration.

[300] The BCTF did not set out the size of fund in its proposal. This was an indication that they were willing to discuss this issue with the government.

[301] At the November 10, 2011 meeting the government representatives still had not come back with the results of their review of the collective agreement legislatively deleted clauses which were, and which were not, acceptable to the government. BCTF asked but the government representatives would not share with the BCTF what criteria they were using to pick and choose which of the deleted clauses were purportedly inconsistent with government priorities.

[302] Later, the list of deleted clauses that were or were not acceptable to the government was prepared by Ms. Zacharuk who presented it at a meeting between the parties on November 21, 2011. The message seemingly to be taken from the list was that the government representatives were maintaining the position that the government would not agree that any clause addressing Working Conditions could

be returned to collective bargaining, such as matters relating to class size and composition and non-enrolling ratios. However, as a gesture the government was willing to allow more minor things to be returned to collective bargaining, such as the example given related to procedures for emergency drills and handicapped children.

[303] At the November 21, 2011 meeting Mr. Straszak explained that the government was not able, at that discussion table, to agree to return any clauses to the collective agreement, even the ones that the government saw as unproblematic. He explained that the government representatives were not in a position to know if there were special circumstances applying to a particular clause. However, with the government's agreement, the unobjectionable clauses would be a matter for the BCTF to negotiate with BCPSEA in good faith -- those would be matters for bargaining.

[304] Mr. Straszak later wrote to the BCTF on November 28, 2011 and suggested that government would advise BCPSEA of its view that the issues addressed in the acceptable clauses could be returned to this round of collective bargaining. He wrote to BCPSEA and the BCTF on November 29, 2011, stating his view that these acceptable clauses were "more properly the subject of bargaining". The government did not direct BCPSEA to accept Mr. Straszak's view and there is no evidence that BCPSEA agreed to follow Mr. Straszak's recommended return of any part of this to collective bargaining.

[305] The government had not yet responded to the BCTF proposal made on November 10. The parties next met on November 23, 2011. The government did not present a counter-proposal. From the parties' notes, the meeting appeared the most contentious yet.

[306] At the November 23, 2011 meeting, on behalf of the government team, Mr. Drescher responded to the BCTF proposal by presenting his summary of how in theory the BCTF proposal would impede school districts in effectively managing resources. The themes were a repeat of his earlier presentation about the management difficulties posed by the collective agreement terms on Working Conditions. The BCTF representatives asked for concrete examples, pointing out

their view that the issues he raised had not happened under the old collective agreement language and would not happen if funding was available.

[307] The government representatives pressed their point that funding was limited. One of the criticisms Mr. Straszak made of the BCTF proposal was that on the government's analysis, it was an even more costly proposal than the first BCTF proposal. However, when asked at the next meeting by Ms. Lambert to assume costing was not the issue, he confirmed that the real barrier was not affordability, it was "flexibility to assign resources", meaning, restriction of management rights.

[308] Mr. Straszak argued that the BCTF proposal failed to address the government's "policy objectives" because it proposed formulas and fixed ratios. This was despite the language in the BCTF proposal providing for a wide range of exceptions. Mr. Straszak still did not address any explanation to the BCTF as to why the government was maintaining that the subject matter of Working Conditions could not be dealt with in collective bargaining.

[309] The government refused to present a counter-proposal to the BCTF proposal. Mr. Straszak stated that the BCTF proposal had moved the parties farther apart. He stated that the parties were at an impasse. He suggested that it was up to the BCTF to come up with ideas other than "fixed ratios" because these restricted management rights. Asked whether the government was prepared to repeal Bill 28, he would not say.

[310] Following the meeting, the government forwarded to the BCTF the government team's costing of the BCTF proposal, if implemented in Surrey. This calculation suggested that 411 more teachers would need to be hired to address the class size and composition proposals; and then to address the proposals for additional teacher preparation time, the number would have to be increased to 1492 FTE, at a total cost of $137 million. The government was estimating the average cost per teacher, salary and benefits, to be approximately $92,000, which was likely an overstated assumption.

[311] The parties met again on November 25, 2011. The BCTF made it clear that it was willing to discuss costs and asked for information to understand the government's costing of the BCTF proposal. Following discussion, Ms. Lambert repeated her request for a counter-proposal. She stated her view that the BCTF was prepared to compromise. She emphasized again that the BCTF interest was in free collective bargaining. Mr. Straszak repeated his view that the parties were at an impasse and the meeting ended.

[312] The parties exchanged correspondence but no further proposals.

Summary of Negotiations

[313] Looking at the whole of the negotiations, the substance of the parties' positions in the post-Bill 28 Decision discussions revealed themselves to be as follows:

a) the government did not change from its position that pre-dated Bill 28 and the Bill 28 Decision, namely that collective bargaining over the Working Conditions was unduly restrictive and limited management rights, and therefore it was not willing to agree to any collective bargaining over these terms, or to any return of the deleted collective agreement language dealing with Working Conditions;

b) the government proposed a different process, outside of collective bargaining, one where the BCTF would be "consulted" in relation to the allocation of a fund that would address only a small percentage of undefined "complex" classes. Its proposal did not address any of the other Working Conditions and required the BCTF to give up the right to negotiate over Working Conditions in collective bargaining and for BCTF members to give up other grievances unrelated to Bill 28 as well;

c) the BCTF did not change from its views that the Bill 28 Decision had affirmed that teachers' were entitled to address Working Conditions as a subject of collective bargaining, and its position that it should be entitled to collectively bargain those issues;

d) although its initial position was that the deleted Working Conditions language should be returned to the collective agreement, the BCTF did propose some changes to the deleted collective agreement language. The BCTF invited a counter-proposal but the government opposed a collective bargaining framework and did not counter-propose;

e) the BCTF started from the position that it did not matter if the restoration of collective agreement terms would cost money by way of hiring more staff, and that the answer to this was simply that the government ought to provide more funding to education. It did however ask for information and appear willing to explore costing in its last discussions, before the government declared an impasse.

Health Sector Unions

[314] Mr. Straszak has also been the province's negotiator with four health sector unions following the Supreme Court of Canada's decision in *Health Services*. He felt that the strategy he had employed in that situation was successful, as it resulted in settlement agreements with those unions. It was his evidence that he employed what he considered to be a similar strategy in the negotiation with the BCTF regarding the repercussions of the Bill 28 Decision.

[315] The government's argument suggests that two inferences arise from this evidence:

a) since government's approach to the health sector unions resulted in settlements with those unions, by adopting the same approach here it must be concluded that it was reasonable and acting in good faith; and,

b) it was only because the BCTF was unreasonable or acting in bad faith that the government could not reach a settlement with the BCTF.

[316] I do not accept that the evidence supports these inferences. To explain, I will briefly review the history of the government's unconstitutional legislation and subsequent negotiations involving health sector unions.

[317] The result in *Health Services* was that the Court found that certain provisions of Bill 29 infringed s. 2(d) of the *Charter*; were not saved by s. 1 of the *Charter*; and were therefore unconstitutional. The Court suspended the declaration of unconstitutionality for twelve months to allow the government time to address the repercussions of the decision.

[318] Following the *Health Services* decision in June 2007, the government's negotiations with the health sector unions commenced in substance in early September with a target of completing negotiations by the end of December (four months later), to allow time for necessary legislation to be passed within the one year suspension period, in the spring of 2008.

[319] The government was not the employer.

[320] Because the collective agreements were between the unions and the health sector employers, the Health Employers Association of British Columbia (HEABC), members of the HEABC were at the negotiating table.

[321] At the time of the government's negotiations with the health sector unions, the unions were mid-contract and there was no ongoing collective bargaining. When considering whether or not to restore the right to collectively bargain over the matters which had been the subject of the lawsuit, such as contracting out, the government noted that it would have more "flexibility" and "control" over contracting out if the subject was not returned to collective bargaining. Nevertheless it recognized that this was constitutionally risky. It decided that the better option was to allow a return of the subject matter to collective bargaining, but to have the parties together negotiate new terms in the collective agreements dealing with this subject.

[322] In its approach to negotiating with the health sector unions, the government recognized that any new legislation had to recognize the union's right to negotiate in good faith on those areas of which the earlier legislation had prohibited collective bargaining, namely contracting out and bumping and layoffs.

[323] Another important factor was that the government decided to suspend its intended program of contracting out and layoffs of public sector employees, pending the outcome of negotiations with the unions. In other words, it did not take the position that it would still act under the suspended legislation as though it was valid for another full year.

[324] As well, the government strategy was to offer money to the health sector unions as compensation for those workers laid-off as a result of the unconstitutional legislation dealing with contracting out. The money could be used for enhanced severance, employee hardship, or retraining or relocation.

[325] The government internally estimated that it had enjoyed savings of approximately $50 million per year as a result of the lay-offs that had occurred based on the legislation, because the number of public sector workers laid off equated to approximately 5,500 full time ("FTE") positions. It estimated that the cost of making workers whole by providing restitution for those affected by the unconstitutional legislation, would be approximately $645 million up to January 1, 2008.

[326] In the result, the government and four unions were able to negotiate settlements following the *Health Services* decision, each structured along the following lines:

a) the settlement agreements involved the government, union, and the relevant employers' association;

b) the parties agreed to amend language of existing collective agreements dealing with the controversial subject matters that had been addressed in the unconstitutional legislation, such as contracting out and portability of benefits but the ability to collectively bargain these matters was restored;

c) the government would pay an amount of money to each of the unions, to be administered by that union or by a joint committee of representatives of the employer and union, for such things as payment

to affected employees, or professional development education. The funds to all the affected unions totalled $84 million;

d) the affected union members released and waived all claims and grievances arising under the impugned legislation and relating to the *Health Services* decision.

[327] As part of the deal with the health sector unions, the government repealed the unconstitutional legislation, Bill 29, and introduced new legislation which did not contain the same restrictions on collective bargaining.

[328] Thus there were several conciliatory factors in the post-*Health Services* negotiations which were not present in the post-Bill 28 Decision discussions between the government and the BCTF:

a) The government team in the post-*Health Services* negotiations showed a willingness to re-introduce to collective bargaining and the collective agreement the very subjects that had been legislatively prohibited. The government also took steps to immediately suspend the practices that offended the unions. This no doubt purchased an enormous amount of goodwill from the unions.

b) In contrast, the government team which negotiated with the BCTF maintained a position that the subjects of the Working Conditions could not be returned to collective bargaining, but did not explain why this was so other than broad statements of it being contrary to government "policy" of "flexibility". It would have purchased goodwill from the BCTF to return these subjects to collective bargaining immediately. Instead, the government approach created a great deal of frustration on the BCTF side of the table. It was only in its last proposal, in November 2011, that the government showed a willingness to have some form of union consultation on class composition funding, and to have this funding structure tied to the collective agreement. However, this was very late in the process, was a very minimal consultation process, and still did not deal with the broader right to collectively bargain.

c) The government in the post-*Health Services* situation recognized that collective agreement changes required negotiations between the employer and employee associations, and facilitated this.

d) In contrast, the government position with the BCTF was not only that terms on Working Conditions would not be returned to the collective agreement but that collective bargaining would not be permitted on these topics either. This left the union with no ability to agree to changes in language to the collective agreement -- it had nothing to negotiate over. Late in the day the union itself made proposals to change the language in the collective agreement, but then the government team declared the negotiations at an impasse without making a counter-proposal.

e) The government offered compensation to the affected unions post-*Health Services*.

f) In contrast, the government did not offer compensation to the BCTF. While the government did eventually propose to establish a limited purpose fund to make grants to schools, it only proposed that the BCTF be consulted on the process of allocation of the fund. The purpose of the fund was not to compensate teachers for their lost collective bargaining rights or for the extra work they had taken on since 2002 after the Working Conditions clauses were deleted from their collective agreement.

Issue 3: Did the Parties' Discussions Post-the Bill 28 Decision, and Prior to the Enactment of Bill 22, save the Bill 22 Duplicate Provisions?

[329] Both sides state in evidence before me that they were prepared to negotiate on the repercussions of the Bill 28 Decision in good faith. However the difficult task for this Court is in determining if this statement was sincere and carried out.

Reasonableness of Asserted Positions

[330] In their negotiations, the government representatives focussed on the outcome the government wished to have, namely no collective bargaining on Working Conditions and no collective agreement terms on Working Conditions.

[331] Mr. Straszak's overall message to the BCTF was that all the government was required to do after the Bill 28 Decision was show that it stated its position and listened to the other side. The government team portrayed itself as having its mind made up that it would not restore collective bargaining rights in respect of the Working Conditions.

[332] The government's positions were manifestly unreasonable, given the outcome of the Bill 28 Decision. The unreasonableness of the government position was eventually somewhat modified, but only modestly and belatedly, by its proposal to fund a "class organization fund" to address some class composition issues. This measure required a significant amount of money and cannot be criticized as being in bad faith.

[333] The COF could have been a starting point in discussing a new way to provide some funds to solve some problems in some classrooms but it did nothing to address the teachers' desire to return the full scope of Working Conditions to collective bargaining. This proposal on its own did nothing to address the bargaining rights issue.

[334] As for the BCTF, it asserted the position that its right to collectively bargain Working Conditions should be restored, as should language in the collective agreement, or language that accomplished similar ends. However, inherent in the BCTF position was that these matters would be subject to collective bargaining, meaning the terms could be negotiated.

[335] In effect, the core of what the BCTF was seeking was a right to collectively bargain, not a legislative imposition of some end result of that bargaining. I do not consider this to be intransigent or unreasonable, given that the BCTF had prevailed in the Bill 28 Decision and this was not appealed.

[336] In addition, the BCTF was seeking some compensation for its members. This aspect of its proposal was akin to settlement discussions regarding its claim for additional remedies in the Bill 28 Action. It was not akin to a negotiation over the scope of collective bargaining. It was not unreasonable.

Opportunity to Influence Employer

[337] The discussions between the government and the BCTF did not give the BCTF an opportunity to influence the employer with respect to Working Conditions. The government maintained that the Bill 28 negotiations needed to be separate from the union's collective bargaining with BCPSEA.

[338] This is a significant difference from the negotiations with the health sector unions, following the *Health Services* decision. Those negotiations did have the employer at the table.

[339] The government emphasises that Mr. Straszak testified that he proposed having the employer at the negotiations as in the health sector negotiations, but it was the BCTF that refused. This fails to appreciate the point that the health sector unions were mid-contract and there was no active collective bargaining table. Here, there was an active bargaining table between BCTF and the employer association, and BCTF was willing to have these matters returned to that table, but the government representatives steadfastly refused.

[340] The government never advanced a good argument to the BCTF as to why it did not agree to have the prohibition on collective bargaining Working Conditions lifted immediately, given that collective bargaining had just commenced. Regardless of the government's suggestion in the meetings with the BCTF that restoring the collective agreement language would be just too expensive for government, returning the ability to collectively bargain would cost the government nothing.

Commitment of Time and Preparation

[341] The government representatives were prepared to commit time to the negotiations.

[342] However, the preparation of the government representatives displayed a lack of true commitment to the content of the discussions.

[343] The central issue for the union in the Bill 28 Action was the government's infringement of collective bargaining rights with respect to Working Conditions. Despite the union winning the litigation on this issue, the government representatives asserted the position that the legislatively-deleted collective agreement terms addressing Working Conditions were contrary to government policy objectives of flexibility and choice, and likewise so would be any collective bargaining on these issues.

[344] Yet the government representatives did not even read the Working Conditions clauses until after a sixth meeting took place with the BCTF on October 24, 2011. They were not in a position to comment on these clauses until as of the November 21, 2011 meeting with the BCTF. This was far too late in the process, given the government's deadline to complete these negotiations by the end of November.

[345] Even then, after having read the clauses, the government representatives were only willing to concede that the most innocuous of clauses might be restored to collective bargaining, such as clauses dealing with fire drills and earthquake drills for special needs students. The government maintained its position that none of the other Working Conditions clauses could be restored to collective bargaining based on its unwavering position that to do so would impede flexibility and choice. This position was maintained without any factual or analytical basis for it.

A Willingness to Exchange and Explain Positions

[346] The parties did meet several times, and of course there can be no good faith negotiations without a willingness to meet.

[347] Unfortunately the first several meetings were taken up by the government representatives speaking about "policy" in vague terms. The government representatives discouraged BCTF representatives from asking questions about their position and were not interested in providing substantive answers.

[348] The evidence of Paul Straszak at trial suggested that at times he found the fact of questioning by BCTF representatives during government presentations to be inappropriate and disruptive.

[349] I find that the BCTF representatives were trying to understand the government positions, which were framed as explaining why the deleted contract language was contrary to government policy. This was a difficult framework for the BCTF representatives to understand, given that during the Bill 28 Action, the union had shown that the collective agreement terms were flexible, and given the absolutist nature of the government position which was not proposing new collective agreement language but instead seemed to be premised on a continued prohibition on collective bargaining.

[350] Part of good faith consultation requires giving the other side the opportunity to ask questions, and not simply going through the motions of meeting where one side lectures the other.

[351] In this regard, I find helpful the description of government consultation given by Saunders J.A. in *Gardner v. Williams Lake (City)*, 2006 BCCA 307 at paras. 29-30:

> At a minimum, "consultation" anticipates bi-lateral communication in which the person consulted has the opportunity to question, to receive explanation and to provide comment to the local government upon the proposal. … The essence of the requirement is that those consulted have the opportunity to question and provide their comment, and that the local government weigh that comment, before advancing in the legislative process.
>
> … the "consultation" conducted must be meaningful; that is, the consulting body must do more than pay lip service to the requirement.

[352] I find that the BCTF representatives wanted to get to the heart of the issue and they were understandably confused by the tactics of the government negotiating team which appeared to be wasting time and not addressing the issues. They sought to question the government representatives. These questions would have been welcomed had the government's representatives been sincerely wanting to have meaningful dialogue, but they were not.

[353] As but two examples: the union's repeated requests that the government explain its position on not returning the Working Conditions subjects to collective bargaining were ignored; the union's questioning of what factors were being used by the government representatives to belatedly review the deleted contract language and determine what language was acceptable or not, was also ignored.

[354] The government submits that the BCTF was unreasonable and showed an unwillingness to listen to the government position. The BCTF continually insisted on a two-fold result: a return of the subject matter of the Working Conditions to collective bargaining; and, a return of the deleted clauses to the collective agreement.

[355] I agree with the government that the BCTF linked the two issues together: a return to collective bargaining, and a return of the Working Conditions clauses to the collective agreement. However, this was responsive to the position of the government team, through Mr. Straszak, who linked these matters together in his starting approach and throughout. Had Mr. Straszak simply indicated that the government was willing to agree that the Working Conditions subject matter could be returned to the collective bargaining process, this issue then would have been de-linked from the issue of returning the collective agreement language. The parties could have then concentrated on what was acceptable or unacceptable about the contract language.

[356] But since the government insisted on starting from an extreme position, linking the two aspects of the unconstitutional legislation together, and insisting that all that was needed to fix the unconstitutional legislation was government consultation, the BCTF response position was rather predictable. If one side starts from an extreme position, it should not be surprised if the other side does not immediately compromise all that is important to it.

[357] I consider it a fair criticism that the BCTF representatives did not appear open to discussions about the costs implications of returning the Working Conditions clauses to the collective agreement until very late in the day. However part of the problem was the way this discussion was framed by the government, as though it

was a problem with the language in the collective agreement or a problem with having any Working Conditions addressed in collective bargaining rather than an overall resources problem.

[358] Limits on resources are always going to be an issue in collective bargaining between employee and employer and will require trade-offs, with each side perhaps having different priorities and pressures. The costs issue would need to be addressed but it was difficult to do so as framed by the government negotiators.

[359] Had the government team moved more quickly to make proposals which addressed the right to collectively bargain over Working Conditions, perhaps real gains could have been made.

Avoidance of Unjustified Delays in Negotiations

[360] I find that the government waited too long to make a substantive proposal to the BCTF.

[361] Mr. Straszak's team wasted time in the first four months of negotiations with the BCTF by his strategy of trying to box the BCTF into accepting government "policy objectives" that were simply a restatement of matters that both sides should have been already well aware of as these matters had been the subject of extensive evidence as well as findings of fact in the Bill 28 Decision. The government's repeated attempt to state that the language in the 2001 Collective Agreement dealing with Working Conditions in fact impeded policy objectives of flexibility and choice was not in good faith, because the government representatives had not even read the deleted collective agreement language and so could hardly take an informed position on the matter.

[362] The time frame set by the government was to have any agreement with the BCTF completed by the end of November 2011. Yet the government negotiators did not address anything to do with a process that even slightly approached collective bargaining until the proposal made on October 27, 2011.

[363] Even then, this proposal was only a modest nod to the union's stated concern that the government had not addressed its desire to be able to collectively bargain over Working Conditions. The October 27, 2011 government proposal allowed for union "consultation" only regarding the process for allocation of the COF, but all other collective bargaining rights flowing from the Bill 28 Decision were required to be released by the union and its members. If this proposal was accepted, the teachers as employees would continue to have no collective voice to negotiate over Working Conditions with the bargaining agent for employers.

[364] Further, there was not sufficient time within the government's deadline -- then only one month -- for the parties to meaningfully negotiate the components of this proposal and to address the BCTF's continued concerns that the proposal did not provide for any return to a right of employees to associate through the BCTF to influence their Working Conditions.

[365] As for delay by the BCTF, the context of negotiations required the government to make a real proposal to address the repercussions of the Bill 28 Decision, not for the BCTF to start with proposals. The government never did make a proposal that would address the loss of rights caused by Bill 28.

[366] I do not find the BCTF's request for the Court's clarification which was heard in October 2011 to be an unjustified delay tactic. I find that the BCTF was understandably frustrated by the negotiating tactics of the government's team and Mr. Straszak's focus on "consultation" being all that the government needed to do to fix its unconstitutional legislation. I find that coming to Court for clarification was not an attempt by the union to block progress but to remove an impediment to progress in the negotiations.

Endeavouring to Reach an Agreement and to Strive to Find a Middle Ground

[367] If the nature of the proposals is "aimed at avoiding the conclusion of a collective agreement or destroying the collective bargaining relationship" then it will not be good faith negotiations (*Health Services*, at para. 105).

[368] From the start of its post-Bill 28 Decision negotiation with the BCTF, the government had a strategy in mind that it would be to its benefit if negotiations failed and if collective bargaining resulted in a strike and impasse. This would give it the opportunity to pass legislation which would address the repercussions of the Bill 28 Decision, and at the same time, pass legislation imposing a new collective agreement with net zero compensation.

[369] To explain, I need to return to the collective bargaining context at the time.

[370] As mentioned, the 2006 Collective Agreement was set to expire in June 2011, and the parties to it, BCPSEA and BCTF, had commenced collective bargaining in March 2011.

[371] The government typically gave mandates to PSEC and the public sector employers' associations, setting out the government's policy and fiscal directives for bargaining.

[372] Prior to the commencement of the 2011 round of collective bargaining with teachers, the government had in late 2009 issued a mandate to public sector employers for 2010 collective bargaining ("Mandate 2010").

[373] Mandate 2010 was colloquially known as the "net zero mandate" because it did not allow for any increase in total net compensation costs to the government. This meant that if a public sector union wanted an increase in benefits, for example, it would have to trade off something that resulted in an equal amount of savings for government. One example given was to "tilt" the pay line by decreasing the wage levels for entry level workers and increasing the wage level for more senior workers; another example was to decrease overtime rates to allow for a benefit increase.

[374] Mandate 2010 was the government's attempt to control costs following the global financial crisis in 2009. It applied to all public sector employees, including non-unionized employees. It applied to those unionized employees covered by collective agreements that expired between December 31, 2009, and March 31, 2012.

[375] Several unions did settle collective agreements within the mandate. As the 2011 round of bargaining approached, the government felt that if this mandate was exceeded in bargaining with teachers, then it would likely have a cascading effect with other public sector unions.

[376] Mandate 2010 was still part of BCPSEA's mandate as of the 2011 round of bargaining. This aspect of the mandate meant that BCPSEA was not able to agree to any term in collective bargaining that would have the effect of raising the net cost to government. There was still room to make trade-offs within that limitation, however.

[377] Mandate 2010 imposed additional limits on BCPSEA's collective bargaining negotiations in that BCPSEA could not give up any existing "material" management rights. What was "material" was defined as including the right to set staffing levels, scheduling, promotion, contracting out, or any other significant aspects of directing the workforce.

[378] Mr. Straszak testified that the requirement to not give up material management rights had been a requirement in earlier mandates and did not preclude non-material concessions. It was his evidence that PSEC would provide guidance to any employer association needing feedback on what might be considered material management rights during the course of negotiations.

[379] In October 2010 and following, government officials began developing a list of the government's priorities for the upcoming collective bargaining between BCPSEA and the BCTF. As early as October 2010, government was contemplating imposing its objectives in a legislated collective agreement. These objectives included obtaining significant concessions from teachers in the areas of evaluation, professional development, and posting, filling, employee assignment and transfer rights. Eventually these objectives were formulated into a list which the government provided to BCPSEA as the concessions it wanted BCPSEA to pursue in collective bargaining.

[380] From before collective bargaining began in 2011, the government expected that the round of collective bargaining would likely fail to result in an agreement between the BCTF and BCPSEA. This is because the collective bargaining mandates government had issued to BCPSEA, combined with a continued prohibition on negotiation Working Conditions, were predicted by the government to be so unacceptable to the BCTF.

[381] The government thus expected from even before collective bargaining began in March 2011 that it would lead to the BCTF calling a strike.

[382] After the Bill 28 Decision came down against it, the government developed a broad political strategy to deal with the BCTF, both in respect of its settlement discussions following the Bill 28 Decision, and in respect of collective bargaining. Mr. Straszak was instrumental in the development of this broad strategy.

[383] The government saw that the failure of the two negotiating tables could be a useful political opportunity for it. As early as June 2011, the government was considering a strategy of a combined legislative response to an expected teachers' strike and to Bill 28. Mr. Straszak's internal notes indicate that the "aim" was "to put government in a position to deal with both at one time if possible (1 hit vs 2)". The expected legislation he had in mind as early as that time:

> Will end legal strike
>
> Will impose 0 compensation increase
>
> Will impose concessions which advance education initiatives:
>
> evaluation, control over pro D, limit application of seniority for placement
>
> Will NOT reinstate class size, comp provisions which were deemed unconstitutional
>
> Only balancing factor is whatever mandate is approved for Bill 28
>
> and most of that will be funded from within existing education budget

[384] The government thought that a teachers strike would give the government a political advantage in imposing legislation that the public might otherwise not support. It felt that the timing of legislation to deal with a teachers strike and failure of collective bargaining could fit conveniently with the timing of legislation to address

the Bill 28 Decision repercussions. The government planned its strategy accordingly so that it could have one legislative initiative at the end of the one year suspension granted in the Bill 28 Decision.

[385] Rather than taking full strike action, instead the teachers withdrew some administrative, non-essential services, such as preparing report cards. Teachers continued to provide all teaching and classroom services.

[386] When a full strike did not materialize, so important was a strike to the government strategy that in September 2011, Mr. Straszak planned a government strategy of increasing the pressure on the union so as to provoke a strike.

[387] In furtherance of this strategy, the government sought to force school districts to cancel teachers' leaves and professional development days, including by reducing funding to school districts to get them to carry these measures out. Another aspect of these pressure tactics was to have BCPSEA apply for an order of the Labour Relations Board to vary previous essential services orders so that districts could reduce teachers' pay. This application was brought but was unsuccessful.

[388] Governments by their nature are political. There is nothing wrong with a government and its servant playing politics: that is what they do.

[389] Nevertheless, I find that Mr. Straszak's key role in developing and pursuing this broader political agenda undermined the sincerity of Mr. Straszak's search to reach a solution in his discussions with the union following the Bill 28 Decision. The broader political agenda and the perceived potential gain for government if negotiations with the BCTF failed distracted Mr. Straszak from a goal of providing a process that truly sought agreement or truly took into account the union's views so as to allow it to influence working conditions of its members. Since Mr. Straszak saw significant political advantages to government if the discussions with the BCTF failed, it is not surprising that they did.

[390] This is another reflection of how the government and union negotiations were not akin to collective bargaining between employer association and employee

association. Employer-employee association negotiations are structured so as to even the playing field, with each side having the potential to lose if no agreement is reached. This encourages each side to sincerely try to compromise and reach agreement.

[391] But with Mr. Straszak for the government on one side of the table across from the union, knowing it could serve the government's broader political goals if no agreement was reached, there was no equality of bargaining power. I find that there was no true will on the government side of the table to reach agreement in the discussions following Bill 28.

[392] Perhaps this affirms the wisdom of the Korbin labour relations model: government is removed from the direct bargaining relationship with public sector employees and the bargaining takes place with the employer association which has a more direct interest in reaching agreement.

Source of Funding the Proposed COF

[393] The BCTF suggests that evidence of the government's bad faith in negotiations is the fact that the government did not earmark any new funds in education towards the COF proposal. Rather, the government packaged up its existing plans for funding and simply re-named it to suggest that new money was being put on the table.

[394] For example, in May 2011 the government was unveiling a new policy agenda in education with an emphasis on "teacher quality", such as new professional standards and a new disciplinary process; "personalized learning", including providing more choice for students and expanded use of technology; and "accountability", including gathering greater statistical data on schools and making it publicly available.

[395] Mr. Straszyk sought to use funds from the government's new education agenda as his monetary source if needed to settle class composition issues for teachers.

[396] Given that no agreement was reached, I do not find the fact of where the government was considering sourcing funds to settle with teachers relevant to the question of whether or not the government was consulting in good faith in a way that would ameliorate the interference with collective bargaining imposed by Bill 22.

Conclusion Issue 3

[397] I conclude that the government approach to its discussions with the BCTF regarding the repercussions of the Bill 28 Decision did not amount to consultation in good faith in the sense that would ameliorate the subsequent legislative violation of s. 2(d) rights by way of Bill 22, so as to make the legislative interference any less substantial.

[398] The government representatives did not engage in meaningful dialogue, listen to the employees' representations, avoid unnecessary delay, or make a reasonable effort to reach agreement, all factors in assessing good faith consultation: *Fraser*, at paras. 40-41. I therefore conclude that the process by which Bill 22 was implemented did not respect the duty to consult and negotiate in good faith.

[399] This Court already found in the Bill 28 Decision that the legislative provisions amounted to a substantial interference with the s. 2(d) *Charter* rights of teachers. The subsequent discussions between the government and the BCTF made the Bill 22 Duplicative Provisions no less a substantial interference.

[400] The next question is whether the one change in the content of the Bill 22 Duplicative Provisions is such as to make the interference with s. 2(d) rights something less than substantial.

Issue 4: Does the Time Limit on the Collective Bargaining Prohibition in Bill 22 Change the Analysis of the Constitutionality of Either of the Bill 22 Duplicative Provisions?

[401] The only change to the re-enacted legislation which the government relies on as "saving" the previously found invalid provisions from being unconstitutional (combined with its pre-legislation "consultation" process), is the government's

change to the length of time for which the legislative ban on collective bargaining would be in force.

[402] In the Bill 28 package of legislation, the legislation prohibited collective bargaining over the Working Conditions without any expiry date on this prohibition: s. 8 of *PEFCA* which amended s. 27(3)(d) to (j) of the *School Act*.

[403] In the Bill 22 package, one part of the legislation extended the prohibition on collective bargaining over the same things, but this time, the legislation had a built-in expiry date of June 30, 2013, some fourteen months later: s.13 of the *EIA*, re-enacting s. 27(3)(d) to (j) of the *School Act*, but also enacting s. 27(7) of the *School Act* which repeals ss. 27(3)(d) to (j) on June 30, 2013.

[404] But in the Bill 22 package, the legislative deletion of past collectively bargained terms was virtually identical to that which had been declared invalid in the Bill 28 Decision: ss. 8 and 24 of the *EIA*. This legislative deletion of past collective agreement terms has no time limit: these terms are gone retroactive to when they were first part of the collective agreement, to July 2002, and thereafter.

[405] The questions are whether the shorter time limit on the legislative prohibition of bargaining cures or saves the Bill 22 Duplicative Provisions, either:

a) the Bill 22 provisions prohibiting collective bargaining on the Working Conditions until June 30, 2013; or,

b) the Bill 22 provisions which re-deleted terms of the BCTF collective agreement dealing with the Working Conditions, retroactive to July 2002.

Continued Prohibition on Bargaining

[406] Dealing first with the time-limited prohibition on collective bargaining over the subject matter of the Working Conditions, the government describes Bill 22, specifically s. 13 of the *EIA*, as extending the legislative prohibition on bargaining but restoring the right to collectively bargain as of June 30, 2013.

[407] The government witnesses testified that there were two reasons for extending the legislative prohibition on bargaining over Working Conditions. One reason was that by the time of the enactment of the *EIA* in early 2012, bargaining between the BCTF and BCPSEA had reached an impasse. The government witnesses say that adding the Working Conditions issues was not considered "productive" to the collective bargaining.

[408] The second reason was that government thought returning the Working Conditions to collective bargaining would have been disruptive to school districts planning for the 2012-2013 school year.

[409] For the above two reasons, the government submits that instead of "restoring" the right to collectively bargain on the Working Conditions immediately, the government "opted" to attempt to achieve a mediated settlement to get the parties through the ensuing school year. The government submits that this is why the *EIA* also provided for the appointment of a mediator in relation to the ongoing collective bargaining and 2011-2013 collective agreement.

[410] These arguments are not supported by the evidence or by logic.

[411] Essentially the government argument is that because it decided not to restore collective bargaining over the Working Conditions immediately upon the Bill 28 Decision being rendered, despite a fresh round of collective bargaining having just begun, it decided to extend the prohibition on collective bargaining until the next round of bargaining. This is not a valid reason.

[412] When in the Bill 28 Decision the Court suspended the declaration of invalidity of the legislation restricting collective bargaining for twelve months, this was to allow the government choices. The government had the choice of repealing the legislation immediately rather than waiting for the one year when the legislation would be automatically invalid. The argument that collective bargaining will be difficult, and that school districts could be affected depending on the outcome of bargaining, applies no matter when the Working Conditions matters are returned to the bargaining table.

[413] I do not criticize the government for its choice to rely on this Court's one year suspension of the invalidity of the legislation. However, the government cannot use the fact of the stay as an excuse for it later unilaterally extending the unconstitutional legislation.

[414] If the government was concerned about the return of the right to collectively bargain over Working Conditions occurring late in the bargaining process, the government has never offered any reason for not repealing the legislative prohibition immediately after the Bill 28 Decision. There was a perfect opportunity to do so given that collective bargaining had just started. This would have given the BCTF and BCPSEA ample time to try to reach agreement on these issues, and if school districts were going to be affected, ample time to adjust. Even if an impasse was reached, there is no logical reason why delaying the discussions until the next round of collective bargaining would be preferable.

[415] The argument that school districts might be disrupted if collective bargaining was permitted immediately is also flawed logic. Delaying bargaining just delays the impact, it does not remove the impact. But how and when school districts might be affected by collective bargaining over the Working Conditions would depend on the outcome of the collective bargaining, not on the process being permitted. The impact on school districts would naturally be part of the discussions at the bargaining table between BCPSEA and the BCTF.

[416] Furthermore, the government evidence that by early 2012 it did not think that adding these matters to collective bargaining would be "productive" suggests that the government expected and wanted collective bargaining to be productive. The evidence is otherwise.

[417] As already mentioned, the government expected collective bargaining to fail. This expectation existed even before collective bargaining commenced in the 2011 round, in large part because of the hard fiscal and policy positions the government was asking BCPSEA to take in bargaining with the union.

[418] The government expected that the BCPSEA positions would be so difficult for the union to accept that the union would take strike action.

[419] When the BCTF did not respond by calling a full strike the government followed Mr. Straszak's recommended strategy to engage in pressure tactics to try to provoke a strike.

[420] These pressure tactics did not succeed in provoking a full-scale strike by the BCTF. But the point is that the evidence is very far from supporting the government argument that it did not return the Working Conditions to collective bargaining earlier because it wanted collective bargaining to be productive.

[421] I have concluded on the evidence that the reason that the government did not return the right to collective bargain over the Working Conditions earlier, is that it wanted to use the threat of not restoring these rights as part of its negotiating leverage over the union, in the post-Bill 28 discussions.

[422] The BCTF was seeking to add the Working Conditions issues to the bargaining table immediately upon the Bill 28 Decision being rendered. The government refused, and its representative, Mr. Straszak, took the position with the BCTF that these matters did not need to be returned to collective bargaining so long as the government "consulted" with the union. In those consultations, the government representatives did not offer to restore the union's right to collectively bargain over Working Conditions immediately, on a delayed basis or ever.

[423] I also do not accept as a matter of fact that the legislated mediation process had anything to do with the government's decision to extend the prohibition on collective bargaining over the Working Conditions. The mediator's mandate was very narrow based on the legislation appointing him and he was not legally permitted to mediate any of the Working Conditions issues.

[424] The union's right to collectively bargain over the Working Conditions issues was restored by this Court's ruling in the Bill 28 Decision. Bill 22 took away the union's right once again.

[425] The union argues that in fact what the government did was take this Court's one year suspension of the declaration of invalidity of the identical Bill 28 legislation and then unilaterally extend that for another fourteen months. If the government wished a greater time period for suspension of the declaration of invalidity, the union argues that the government ought to have approached the court for an extension. This did not happen and there is no need for me to comment further other than to say that I have rejected the government's argument that the extension of the legislative prohibition was justified.

Repeated Deletion of Working Conditions Terms

[426] I turn now to address the Bill 22 Duplicative Provisions which duplicated the deletion of hundreds of clauses of the collective agreement retroactively. The argument by the government is that the deletion of past negotiated terms of a collective agreement is not substantial interference when the right to continue to collectively bargain over the same subject matters continues.

[427] The government submits correctly that s. 2(d) of the *Charter* does not protect the fruits of association, just the process of association, as confirmed in *Fraser*.

[428] The government argues in its written submission as follows:

> The final point of clarification in *Fraser*, a critical one for present purposes, arises from Justice Rothstein's criticism that *Health Services* placed "*contracts above statutes in the traditional hierarchy of laws*" (*Fraser*, at para. 216). This interpretation of *Health Services* was expressly rejected by the majority in *Fraser* at para. 76. It was the nullification of collective agreement terms, *coupled* with the prohibition on future bargaining that violated s. 2(d) not that concluded collective agreement terms could not be legislatively overridden. In short, under the *Health Services* analysis contractual terms are not given hierarchy over statutes simply because they have been collectively rather than individually negotiated.
>
> [Emphasis in Submission.]

[429] The government argues in essence that the legislative deletion of terms in a collective agreement, on its own, without a corresponding legislative prohibition on collective bargaining, can never be found to be unconstitutional.

[430] I respectfully disagree.

[431] There are several flaws in the government's argument.

[432] The government submits that it is only because the legislative deletion of past negotiated terms was coupled with a prohibition on future collective bargaining that both were found unconstitutional in *Health Services*. With respect, this argument is not consistent with the Supreme Court of Canada's analysis or the result in *Health Services*.

[433] If the government's argument was correct, there would have been no need for the Court in *Health Services* to decide that those aspects of the legislation that deleted past negotiated terms of collective agreements amounted to a substantial interference with s. 2(d) rights. It would have been sufficient for the Court to simply say that future prohibitions on collective bargaining constituted substantial interference with s. 2(d) rights. This is not what the Court in *Health Services* said.

[434] When the Court in *Health Services* reviewed each of the challenged provisions of the legislation, it did so with a view to determining whether the legislation invalidated, nullified or repudiated <u>past negotiated</u> terms and thereby undermined <u>past processes</u> of collective bargaining; or prohibited future terms and thereby undermined <u>future</u> processes of collective bargaining, or both: see, for example, paras. 96, 111, 113, 121, 127-128, 132-136. The Court found the legislation invalid in both respects (at para. 161).

[435] Interestingly, the legislative provision in *Health Services* restricting certain terms from being included in a collective agreement was time limited to four years (s. 9 of the impugned legislation). The Court rejected the argument that the temporary basis of the restriction saved the provision (at para. 155), noting that this was "scant comfort" to employees affected in the meantime.

[436] What the Court in *Health Services* recognized was that some significant degree of legislative interference with past negotiated terms of collective agreements could so undermine the past process of collective bargaining that it rendered the process meaningless. As noted in *Fraser* at para. 76, the Court did not suggest that a government could never interfere with negotiated terms. But likewise, neither

Fraser nor *Health Services* suggests that a government can freely interfere with past negotiated collective agreement terms either. It is a question of degree and context, with the focus always being on the impact of the government action on the process of collective bargaining.

[437] In *Federal Government Dockyard Trades and Labour Council v. The Attorney General*, 2011 BCSC 1210, aff'd 2013 BCCA 371 [*Federal Dockyard*], the British Columbia Court of Appeal found that there was only one term in the parties' negotiated agreement that had been negated by the legislation. The legislative effect was time-limited. The Court found at para. 52 that the effect of this was not as "invasive" as the nullification of terms in *Health Services*. This result does not mean that legislative nullification of negotiated terms alone can never amount to interference with collective bargaining.

[438] Again, this confirms that the question of whether or not legislative interference with past negotiated terms in a collective agreement is a substantial interference with the process of good faith bargaining and is therefore unconstitutional depends on all the circumstances, but one of the factors includes the degree of the interference.

[439] Here, it has already been determined that the Working Conditions were very important matters to the workers: Bill 28 Decision, at paras. 283-288, 290, 293, 295. It has already been determined that the wording of the legislative provision that deleted the hundreds of Working Conditions terms of the parties' collective agreement was "strikingly broad", to quote the arbitrator charged with the responsibility of deleting the terms: Bill 28 Decision, at para. 228.

[440] The hundreds of terms from the collective agreement that were deleted by Bill 28 and re-deleted by Bill 22 covered as many as nine categories (Bill 28 Decision, at paras. 226-227). The deleted terms included the whole of the 2001 K-3 Memorandum and included any term argued to be in conflict with or inconsistent with s. 27(3)(d) to (j) of the amended *School Act*, which for ease of reference is repeated below:

> (3) There must not be included in a teachers' collective agreement any provision
>
> …
>
> (d) restricting or regulating a board's power to establish class size and class composition,
>
> (e) establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes,
>
> (f) restricting or regulating a board's power to assign a student to a class, course or program,
>
> (g) restricting or regulating a board's power to determine staffing levels or ratios or the number of teachers or other staff employed by the board,
>
> (h) establishing minimum numbers of teachers or other staff,
>
> (i) restricting or regulating a board's power to determine the number of students assigned to a teacher, or
>
> (j) establishing maximum or minimum case loads, staffing loads or teaching loads.

[441] It is curious for the government to argue in respect of Bill 22 that identical legislative deletion of these hundreds of past terms is now not significant. It clearly lost this issue in the Bill 28 Decision and did not appeal. The Bill 28 Decision made it clear that both aspects of the legislation were unconstitutional: the provisions invalidating these hundreds of terms from the collective agreement, and the provisions prohibiting future bargaining over the same subjects (para. 308).

[442] Restoring a right to bargain to some degree over the same subjects in the future does not change the analysis about the widespread deletion of past terms. If it did, there would have been no need to rule in the Bill 28 Decision that the legislation deleting past collectively bargained terms was invalid. Rather, it would have been sufficient to rule as invalid the legislation prohibiting future bargaining.

[443] In its defence to Bill 22, the government made no attempt to put before the court the body of the collective agreement and to consider the volume and significance of the deleted terms.

[444] It is no answer to say the teachers were permitted to start bargaining from scratch in the future. This fails to recognize the hours of negotiations, the give and

take, the resources and the research that went into the negotiation of so many collective agreement terms, many designed to respond to local conditions. The frustration and the sense that collective bargaining is ultimately a pointless exercise can only follow legislative interference with such a broad scale of negotiated terms.

[445] As described by the majority judgment in *Fraser*, "[l]aws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless" (at para. 46, original emphasis). Bill 22 made the past work of the union to craft and negotiate hundreds of terms regarding Working Conditions "pointless". Here, by making pointless the union's past significant investment in collective bargaining, the legislation substantially interfered with the teachers' s. 2(d) rights.

[446] Another flaw in the government's argument here is that by asserting that the parties are free to negotiate whatever they wish in the future it glosses over the actual language of the legislation that deletes past terms of the collective agreement.

[447] First, the parties were not free to negotiate over Working Conditions until June 30, 2013, which was fourteen months after this legislative prohibition. I have already found that there was no valid reason for extending the ban on collective bargaining in this way.

[448] It is also important to appreciate that Bill 22 does not clearly restore the right to bargain over the Working Conditions after June 30, 2013.

[449] This is because of the language of the provision in Bill 22 which once again deletes collective agreement terms on Working Conditions. The BCTF argues that the legislative deletion of collective agreement terms is worded so broadly that it still likely provides a significant impediment to future bargaining over the subject matter of Working Conditions.

[450] Section 24 of Bill 22, the *EIA*, like its predecessor, the unconstitutional s. 5 of the *Amendment Act*, deletes not just the Working Condition clauses that had been negotiated retroactive to July 1, 2002, it deletes any of these same "words, phrases,

provisions, and parts of provisions" from being part of the parties' "collective agreement" on or after July 1, 2002. [Emphasis added.]

[451] The BCTF submits that if it seeks to negotiate new terms on Working Conditions in the collective agreement after June 30, 2013, it will face the argument by BCPSEA that none of the new terms can contain any of the words or phrases or parts of provisions that were in the hundreds of legislatively deleted terms, based on the wording of s. 24 of Bill 22. This means that not only is the BCTF prohibited from bargaining a return to the deleted language, it is prohibited from bargaining terms that contain any of the words or phrases deleted.

[452] The government did not deny that this interpretation is correct.

[453] The BCTF argument appears correct. Limiting collective bargaining is exactly what the legislative deletion of past collective agreement terms was designed to do.

[454] At the time the legislative deletion of terms in the collective agreement was first introduced in the legislature, the Bill was described as implementing the intent of Bills 27 and 28, which was "to exclude some issues… from the scope of bargaining": Bill 28 Decision, at para. 240.

[455] Past history between BCPSEA and the BCTF shows that BCPSEA takes a broad interpretation of any legislation putting limits on collective bargaining.

[456] Thus, contrary to the government position that the right to collectively bargain over the Working Conditions was only delayed but then fully restored as of June 30, 2013, the right to collectively bargain was still seriously undermined due to the re-enactment of the Duplicative Provisions deleting past terms of the collective agreement on July 1, 2002 and prohibiting their re-inclusion after July 1, 2002.

Conclusion Issue 4

[457] The Working Conditions subject matters were extremely important to the BCTF members. The right to collectively bargain these matters was extremely important to them as well: they had been trying to associate to influence these working conditions since they first began to associate as workers.

[458] As reviewed in the Bill 28 Decision at paras. 283-290, class size and composition issues greatly impact the quality of a teacher's working conditions and job stress. The more students in a class and the more students with special needs integrated without adequate assistance, the more before and after class planning and preparation and in-class student management is required by the teacher and the less time there is available for actually teaching.

[459] If a teacher finds the rewarding aspect of teaching to be the connection with a child and the sense that the child is learning from the teacher's efforts, which one hopes is the motivation for most teachers, then it is obvious that teacher job satisfaction will decrease dramatically the less opportunity there is to make this connection. Teacher job satisfaction will also decrease dramatically the less opportunity there is to influence these Working Conditions.

[460] If a constitutional right to collective bargaining enhances democracy and the rule of law, as stated in *Health Services*, one may ask what then is the impact of government legislation which simply re-enacts the restrictions on collective bargaining previously declared by a court to be unconstitutional?

[461] That this legislation was passed after so much effort by the BCTF to restore their workers' ability to collectively bargain had to be extremely destructive to the dignity and autonomy of the teachers which the s. 2(d) *Charter* right was meant to help protect (*Health Services*, at paras. 80-82).

[462] I conclude that the temporal limitation on s. 13 of Bill 22, which re-enacted the legislation prohibiting collective bargaining over Working Conditions, does not change the analysis on the unconstitutionality of the Bill 22 Duplicative Provisions.

[463] The Bill 22 Duplicative Provisions constitute a substantial interference with the s. 2(d) *Charter* rights of teachers for the same reasons the similar legislative prohibition on collective bargaining and deletion and prohibition of collective agreement terms was found to be substantial interference in the Bill 28 Decision.

Issue 5: Does s. 1 of the *Charter* Apply to Save the Bill 22 Duplicate Provisions from a Finding of Unconstitutionality?

[464] I have found that the Bill 22 Duplicative Provisions offend the s. 2(d) *Charter* guaranteed freedom of association of the BCTF members.

[465] However, the *Charter* permits governments to pass laws infringing *Charter* rights and freedoms if the test provided by s. 1 is met.

[466] The legal approach to the s. 1 test is set out in the Bill 28 Decision at paras. 317-322 and following.

[467] The government has the onus of establishing that its infringement of *Charter*-guaranteed rights is "demonstrably justified", meeting the requirements of s. 1 of the *Charter*. In brief:

a) the government must establish that the law has a pressing and substantial objective;

b) there must be a rational connection between the means adopted by the legislation and the pressing and substantial objective;

c) the legislation must minimally impair the *Charter* right;

d) there must be proportionality between the objective and its effects.

(Hutterian Brethren, at para. 186.)

[468] The government relies on the findings in the Bill 28 Decision that the government's policy objectives were pressing and substantial, and that the impugned legislation was rationally connected to those objectives.

[469] In the Bill 28 Decision this Court held:

a) the stated goal of the government with the legislation was to give school boards more flexibility to manage class size and composition issues and to respond to choices of parents and students and to make their own decisions on better use of facilities and human resources,

and this was a pressing and substantial objective (at paras. 327, 331, 338-339);

b) this was rationally connected to the legislation because it gave power to school boards to decide these issues without needing to meet union demands in collective bargaining (at para. 343).

[470] As I have noted, the government does not argue that there were any circumstances of exigency following the Bill 28 Decision in relation to Bill 22.

[471] There was speculative reference in the evidence and submissions to the potential costs to school districts if the legislation deleting terms of the collective agreement was struck down, however neither party attempted to call direct evidence on those costs. Both parties agree that these costs are irrelevant to the s. 1 analysis here.

[472] Importantly, the government does not say that because the potential costs of restoring the deleted language will be so large, it was therefore justified pursuant to s. 1 of the *Charter* in enacting the Bill 22 provisions.

[473] This is consistent with the authorities. As held in *Schachter* at 709, "budgetary considerations cannot be used to justify a violation under s. 1".

[474] Rather, under the s. 1 analysis, the government simply relies on the argument that the Bill 22 Duplicative Provisions constitute minimal impairment of the right because (a) there was pre-legislation consultation; and (b) the provision prohibiting collective bargaining is time restricted, such that the BCTF's right to collectively bargain these issues was restored after June 2013.

[475] The BCTF argues firstly that the government cannot rely on the findings in the Bill 28 Decision as to the government having pressing and substantial policy objectives and the legislation being rationally connected to those objections. This is not only because the government was unsuccessful in upholding the challenged legislation. It is also because the Court in the Bill 28 Decision rejected the assertion

that the government policy objectives could not be accomplished within the process of collective bargaining:

a) The Court found that the policy objectives of "flexibility" and "choice" could be accomplished within collective bargaining, and that many terms of the collective agreement provided flexibility and choice already (at para. 378).

b) The Court was critical of the government for not pursuing other established labour solutions in the event of a collective bargaining impasse which would preserve the employees' freedom to associate to influence their Working Conditions (at para. 368).

c) The Court was critical of the government goal of taking important Working Conditions out of the collective bargaining process (at para. 375).

[476] I accept the BCTF argument that having learned the above results in the Bill 28 Decision, the government is not able to rest on the same legislative goals that it had for Bill 28 as the basis for the Bill 22 Duplicative Provisions.

[477] After the findings were made in the Bill 28 Decision I conclude:

a) the government goal of increasing the ability of school boards to decide issues regarding Working Conditions and better enhance management "flexibility" and "choice" by not having to engage in collective bargaining over these issues was no longer pressing and substantial; and,

b) it was no longer rational for the government to connect its goals of flexibility and choice to the Bill 22 Duplicative Provisions imposing broad limitations on collective bargaining.

[478] Nevertheless, I will go on to consider the government's argument that the Bill 22 Duplicative Provisions constitute minimal impairment of the right because of its discussions in advance of Bill 22, and because the prohibition on collective bargaining over Working Conditions is time limited.

[479] There were a number of options open to the government following the Bill 28 Decision. It was facing a situation where it had now been judicially recognized that the government had acted unconstitutionally in respect of the BCTF for nine years, since introducing Bill 28 in 2002. The relations between the BCTF and the government had no doubt deteriorated substantially during that time.

[480] The government consultation with the BCTF was not a search for a minimally impairing solution, for all of the same reasons that I have already found it not to amount to good faith consultation.

[481] The government proposals during the discussions with the BCTF combined the two positions: a refusal to restore the right to collectively bargain over Working Conditions, with a refusal to restore the deleted terms. This was so broad as to be unreasonable. It left the BCTF with virtually nothing to work with.

[482] Had the government not extended the prohibition on collective bargaining, and had the government not re-deleted terms of the collective agreement, collectively bargaining could have dealt with any management-side desire to change the substance of the Working Conditions clauses.

[483] If collected bargaining resulted in an impasse (and we do not know that it would) there are all sorts of tools available for resolving the impasse without infringing collective bargaining rights, as mentioned in the Bill 28 Decision (at para. 368), whether by mandatory arbitration, mediation, or otherwise.

[484] What was going to potentially cost the government coffers was the retroactive return of the Working Conditions clauses to the collective agreement and having those terms serve as the starting point for ongoing bargaining. There is no doubt that it is an important part of the government's legitimate function to manage these costs.

[485] It would have been an option for the government to hold out to BCTF and BCPSEA that it would make some additional funding available if the parties to the collective agreement were able to resolve all past class size and composition

grievances and agree on new language relating to the Working Conditions in the collective agreements. The government had used the promise of funding in the past to influence the result of collective bargaining. This would have been similar to the settlement reached between the health services unions and employer associations after the *Health Services* decision.

[486] The government did not choose to follow this path or anything similar. I do not suggest that this was the only path open to the government. However, I do wish to point out that the government had conciliatory paths open to it which were far less intrusive on s. 2(d) rights.

[487] Furthermore, the government representatives did not even read the deleted clauses until far too late in the process. Then, when they discussed which clauses they might not object to, they refused to provide the BCTF with the parameters they had used to review the clauses, making it impossible for the BCTF to meaningfully respond.

[488] The BCTF did show a willingness to negotiate the content of the deleted terms of the collective agreement and a willingness to discuss costs, but it insisted on maintaining the right to bargain over Working Conditions. The government team made it clear that it was not costs driving their motivation, but management rights.

[489] For the above reasons, I conclude that the government discussions with the BCTF post-the Bill 28 Decision do not satisfy the minimal impairment test. I also conclude that the time-limited nature of the continued prohibition on collective bargaining also does not satisfy the minimal impairment test.

[490] The following conclusion reached in the Bill 28 Decision at para. 380 applies equally here to the Bill 22 Duplicative Provisions:

> The legislation undoubtedly was seen by teachers as evidence that the government did not respect them or consider them to be valued contributors to the education system, having excluded them from any freedom to associate to influence their Working Conditions. This was a seriously deleterious effect of the legislation, one adversely disproportionate to any salutary effects revealed by the evidence.

[491] The harmful effects of the legislation were adversely disproportionate to any objectives of the legislation.

[492] I therefore find that the Bill 22 Duplicative Provisions are not saved by s. 1 of the *Charter*, and are unconstitutional.

Issue 6: Are Either or Both of the Two Regulations Unconstitutional?

The Learning Improvement Fund Regulation

[493] Sections 18 and 19 of Bill 22 amended the *School Act* at s. 115.2, to provide for the establishment of a learning improvement fund, funded by appropriation by the Legislature. It provides that the Minister of Education must make grants to school boards each year from the fund for the purpose of enabling the boards to "address learning improvement issues". Before the first grant each year, the Minister is required to "consult with the [BCTF] respecting the allocation among boards of grants from the learning improvement fund".

[494] The consultation with the BCTF is only to do with allocation of the fund to school districts, presumably on the basis of prioritizing which districts get the money. However, so far the process by the minister has been just to allocate the fund on a pro rata basis without considering any special problems in one district.

[495] The BCTF position has been that this type of funding encourages competition between schools with the worst problems and most need and is not the correct approach.

[496] The LIF regulation provides that school boards have to submit a spending plan to the Minister allocating any grants under the LIF to one or more of: additional staff, additional teaching time and service to students, professional development training of teaching staff to address challenging learning conditions, and a reserve fund for any of these needs.

[497] School boards are to consult with school administrators and teachers with no role for the BCTF as an organization, except that the local union president is one of

the several parties to be consulted. This is clearly a process meant to dilute the influence and role of the BCTF.

[498] The LIF is not meant to address Working Conditions of teachers. The limited consultation with the BCTF with respect to allocation of the fund to school districts is not meant to address Working Conditions of teachers. This limited consultation is not part of any collective agreement or otherwise binds teachers' employers.

[499] The size of the fund appears to have been based on government's very rough assessment that it would address approximately 25% of the most serious situations where class composition was affecting learning conditions. For example, this might be a situation where there might be so many special needs students integrated into a class and not enough present resources to manage those students' needs and to still provide adequate learning conditions for other students in the class.

[500] Because the LIF has nothing to do with addressing teachers' Working Conditions, the government can allocate grants from it as it sees fit without changing teachers' Working Conditions. For example, the government can allocate grants to allow school districts to hire additional support staff with no decrease in the number of special needs students per class having to be taught by a single teacher who remains responsible for also teaching all the other students in a class.

[501] If the LIF was meant to provide a process to replace the collective bargaining rights taken away by the Bill 22 Duplicative Provisions, I would find that it does not come close to doing so. However, the government does not argue that this is the intention or effect of the legislation. It submits that the LIF is a separate part of the government's education policy agenda.

[502] Nevertheless, to be clear, I find that the LIF Regulation and associated provisions of the *EIA* do not provide for a process in any way akin to collective bargaining, as these provisions do not provide for a meaningful opportunity for teachers to associate to make representations to their employers and to have their employers consider them in good faith.

[503] Despite this, I find that these provisions on their own do not amount to a substantial interference with the ability of the BCTF to attempt to influence teachers' employers' association, BCPSEA, on employment related matters and Working Conditions. As such they do not violate the BCTF members' s. 2(d) *Charter* rights.

Class Size Compensation Regulation

[504] The Class Size Compensation Regulation provides for a formula to compensate teachers of grades 4 to 12 classes with additional preparation time, professional development, classroom supplies, or pay, where classes exceed thirty students, subject to exceptions.

[505] The government consulted with employers but not with the BCTF prior to introducing the legislation. The government says that this, like the LIF idea, are separate parts of its education policy agenda and it does not submit that the regulation ameliorates any of the Bill 22 Duplicative Provisions.

[506] The BCTF is opposed to the legislation, calling it "cash for kids".

[507] There is some irony in the positions of both parties regarding this regulation.

[508] Through this regulation the government enacted a rigid, inflexible formulaic approach to some class size issues. This would seem contrary to its repeated position that such issues need to be approached in a way that is flexible.

[509] For its part, the BCTF is complaining about legislation that will allow for increased compensation to teachers.

[510] But the BCTF argues that it is not the fact of additional compensation that it complains about, it is again the fact that it was left entirely out of the process. It argues that it is the exclusive bargaining agent to negotiate compensation for teachers. Its complaint is that by this regulation, the government bypassed the statutory collective bargaining process in order to provide compensation for teachers.

[511] There is some weight to the BCTF complaint.

[512] There is evidence that Rick Davis for the government was instrumental in developing the idea behind this regulation and that he saw it as serving a useful goal of driving a wedge between individual teachers and the BCTF. The regulation was seen as diminishing the influence of the union over its members.

[513] I accept the BCTF argument that the government bypassed collective bargaining by introduction of this regulation.

[514] Nevertheless, I do not accept that on its own, the legislation amounts to a substantial interference with s. 2(d) rights. The Class Size Compensation Regulation does not prevent employees from being able to associate together to attempt to influence their Working Conditions, including to argue that this legislated approach is insufficient to address class size issues.

Issue 7: Is the Government's Directive to Public Sector Employers Contained in Mandate 2010 Unconstitutional?

[515] The BCTF argues that in issuing Mandate 2010 to BCPSEA, and other directives to BCPSEA in the course of collective bargaining, the government interfered with collective bargaining on significant and fundamental Working Conditions.

[516] The BCTF also argues that the government does not have legal authority to impose such mandates.

[517] Dealing with the latter point first, the BCTF argues that the structure of the *Labour Relations Code* and *PELRA* is such that it means that BCTF and BCPSEA are the exclusive bargaining agents for teacher employees and employers respectively.

[518] I do not read the statutory structure of the collective bargaining relationship as prohibiting government from making its fiscal and policy parameters known to BCPSEA.

[519] I have earlier reviewed the provisions of *PSEA*, which came out of the Korbin commission and establishes the PSEC structure. This structure is populated with

government representatives, and PSEC's function is to "set and coordinate strategic directions in human resource management and labour relations": s. 4(1) of *PSEA*.

[520] I do not consider the fact that the government issues mandates to PSEC, which PSEC issues to the public sector employer associations, as contrary to law.

[521] As explained in the government's submission, the mandates issued by government to PSEC have both a financial component, coming from cabinet, and a policy component, coming from the affected ministry. The employers' have input as well on the operational issues.

[522] The government has a public responsibility to properly manage and to develop policy in respect of publicly funded services such as education and health. One of the biggest public expenses which government funds are labour costs associated with the delivery of public services. It is therefore quite important and appropriate for the government to have a role in influencing collective bargaining between public sector employer associations and employees.

[523] The background to the development of Mandate 2010 was a global financial crisis in 2009. The government was predicting deficits for that year and the following years, and so issued a strong fiscal restraint policy.

[524] That part of that policy included a "net zero" mandate is not for this Court to question. That mandate provided that public sector employees would not be entitled to a net increase in overall compensation. As noted already, there could be trade-offs within the mandate.

[525] As held by the trial judge Harris J. as he then was in *Federal Dockyard* at para. 245, it is not the role of the Court nor does the Court have the expertise to second-guess the legislature on policy issues such as overall fiscal restraint and spending priorities.

[526] This Court also does not have the role or expertise to second-guess government taxation choices and how these choices affect government revenues and the funding available for education.

[527] The Court's role in the present context is to determine if the government has acted within or contrary to the Constitution when carrying out policy choices.

[528] The net zero mandate was imposed on all public sector employees whose collective agreements expired between December 31, 2009, and March 31, 2012. Collective agreements covering many employees were concluded under this mandate.

[529] The British Columbia economy in 2011 was improving from the pessimistic pall affecting prognostications following a global financial crisis in 2009. Nevertheless, the government's perspective was that it still needed to exercise fiscal restraint and to work towards a balanced budget.

[530] The BCTF further argues that the government also interfered with collective bargaining with its policy directions to PSEC and BCPSEA. These policy directions included the direction that BCPSEA not give up material management rights, and the direction that BCPSEA seek significant concessions from the BCTF on certain matters, such as professional development and seniority rights.

[531] It is true that the evidence on this hearing contradicted the position taken by the government in the Bill 28 Action to the effect that it did not "direct" BCPSEA in collective bargaining.

[532] But the mere fact of the government issuing policy and fiscal parameters to the entity charged with collective bargaining is not in my view objectionable.

[533] It is true that the scope of bargaining was considerably narrowed by the government's directives to BCPSEA in 2011. This likely impeded the ability of the parties to reach agreement.

[534] But there was not a great deal of evidence on the hearing before me regarding the actual details of the collective bargaining in 2011, and the proposals exchanged between BCPSEA and the BCTF.

[535] Leaving aside the impact of the Bill 22 Duplicative Provisions, I am not satisfied on the evidence before me that the mandate, or collective bargaining directives, from government to the employer bargaining agent were so over-bearing or so narrow as to substantially interfere with the ability of the employees to associate to attempt to achieve their workplace goals. Or, to put it another way, I am not satisfied on the evidence that the bargaining parameters that the government put around the employer association, BCPSEA, prevented BCPSEA from considering and discussing the BCTF representations in good faith.

[536] As such, I do not find that the government mandate to BCPSEA was a violation of the teachers' s. 2(d) rights.

Issue 8: Is s. 6 of the *EIA*, which Provided for the Appointment of a Mediator to Settle the Terms of a Collective Agreement within Legislated Terms of Reference, Unconstitutional?

[537] As part of Bill 22, s. 6 of the *EIA* required the appointment of a mediator to assist the BCTF and BCPSEA in settling the terms of a new collective agreement within narrow parameters. The narrow parameters included meeting the "net zero" mandate.

[538] The mediator who was appointed by the government, on March 29, 2012, was Dr. Charles Jago.

[539] Although the BCTF initially objected to his appointment, the BCTF representatives met with Dr. Jago and participated in the mediation process.

[540] Ultimately Dr. Jago was able to advise the government that the BCTF and BCPSEA had reached an agreement with his assistance in late June 2012. That agreement was ratified by the BCTF and this was incorporated into the latest version of the collective agreement between the BCTF and BCPSEA.

[541] While the government by its legislation did impose narrow terms on the mediation process, beyond the fact of the Bill 22 Duplicative Provisions I am unable to conclude on the evidence that the imposed mediation process by itself violated the teachers' s. 2(d) *Charter* rights.

Ongoing Relationship

[542] Before I leave this aspect of the review of government conduct which was outside of the Bill 22 Duplicative Provisions, and which I have found not to infringe teachers' s. 2(d) rights, I will comment on the ongoing relationship between the BCTF, BCPSEA, and government's role in setting education and fiscal policy.

[543] There is evidence that one government motivation behind the establishment of the LIF and the Class Size Compensation Regulation was to diminish the influence of the BCTF.

[544] However, as they stand now, I have not concluded that either the LIF regulation and associated provisions of the EIA, or the Class Size Compensation Regulation, in fact diminish the opportunity for employees to associate to achieve workplace goals.

[545] I have also found that while government is entitled to state its policy and fiscal objectives by way of mandates for bargaining given to PSEC and BCPSEA, I note that the protection of s. 2(d) *Charter* rights means that it must not draw the parameters of those objectives so narrowly that it means that the employer will not consider the BCTF representations in good faith. This would make it effectively impossible for the BCTF to attempt to influence workplace goals.

[546] It is permissible for government to draw a fence around the collective bargaining negotiations between the teachers' association and the employers' association which allows movement within the fenced area; it is not permissible for government to put the teachers' side of the table in a straitjacket.

[547] Given the evidence in this case, it is also necessary to observe that while individual government measures on their own may not constitute interference with s. 2(d) *Charter* rights, the cumulative effect of these measures might do so.

[548] The government measures challenged here -- the two regulations, the mandate to BCPSEA, and the narrow terms of mediation -- in total came close to the tipping point, especially given the evidence that the government was trying to

provoke a strike so as to have public support for imposing legislation that might otherwise seem heavy-handed, and the evidence that one purpose behind its regulations was to undermine the influence of the union.

[549] It is difficult to know where the line is drawn on how many single steps of interference by government with collective bargaining rights will accumulate to amount to substantial interference and be contrary to s. 2(d) of the *Charter*.

[550] If after a series of steps taken by the government the teachers are left without any real ability to associate together to attempt to achieve workplace goals and to have their employer consider their representations in good faith, then the government will remain at risk of a finding that it has violated teachers' s. 2(d) *Charter* rights.

Issue 9: What Remedies are the Plaintiffs Entitled to, if at all, in the Two Actions?

[551] Before I address any additional remedies, I will first address the implications of the remedy already ordered in the Bill 28 Decision.

Bill 28 Decision Declaration of Invalidity

[552] In the Bill 28 Action, the remedy the BCTF was seeking was to strike down the legislation, and to reserve its right to argue additional remedies such as damages. The government was defending the constitutionality of the legislation, but did not argue in the alternative that if it lost this argument, something other than striking down the legislation should follow (such as reading in words to the legislation for example). The parties in their submissions were agreeable to a twelve month suspension of invalidity if the court concluded that the legislation was invalid.

[553] In the Bill 28 Decision, the unconstitutional legislation was declared invalid, but the invalidity was suspended for a period of twelve months to allow the government time to address the repercussions of the decision. The terms of the April 13, 2011 Court order read:

> 1. This Court Orders and Declares that in enacting ss. 8, 9 and s. 15 of the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 and s. 5 of

> the *Education Services Collective Agreement Amendment Act,* 2004, S.B.C. c. 16, the government infringed the Plaintiffs' freedom of association guaranteed by s. 2(d) of the *Charter* and this infringement was not a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*;
>
> 2. And this Court Orders and Declares that ss. 8 and 15 of the *Public Education Flexibility and Choice Act,* and section 5 of the *Education Services Collective Agreement Amendment Act* are unconstitutional and invalid;
>
> 3. And this Court Orders that the declaration of invalidity is suspended for a period of twelve months to allow the government time to address the repercussions of this decision…

[554] When legislation is found invalid as being contrary to the Constitution, section 52(1) of the *Constitution Act* provides:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[555] Section 52(1) is the supremacy clause of the Constitution and any law found to be *ultra vires* to the Constitution is of no force or effect.

[556] Mr. Justice Gonthier in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 at para. 28 explained that this means that the legislation is invalid from the moment it is enacted:

> First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects.
>
> [Emphasis added.]

[557] In relation to the same concept of constitutional supremacy, Mr. Justice Field of the United States Supreme Court said in *Norton v. Shelby County* (1896), 118 U.S. 425 at 442: “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it has never been passed.”

[558] Thus, where a court strikes down legislation as being unconstitutional that legislation is held to have been invalid and inoperative from the moment of its enactment.

[559] The government in this case does not argue otherwise.

[560] A suspension of a declaration of invalidity is a legal paradox, in that a law which is invalid from its start is nonetheless considered alive for a brief period, out of deference to the legislature so that the legislature has time to react to the repercussions of the invalidity: see *Schachter*, at 715-717.

[561] It is obviously presumed and hoped that when there is a suspension of a declaration of invalidity of a law, the legislature will react lawfully, in accordance with the Constitution.

[562] Applying the usual constitutional principles to the Court's declaration in the Bill 28 Decision, after the twelve months suspension period expired from the date of the Bill 28 Decision, the unconstitutional legislation was then invalid from the date of its enactment.

[563] The twelve months expired at midnight on April 12, 2012.

[564] This means that as of April 13, 2012, the laws declared unconstitutional in the Bill 28 Decision were no longer in effect from the date of their enactment. For clarity, an additional declaration to this effect is made in the Bill 28 Action as part of the application by the BCTF for additional remedies in that action.

[565] The result is that as of April 13, 2012, the BCTF had the right to engage in collective bargaining over the Working Conditions; it also means that as of July 2002 the Working Conditions clauses were returned to the collective agreement between the BCTF and BCPSEA. All, of course, later subject to the provisions of Bill 22 being brought into force the next day and this Court's findings regarding the constitutionality of those provisions.

Bill 22 Unconstitutionality

[566] While the government enacted Bill 22 on March 14, 2012, the Bill 22 Duplicative Provisions were not brought into force until April 14, 2012, pursuant to s. 26 of the *EIA*.

[567] I have found that the Bill 22 Duplicative Provisions are also contrary to s. 2(d) of the *Charter* and are not saved by s. 1 of the *Charter*.

[568] The government argues that rather than declare the Bill 22 Duplicative Provisions invalid, this Court should simply order that the government re-engage the BCTF in consultation. I do not accept this as an appropriate remedy given s. 52(1) of the Constitution and the principles set out above.

[569] As of the time of the present hearing, s. 13 of the *EIA* was already spent, the unconstitutional provisions having been automatically repealed as of June 30, 2013, fourteen months after it was enacted. Nevertheless, for clarity, I find that s. 13 of the *EIA*, which re-enacted the prohibitions on collective bargaining set out in s. 27(3)(d) to (j) of the *School Act*, was unconstitutional and invalid from the date of its enactment.

[570] I find that the Bill 22 Duplicative Provisions which re-deleted terms of the BCTF collective agreement, ss. 8 and 24 of the *EIA*, are also invalid. The government has advanced no argument that any declaration of invalidity that follows should be suspended. I find that there is no good reason to do so. These provisions are struck down effective from the date of their enactment. They are a nullity as of April 14, 2012.

[571] The result of both the Bill 28 and Bill 22 Actions is that the Working Conditions clauses are returned to the collective agreement between the BCTF and BCPSEA as of July 1, 2002.

Additional Remedies

[572] The position of the BCTF is that it should be awarded general damages pursuant to s. 24(1) of the *Charter* commencing from the date when the Bill 28

legislation was passed, on January 28, 2002 to present. The BCTF advances alternative arguments as to whether the damages remedy should be awarded all or in part in the Bill 28 Action or the Bill 22 Action.

[573] The position of the government is that damages are not appropriate in either action.

[574] The *Charter* provides in s. 24(1) as follows:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> [Emphasis added.]

[575] Any consideration of damages has to consider the interplay between the remedy provided by s. 52(1) of the *Constitution Act*, which results in striking down the legislation and which has already been granted in this case, and the remedy provided by s. 24(1) of the *Charter*.

[576] As mentioned earlier in this judgment in the context of exploring the relevance of pre-legislative consultation, and as explained in *Ferguson*, the remedy for unconstitutional legislation is the s. 52(1) remedy, a striking down or other modification of the legislation.

[577] The remedy provided by s. 24(1) of the *Charter* is generally considered applicable to a different situation, where government conduct is challenged as opposed to legislation, as held in *Ferguson* at para. 35.

[578] The Supreme Court of Canada in *Ferguson* did suggest that while usually the two remedies are not awarded together, a s. 24(1) *Charter* remedy is not precluded by a s. 52(1) *Constitution Act* remedy striking down legislation where the additional relief is needed to provide the claimant with an effective remedy. The Court made it clear however that this will be a rare circumstance: see paras. 61-66.

[579] The Province relies on the Supreme Court of Canada decision in *Mackin* to argue that a s. 24(1) *Charter* remedy of damages should only be awarded against

governments for actions taken under valid statutes subsequently declared invalid, where the government conduct is "clearly wrong, in bad faith or an abuse of power": *Mackin*, at para. 79.

[580] The Court in *Mackin* also listed as potential grounds for s. 24(1) *Charter* damages, even where legislation is found unconstitutional and struck down, such situations as: "negligence" or "wilful blindness" by the government with respect to its constitutional obligations; and where the government enacted legislation for "ulterior motives or with knowledge of its unconstitutionality" (at paras. 82-83).

[581] The *Mackin* principle has been cited as a reason for denying an individual a s. 24(1) *Charter* remedy during a period of suspended invalidity of a statute: *R. v. Demers*, 2004 SCC 46.

[582] The rationale underlying this limited government immunity to a damages claim is that it would interfere with good governance if government officials were deterred from enforcing the law by the possibility of liability for future damages awards in the event the law was subsequently declared invalid: *Vancouver (City) v. Ward*, 2010 SCC 27 [*Ward*] at para. 39.

[583] The Supreme Court of Canada in *Ward* did not attempt to describe the parameters of when s. 24(1) *Charter* damages might be available against a state in relation to unconstitutional legislation which is struck down, other than setting out that some "threshold misconduct" is required, also described as a "minimum threshold of gravity": at para. 39.

[584] In *Ward*, the plaintiff was detained by the Vancouver Police Department ("VPD") on the basis of information that an unknown individual intended to throw a pie at Prime Minister Jean Chretien while he was in attendance at a ceremony in Vancouver. Mr. Ward was mistakenly identified as the putative-pie-thrower, chased down, handcuffed, and later strip searched by corrections officers after being arrested by the VPD for breaching the peace for protesting his detainment.

[585] In *Ward*, the Court noted that the case did not involve a challenge to legislation, but rather, a challenge to government conduct.

[586] The Supreme Court of Canada in *Ward* held that the language of s. 24(1) of the *Charter* was sufficiently broad to include a remedy of constitutional damages for a breach of a claimant's *Charter* rights if such a remedy was found to be appropriate and just in the circumstances of a particular case (*Ward*, at para. 21). The Court created a three-step test for establishing when damages may be "appropriate and just" under s. 24(1) of the *Charter*:

a) First, the claimant must establish a *Charter* breach as this is the wrong on which the claim for damages is based.

b) Second, for damages to be awarded, they must further the general objects of the *Charter*; reflecting one or more of three interrelated functions that damages may serve, specifically, compensation, vindication, and deterrence.

c) Third, even where a claimant establishes that damages are functionally justified, the state may establish that countervailing factors defeat the functional considerations and render s. 24(1) damages inappropriate or unjust.

[587] The Court in *Ward* noted that the availability of other remedies may meet the need for compensation, vindication and/or deterrence, and may support a conclusion that s. 24(1) *Charter* remedies are not appropriate and just: para. 34. This of course is consistent with the notion that because s. 52(1) of the *Constitution Act* already provides a remedy in cases where legislation is struck down, in those cases it usually is not appropriate and just to also award s. 24(1) *Charter* damages.

[588] With regard to determining the quantum of s. 24(1) *Charter* damages, the Court in *Ward* found that "[g]enerally, compensation will be the most important object, and vindication and deterrence will play supporting roles" (at para. 47).

[589] However, at para. 29 of *Ward* the Court discussed the importance of deterrence in the awarding of *Charter* damages:

> Finally, deterrence of future breaches of the right has also been widely recognized as a valid object of public law damages: e.g., *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328, at para. 19; Taunoa, at para. 259; Fose, at para. 96; *Smith v. Wade*, 461 U.S. 30 (1983), at p. 49. Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. This purpose is similar to the criminal sentencing object of "general deterrence", which holds that the example provided by the punishment imposed on a particular offender will dissuade potential criminals from engaging in criminal activity. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity: *R. v. B.W.P.,* 2006 SCC 27 (CanLII), 2006 SCC 27, [2006] 1 S.C.R. 941. Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.
>
> [Emphasis added.]

[590] In determining quantum of damages, the Court in *Ward* stressed that the damages must take into account the seriousness of the breach and be fair to the claimant and the state. In respect of the latter, the quantum of damages must "take into account the public interest in good governance, the danger of deterring government from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests" (at paras. 52-53).

[591] The trial judge awarded the plaintiff in *Ward* damages of $5,000 in relation to the strip search which violated his constitutional rights. The Supreme Court of Canada reviewed the nature of the strip search (which did not involve removal of underwear, exposure of genitals, or touching) and considered that it did not involve the most serious conduct, but did justify a moderate damages award (at para. 71). It found that the trial judge's award of $5,000 was appropriate.

[592] The trial judge in Ward made an additional award of $5,000 damages in relation to the plaintiff's wrongful imprisonment. The wrongful imprisonment was for a period of 3½ to 4 hours. This *Charter* damages award was not appealed.

Bill 28 Action Additional Remedies

[593] The trial judge also awarded the plaintiff in *Ward* $100 for violation of his *Charter* rights in relation to the seizure and towing of his car. The Supreme Court of Canada overturned this award. The Supreme Court of Canada found that the breach of Mr. Ward's *Charter* rights in this regard was not so serious as to justify damages under s. 24(1), and that a mere declaration that the conduct violated his *Charter* rights was sufficient to serve the goals of vindication and deterrence.

[594] In considering whether or not striking down the legislation in the Bill 28 Action provides an effective remedy, I note that the effect was to, after one year, return the right to collectively bargain over the Working Conditions, and to return the Working Conditions terms to the collective agreement between the BCTF and BCPSEA, effective back to July 1, 2002.

[595] Over the years that the unconstitutional legislation was in place, teachers claim to have suffered overcrowded and unmanageable classrooms, for example due to integration in a large class of too many students requiring special supports without the corresponding supports being provided. The BCTF suggests that many teachers may have lost their jobs, or quit the profession or decided to take early retirement based on a feeling that in these working conditions they could not fulfill their professional aspirations to teach students. Without making any specific findings of fact in this regard, I accept the argument that a return of the Working Conditions clauses to the collective agreement retroactively will not be a complete remedy as not every teacher affected by the legislation will necessarily be still teaching.

[596] The BCTF urges the Court to order a global damages award in the several hundreds of millions of dollars to put the teachers in the place they would have been if their rights had not been breached. It seems that the BCTF considers such an award could serve as a rough replacement to the bringing of thousands of labour relations claims by its members on the basis of breach of the now-restored Working Conditions clauses in the collective agreement.

[597] The government argues that no damages are warranted because at the time the Bill 28 package of legislation was enacted, in 2002, the present scope of the s. 2(d) *Charter* right was not recognized. This was not recognized until the landmark *Health Services* decision by the Supreme Court of Canada, which was rendered on June 8, 2007.

[598] This government argument has some force but less so after the *Health Services* decision. Once it had that decision in hand, the government understood the risks of continuing to rely on Bill 28 given that it had been modelled on Bill 29 and contained the same structure: a legislative override of existing collective agreement terms, and prohibitions on bargaining over those subject matters in the future. The government from 2007 on had four years prior to the Bill 28 Decision to do something to rectify its legislation, but it did not.

[599] Internal documents of the government reveal that when discussing the ramifications of the *Health Services* decision in August 2007, the government considered whether or not to engage the BCTF in discussions. It decided not to do so, in full appreciation of the risk that the legislation affecting the BCTF would be subsequently found by a court to be unconstitutional.

[600] I thus conclude that from at least August 2007, the government understood that there was a risk that the Bill 28 legislation could be unconstitutional and that there would be financial ramifications that would flow from a court deciding this. It decided to maintain the legislation nonetheless.

[601] But although the government conduct in maintaining the legislation after 2007 was constitutionally suspect, I find it did not reach such a threshold of gravity equivalent to being clearly wrong at the time. The Bill 28 legislation was very similar in structure but did have some differences in content and context from the legislation at issue in the *Health Services* decision.

[602] The government also argues that the BCTF was provided an additional remedy after the Bill 28 Decision by the fact of the government negotiating in good

faith with the BCTF. I have already found that this process of meetings did not amount to good faith negotiations.

[603] The BCTF has also been unlawfully deprived of the right to collectively bargain over the Working Conditions from 2002 until the Bill 28 Decision in 2011. The loss of that right is not completely remedied by striking down the legislation because time cannot be turned back. Collective bargaining between the BCTF and BCPSEA occurred in the 2002 to 2011 timeframe, and whatever gains, set-backs or trade-offs were made would have been while the BCTF had its hands tied in being unable to bargain over the Working Conditions. But just as it is possible that this disadvantaged members of the union, it is possible that the union made other bargaining gains during this period.

[604] The result of returning the Working Conditions clauses to the BCTF and BCPSEA collective agreement means that members of the BCTF will be able to bring labour relations grievances if these clauses were violated in the past. Highly speculative numbers as to the cost of these claims have been bandied about in the evidence in this case but no substantive evidence was called in this regard. Nevertheless, the thrust of the evidence makes it clear that it will be in the interests of the BCTF and BCPSEA to negotiate an overall resolution to these claims through bargaining.

[605] While not a perfect remedy, I conclude that the return of the Working Conditions clauses to the BCTF and BCPSEA collective agreement, which will have retroactive effect, is the most appropriate remedy in the Bill 28 Action.

[606] I do not find that by passing the legislation in 2002, and then not taking steps to repeal it prior to the Bill 28 Decision in 2011, that the government acted in such a way as to warrant a damages remedy in addition to a declaration of invalidity.

[607] In conclusion on this point, considering all of the circumstances I am not persuaded that a s. 24(1) *Charter* remedy is appropriate and just in the Bill 28 Action. I find that the effect of s. 52(1) of the *Constitution Act*, which results in

striking down the unconstitutional sections of the legislation, provides an effective remedy.

Bill 22 Action Additional Remedies

[608] I turn now to the Bill 22 Action.

[609] The primary remedy in the Bill 22 Action, again, is the s. 52(1) Constitutional remedy of striking down the Bill 22 Duplicative Provisions to the extent they remain in force.

[610] This provides a remedy with respect to the provisions which re-deleted the Working Conditions clauses from the collective agreement, namely ss. 8 and 24 of the *EIA*. The result will be to return the Working Conditions clauses to the collective agreement effective as of July 1, 2002, as already noted, and I find that whatever labour relations grievances and remedies flow from this will be a sufficient remedy in respect of that piece of the legislation.

[611] With respect to the Bill 22 Duplicative Provisions extending the prohibition on collective bargaining for another fourteen months, to June 30, 2013, that section of the legislation, s. 13, had expired by the time of the hearing of the Bill 22 Action and these Reasons for Judgment.

[612] A declaration that the legislation was unconstitutional when enacted has some element of vindication, but it has little deterrent effect here.

[613] By the time of the introduction of s. 13 of Bill 22, there had already been a judicial finding that the virtually identical legislation was invalid. The government had a number of other options open to it, other than unilaterally extending the unconstitutional legislation. There was no case law suggesting that the mere fact of consultation after legislation is declared invalid can save substantially similar legislation if it is re-enacted.

[614] In the discussions following Bill 28, the government representatives maintained with the BCTF that the government was not going to repeal the unconstitutional legislation. It was clear that the government representatives were

trying to use the threat of continuing the legislation as leverage in their negotiations with the BCTF, in efforts to gain agreement from the BCTF to forgo the rights which had just been vindicated. These meetings did not ameliorate the subsequent re-introduction of legislation found unconstitutional.

[615] The government has a short-term financial incentive to interfere with public sector workers' freedom of association that is not present with respect to private sector employees: a government in the short-term may be able to substantially reduce its expenses if it violates public sector employees' *Charter* rights. Given its desire to achieve policy goals unfettered by employee rights, the government also has a self-interest in strengthening management rights and weakening employee rights of public sector workers.

[616] Any student of history or human nature recognizes that a natural tendency and desire of any political force is to attempt to consolidate and gather more power and to seek to diminish any restraint on that power. A democratic system has institutional checks to counter that tendency and to safeguard against tyranny. In Canada, as one of those institutional checks, Parliament in its wisdom enacted the *Charter* as the supreme law of the country and a safeguard of certain rights and freedoms seen by Canadians as fundamental to Canadian democratic values.

[617] In *Health Services*, the Supreme Court of Canada noted the importance of collective bargaining to democracy. The values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" are all promoted by the protection of collective bargaining in s. 2(d) of the *Charter* (at para. 81).

[618] The activity of collective bargaining itself, whatever the outcome, has an intrinsic value by allowing the workers to gain some influence and control over a major aspect of their lives, their employment (*Health Services* at para. 82).

[619] Democratic institutions and democratic philosophy are at their root based on a belief that society should be structured in a way that is fair.

[620] It was fundamentally unfair for the government to extend the unconstitutional legislation by way of Bill 22, after the union had already prosecuted and won a Court decision declaring that the legislation was unconstitutional. The government here was strongly influenced to continue the unconstitutional legislation because of its desire to gain the upper-hand in negotiations with the union and not in pursuit of any valid policy objective.

[621] The evidence is that the government knew, following the Bill 28 Decision, that the legislative prohibition on bargaining over Working Conditions was unconstitutional, and so must have known that continuing the prohibition was also unconstitutional.

[622] As noted in *Ward*, the awarding of *Charter* damages on the basis of deterring government conduct is meant to deter the government from engaging in conduct that is not in compliance with the Constitution. Furthermore, this deterrence is not aimed at influencing the errant behaviour of a specific government actor but is meant to serve a much broader purpose: to influence government behaviour in general, in order to ensure government compliance with the *Charter* in the future.

[623] I conclude that unless there is a sufficient deterrent, and some significant cost to a government if it violates s. 2(d) *Charter* rights even temporarily, the motivation to act unconstitutionally by substantially interfering with the freedom of association of public sector workers can simply be too tempting on the part of governments.

[624] As for the seriousness of the *Charter* violation, the fourteen month extension of the legislative prohibition on collective bargaining over Working Conditions has to be viewed in context. It was not simply a one-off temporary suspension of rights. It was a continuation of unlawful conduct which had been then on-going for ten years. Further, when combined with the unlimited continuing legislative deletion and prohibition on including certain terms on Working Conditions in the collective agreement, the right to collective bargain over Working Conditions would still not be fully restored even after the fourteen months prohibition on bargaining expired. This *Charter* breach was more than slight or moderate.

[625] I conclude that the unique circumstances of this case, where the government temporarily re-enacted legislation it knew to be constitutionally invalid, but the legislation had expired by the time of the hearing of the ensuing court action, makes it appropriate and just to award damages against the government pursuant to s. 24(1) of the *Charter*, in relation to the fourteen months from the enactment of s. 13 of Bill 22 until the expiry of the extended prohibition on collective bargaining over Working Conditions, June 30, 2013.

[626] There is one remaining issue, however. Section 24(1) of the *Charter* allows "anyone" whose rights or freedoms have been infringed to apply to a court for a remedy. The Bill 22 Action was brought by the BCTF as plaintiff but styled as being "on behalf of all members of the BCTF".

[627] In *Health Services*, the Court rejected the argument that the freedom of association guarantee provided by s. 2(d) of the *Charter* applies only to activities that can be carried out by individuals. The Court at para. 28 affirmed its previous judgment in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, which held that the freedom of association right also protects certain collective activities undertaken by a union, which would be incapable of being performed by an individual, as follows:

> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. ... [B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities -- making collective representations to an employer, adopting a majority political platform, federating with other unions -- may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(*d*), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(*d*).... It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.
>
> [Emphasis added in *Health Services*; quoting *Dunmore* at para. 17.]

[628] The Court's treatment of the individual and associational aspects of s. 2(d) *Charter* right was also further stated at para. 89 of *Health Services*:

> The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(d) does not apply solely to individual action carried out in common, but also to associational activities themselves.
>
> [Emphasis added.]

[629] In *Fraser*, the majority decision also affirmed the notion of the s. 2(d) *Charter* right extending to the protection of group activity, at paras. 63-66.

[630] In this case, there is no contest that the BCTF represented its members in bringing this litigation. The government interference at issue here was interference with the associational activity carried out by the BCTF on behalf of its members. It would have been very difficult for individual members of the union to bring this litigation on their own, but they have benefited from the efforts of the BCTF in bringing this litigation on their behalf. Furthermore, any benefit of a modest damages award to each member of the BCTF would surely be lost in the administrative cost associated with each member having to make and process an individual claim to the same.

[631] As stated by the Supreme Court of Canada in *Ferguson* at para. 34:

> A court which has found a violation of a *Charter* right has a duty to provide an effective remedy.

[632] I conclude that it is just and appropriate in this case to provide a remedy to the members of the BCTF whose rights were infringed by the government, by way of a damages award to the BCTF under s. 24(1) of the *Charter*.

[633] As for the amount of damages, it is important to note that there were tens of thousands of teachers affected by the unlawful legislation. According to evidence filed by the BCTF, there were approximately 33,000 "FTE", or full-time equivalent teacher positions in 2001, before Bill 28 was introduced. These numbers were reduced after the legislation to a low in the range of 30,000 according to the BCTF.

The BCTF submits that this reduction was a consequence of the legislation although the causal link is disputed by the government.

[634] There is no evidence on the exact number of teachers affected for the period of time covered by s. 13 of Bill 22, which extended the prohibition on collective bargaining on Working Conditions for fourteen months. However, the evidence and submissions support a minimal rough estimate of 30,000 teachers.

[635] I find that an appropriate damages award, serving the functions of compensation, vindication, and deterrence, but without being so large as to unduly take from the public purse and other public programs, is $2 million awarded to the BCTF as the bargaining agent representing teachers.

[636] If BCTF had approximately 30,000 members at the time, this works out to the equivalent value of approximately $66 per member.

[637] I am satisfied that by fashioning the remedy for interference with s. 2(d) *Charter* rights in this way that it will create a deterrent for future governments and at the same time provide some very small financial compensation and vindication to those whose rights were infringed.

Costs

[638] In addition, the BCTF is awarded costs on a scale of more than ordinary difficulty in both actions, Scale C. The litigation was complex, covered a wide body of information and involved numerous difficult legal issues. Counsel for both sides were required to go to extraordinary lengths to organize the materials and provided many written materials which were helpful to the court.

Issue 10: Miscellaneous Issues

[639] The hearing before me concerned the two proceedings:

a) first, the application of the BCTF in the Bill 28 Action for additional remedies including its challenge to Bill 22, and the corresponding application of the government to strike this application ("Bill 28 Remedies Application"); and

b) second, the trial of the Bill 22 Action.

[640] The parties in the Bill 28 Action are the same as the parties in the Bill 22 Action. The parties agreed that in the Bill 22 Action they are bound by this Court's findings made in the Bill 28 Decision. The parties agreed that I should hear both matters.

[641] It is clear that the arguments in both proceedings at least in part dealt with the events that happened following the Bill 28 Decision and leading up to Bill 22 being enacted, and the effect and implications of Bill 22. For example, while the government argues that the steps it took before and in enacting Bill 22 cannot be challenged in the Bill 28 Action, it also argued that when considering whether or not any additional remedy of damages should be awarded the BCTF in the Bill 28 Action, the Court should consider damages are not necessary because of the actions the government has since taken in consulting in good faith with the BCTF.

[642] Thus both proceedings required this Court to look at the facts of the post-Bill 28 discussions between the government and the BCTF and the implications of Bill 22.

[643] Due to the overlap between the issues in the two proceedings, I ordered that they be heard before me together in one extended hearing. The purpose was to avoid duplication of proceedings and the potential for inconsistent results.

[644] The government urged the Court to limit the scope of the evidence that may be called in the Bill 28 Remedies Application. I did not consider this appropriate, given the wide ambit of the arguments being advanced by both sides. A premature ruling limiting the scope of evidence and arguments could dictate the substantive result.

[645] Because of the overlap of issues, until I heard all the evidence and the arguments, I could not determine which result or remedy properly flowed in which proceeding.

[646] The method of prosecuting two different proceedings and having them heard together where the claims are novel and there is uncertainty as to which proceeding is appropriate was approved in *Halvorson v. British Columbia (Medical Services Commission)*, 2003 BCCA 264 at para. 6.

[647] The procedural background to the choice to deal with the constitutional issue first in the Bill 28 Action, and additional remedies later, is reviewed in oral Reasons for Judgment in that proceeding published at 2012 BCSC 2090. As I noted, I anticipated at the time of the Bill 28 Decision that the parties might wish to call evidence on any additional remedies at a subsequent hearing.

[648] I have concluded that the evidence in the Bill 22 Action can be considered evidence in respect of the Bill 28 Remedies Application. This is the only sensible way to determine all of the arguments, claims and defences in both proceedings. This does not mean that all evidence is necessarily relevant to all arguments, but simply that it was more efficient to hear it together rather than parse out the relevance of the evidence on an issue by issue basis.

[649] In granting the government a one year suspension of the declaration of invalidity in the Bill 28 Action, the Court was not taking on a supervisory role with respect to subsequent legislation. I agree with the government that any challenge to the subsequent legislation was required to be a fresh challenge. For this reason I conclude that the appropriate proceeding for the declarations concerning the unconstitutionality of the Bill 22 Duplicative Provisions is the Bill 22 Action.

Cabinet Documents

[650] There is another miscellaneous issue, having to do with the government's assertion in this proceeding that some of the documents marked as exhibits in this proceeding were Cabinet documents entitled to protection by way of a confidentiality order.

[651] The terms by which the government produced documents it claimed to be subject to Cabinet privilege, also known as public interest immunity from production, followed a precedent established by Burnyeat J. in the *Health Services* litigation

indexed at 2002 BCSC 1509. These terms essentially provided that while during the course of the hearing the Court would be able to read and see the alleged Cabinet documents entered as exhibits, the documents would not otherwise be made publicly available, and they would be returned at the end of the litigation to the government.

[652] As well, the parties agreed that the Cabinet documents could be put to witnesses and referred to in submissions in open court at trial, but without otherwise making the Cabinet documents publicly available.

[653] I pause to note that both parties are to be commended in finding a practical way to provide for the production of alleged Cabinet documents and refer to them at trial so as to preserve the plaintiff's right to a fair trial and to allow for an efficient hearing open to the public. The parties quite properly compromised: the plaintiff agreed to these confidentiality terms without finding it necessary to challenge each assertion of Cabinet privilege; the defendant agreed to these confidentiality terms without seeking to apply an absolute privilege that would prevent any production of alleged Cabinet documents.

[654] There were two pre-hearing Court orders regarding the production and protection of the alleged Cabinet documents in the Bill 22 Action, one made by consent on January 14, 2013, and the other made July 9, 2013, and each contained a term reserving the Court's jurisdiction to vary the Order. In my view, the prospect that the order might be varied was in recognition that the balancing of interests as between protecting the confidentiality of the documents and the open court principle might shift in the course of the litigation.

[655] The plaintiff's position at the end of trial sought a variation of the confidentiality orders, so as to allow it to publish the plaintiff's written closing submission to the BCTF members and thereby publish any references to the purported Cabinet documents contained therein which were referred to as exhibits at trial. The defendant opposes this.

[656] What is at issue is the tension between two public interests:

a) the public interest in fostering free and open debate between members of Cabinet, which might be harmed if Cabinet documents were not confidential, a public interest expressed in such authorities as *Carey v. Ontario*, [1986] 2 S.C.R. 637 and *Babcock v. Canada (Attorney General)*, 2002 SCC 57; and,

b) the public interest in an open court process, expressed in such authorities as *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*].

[657] In *Sierra Club* at para. 53, the Supreme Court of Canada established a test in relation to applications for confidentiality orders as follows:

> A confidentiality order ... should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[658] The Supreme Court in Canada in *Sierra Club* made it clear at para. 54 that under the first branch of the above test, the risk in question must be real and substantial, be well-grounded in the evidence, and pose a serious threat to the interest in question.

[659] In considering the interests at play, I consider that the following factors are relevant:

a) with perhaps one exception, the majority of the documents over which Cabinet privilege has been asserted have not been proven by the government to have been created with an expectation that they would be confidential if litigation ensued. The one exception is a minute recording a decision by Cabinet, but it is quite innocuous and does not record any discussion or debate amongst members of Cabinet;

b) the majority of the documents at issue were authored or known by or reflected advice or recommendations or strategy of Mr. Straszak in his approach to the BCTF. The government has relied in this litigation on the assertion that Mr. Straszak engaged in good faith negotiations with the BCTF following the Bill 28 Decision and that this remediated any otherwise unconstitutional legislation. It is therefore the government's position in this litigation which makes Mr. Straszak's knowledge and involvement in broader government strategy relevant.

[660] Dealing with the first factor, the government did not anticipate that the Cabinet privilege would be challenged at the end of trial and so it should not be held against it that it did not waste time at trial by calling evidence on the issue of whether the documents were expected to be confidential if litigation ensued. However, when the issue was raised in closing submissions, it did not seek to call additional evidence on the issue.

[661] Instead the government relied on previously filed affidavit evidence of Elizabeth MacMillan, Deputy Cabinet Secretary, which was filed in relation to a preliminary motion for production of documents. As noted in an interim ruling on document production, indexed at 2013 BCSC 1216 at para. 50-58, the government's evidence did not specifically address whether or not there was any expectation of confidentiality regarding documents having to do with the post-Bill 28 Decision negotiations with the BCTF.

[662] In the absence of evidence, logic would suggest that the government must have anticipated there could be continuing litigation following the Bill 28 Decision and did not have an expectation of confidentiality in the documents if litigation did ensue.

[663] As for the second factor, the government chose not to pick someone to lead the discussions with the BCTF who was a neutral party. The government chose Mr. Straszak to lead those discussions, knowing that he was involved in the government's overall strategy of requiring BCPSEA to extract concessions from the

BCTF in collective bargaining and the government strategy of imposing legislation in the face of an expected strike.

[664] Before trial, when the alleged Cabinet documents were produced under confidentiality orders, it was too early to know whether any of the documents would prove important at trial or would be peripheral. To avoid mischief, understandably the terms of confidentiality were therefore quite broad.

[665] But during the trial it became clear that Mr. Straszak's intentions and motivations were central and could in part be tested based on the documents introduced into evidence.

[666] I have reviewed the references in the BCTF written submission. I have concluded that counsel for the BCTF has not attempted to cause mischief by reference to alleged Cabinet documents that have little importance on the central issues. Rather, the BCTF written submission is referring to documents the BCTF counsel consider highly relevant to defeat the government argument that on behalf of the government Mr. Straszak consulted in good faith with the BCTF.

[667] The fact that some of the documents in evidence relating to this issue constituted submissions to Cabinet or permit inferences to be drawn as to government decisions in my view do not justify preventing the BCTF from disclosing them in its written submission and providing its written submission to its members.

[668] In the interim ruling, I ruled that the content of the documents did not reveal actual Cabinet discussions, and so disclosure should not otherwise create a chill on active debate at the Cabinet table: 2013 BCSC 1216 at para. 75.

[669] I continue to be persuaded that allowing for the circulation of the plaintiff's written submission will not create a chilling effect on Cabinet discussions. This is a unique case where the government relied on assertions of fact regarding its conduct, alleging that it had consulted in good faith. It was the testing of that assertion that made the documents highly relevant. These circumstances will rarely arise in most litigation.

[670] One of the reasons for the open court principle is to allow the public access to the same evidence that the court relied on, so as to allow the public the opportunity to critique the court's judgment.

[671] The principle of open courts is one of the hallmarks of democracy, at the "very soul of justice", and "...permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson)*, [1996] 3 S.C.R. 480 at 495-497.

[672] In my view, where the Courts are tasked with the role of determining the constitutionality of government conduct, it is even more important for there to be transparency so that the public can have confidence that the result was reached in fulfilment of the Court's duty to be independent and impartial.

[673] Mr. Straszak's role was central to this Court's conclusions as to whether or not the discussions he led with the BCTF amounted to good faith consultations. I have essentially found that due to Mr. Straszak's wider role in recommending broader political strategy to the government, he unfortunately lost sight of what should have been the goal of the Bill 28 discussions: addressing the repercussions of the Bill 28 Decision declaring legislation to be unconstitutional.

[674] Here, the members of the BCTF have a direct interest in the litigation. In order for the members of the BCTF to be informed critics of my conclusions reached in this case, especially in relation to the government's central argument that it consulted in good faith with the BCTF, it is necessary for the BCTF members to have access to the un-redacted written submissions of their counsel.

[675] The minimal salutary effects in protecting the Cabinet confidences alleged to exist here, which are far from proven, in my view are outweighed by the deleterious effects of not varying the confidentiality order to allow BCTF members to be informed of the written positions advanced by their counsel in this litigation.

[676] I therefore order that the previous production orders be varied to allow the BCTF to provide its un-redacted written submission to the BCTF members; such order to be stayed for a period of 31 days or such other time as the parties may agree to allow the time for any appeal from this judgment to be taken.

Conclusion

[677] The result of both the Bill 28 and Bill 22 Actions is that the Working Conditions clauses are returned to the collective agreement between the BCTF and BCPSEA as of July 1, 2002. The subject matter of the Working Conditions is a matter for collective bargaining between the BCTF and BCPSEA.

[678] The parties have been unable to point me to any other case where the present process has occurred: where legislation that was ruled unconstitutional because it interfered with rights guaranteed under the *Charter* was re-enacted in substantially the same form and the government argued that the unconstitutionality was fixed or ameliorated by the fact of the government having "consulted" with the affected party and, or, by the fact that the government made one part of the legislation temporary.

[679] The outcome of this case means that teachers have once again had their right to collectively bargain over their working conditions restored. They have had certain language returned to their collective agreement retroactively. This does not guarantee that the language is clad in stone, as it can and likely will need to be the subject of ongoing collective bargaining.

[680] The government remains free to give guidance to the employer association in collective bargaining as to any fiscal and policy parameters of collective bargaining. However, there needs to be room for movement within those parameters to allow the workers to have meaningful influence over their employer.

[681] If collective bargaining reaches an impasse, a number of options remain available to government that are consistent with respecting the s. 2(d) *Charter* rights of teachers, including mediation and arbitration.

[682] For clarity, the following additional declarations are made in the Bill 28 Action:

a) as of April 13, 2012, the laws declared unconstitutional in the Bill 28 Decision were invalid from the date of their enactment;

b) no additional remedies are granted;

c) the plaintiff is entitled to costs on scale C.

[683] The following declarations and orders are made in the Bill 22 Action:

a) s. 13 of the *EIA*, Bill 22, to the extent it re-enacted the prohibitions on collective bargaining set out in s. 27(3)(d) to (j) of the *School Act*, was unconstitutional and invalid from the date it came into force;

b) the defendant must pay the plaintiff $2 million in damages;

c) ss. 8 and 24 of the *EIA* are unconstitutional and invalid from the date they came into force;

d) the plaintiff is entitled to costs on scale C.

"S.A. Griffin, J."
The Honourable Madam Justice Susan A. Griffin

Appendix A

BILL 22 — 2012

EDUCATION IMPROVEMENT ACT

Part 2 — Education Statutes Amendments

Education Services Collective Agreement Act

8 Section 2(1)(a)(v) of the Education Services Collective Agreement Act, S.B.C. 2002, c. 1, is repealed and the following substituted:

(v) effective July 1, 2002,

(A) deleting Article D.1 entitled "Staffing Formula — Non-Enrolling/English as a Second Language Teachers",

(B) deleting Article D.2 entitled "K-3 Primary Class Size",

(C) deleting sections D.1, D.2 and D.3 of Appendix 1 of Letter of Understanding No. 1, dated May 31, 1995,

(D) in Addendum C to Letter of Understanding No. 1, which addendum is dated April 23, 1997, deleting the heading "Professional Development and Teacher Assistants" and substituting "Professional Development" and deleting the heading "Teacher Assistants:" and the paragraph immediately under that heading,

(E) deleting paragraphs 1 to 5 and everything after paragraph 8 of Letter of Understanding No. 3, dated June 4, 1999,

(F) deleting Letter of Understanding No. 4, dated June 22, 1999,

(G) deleting Letter of Understanding No. 5, dated June 19, 2000, and

(H) in respect of an agreement referred to in Column A of the document entitled "Teachers' Collective Agreement Deletions" tabled in the Legislative Assembly on the date of First Reading of the *Education Services Collective Agreement Amendment Act, 2004*, deleting those words, phrases and provisions, or parts of provisions, as set out in the same row in Column B of that document; ***.***

…

School Act

13 Section 27 is repealed and the following substituted:

Terms and conditions of teachers' employment and restricted scope of bargaining

27(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment between a board and a teacher are

(a) the provisions of this Act and the regulations,

(b) the terms and conditions, not inconsistent with this Act and the regulations, of a teachers' collective agreement, and

(c) the terms and conditions, not inconsistent with paragraphs (a) and (b), agreed between the board and the teacher.

(2) A provision of an agreement referred to in subsection (1) (b) excluding or purporting to exclude the provisions of this Act or the regulations is void.

(3) There must not be included in a teachers' collective agreement any provision

(a) regulating the selection and appointment of teachers under this Act, the courses of study, the program of studies or the professional methods and techniques employed by a teacher,

(b) restricting or regulating the assignment by a board of teaching duties to principals, vice principals or directors of instruction,

(c) limiting a board's power to employ persons other than teachers to assist teachers in the carrying out of their responsibilities under this Act,

(d) restricting or regulating a board's power to establish class size and class composition,

(e) establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes,

(f) restricting or regulating a board's power to assign a student to a class, course or program,

(g) restricting or regulating a board's power to determine staffing levels or ratios or the number of teachers or other staff employed by the board,

(h) establishing minimum numbers of teachers or other staff,

(i) restricting or regulating a board's power to determine the number of students assigned to a teacher, or

(j) establishing maximum or minimum case loads, staffing loads or teaching loads.

(4) Subsection (3) does not prevent a teachers' collective agreement from containing a provision respecting hiring preferences for teachers who have previously been employed by the board.

(5) A provision of a teachers' collective agreement that conflicts or is inconsistent with subsection (3) is void to the extent of the conflict or inconsistency.

(6) A provision of a teachers' collective agreement that

(a) requires the employers' association to negotiate with the Provincial union, as defined in the *Public Education Labour Relations Act*, to replace provisions of the agreement that are void as a result of subsection (5), or

(b) authorizes or requires the Labour Relations Board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (5),

is void to the extent that the provision relates to a matter described in subsection (3).

(7) Subsection (3) (d) to (j) is repealed on June 30, 2013.

[Emphasis on duplicative unconstitutional provisions.]

…

Retroactive effect

24 Despite any decision of a court to the contrary made before or after the coming into force of this section, words, phrases, provisions and parts of provisions deleted, under section 8, from a collective agreement between the British Columbia Teachers' Federation and the British Columbia Public School Employers' Association must not for any purpose, including any suit or arbitration commenced or continued before or after the coming into force of this section, be considered part of that collective agreement on or after July 1, 2002.